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**U.S. Department of Justice
Stakeholder Listening Session on
First Step Act Implementation**

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On December 21, 2018, former President Donald Trump signed the First Step Act. The law has two overarching goals: **corrections reforms** aim to expand recidivism reduction programming to hasten people's transfer from prison to community corrections; and **sentencing reforms** reduce extreme sentences for certain federal offenses. In the first two and a half years since the First Step Act's passage, implementation has been problematic, and efforts to thoroughly evaluate progress are hindered by a lack of transparency by the Department of Justice.

CORRECTIONS REFORMS

The First Step Act's corrections reforms were designed to expand rehabilitative programming for incarcerated individuals with the goal of hastening their release from prison into community corrections settings, like Residential Reentry Centers, home confinement, and supervised release. The law mandated creation of a needs and risk assessment tool to match incarcerated people with appropriate programming to further their rehabilitation and categorize participants to determine eligibility and accrual rates for a new earned time credit system that would incentivize program participation.

PATTERN

The Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN) is intended to serve as the foundation of the First Step Act's efforts to connect incarcerated people with the rehabilitative programming they need to successfully reenter the community. PATTERN considers multiple factors to determine whether a person is at minimum, low, medium, or high risk of reoffending. Those at low or minimum risk are eligible for early transfers to community corrections.

When PATTERN was first released in July 2019, The Sentencing Project highlighted [several major concerns](#) with the tool: (1) Static factors (like age and type of criminal offense) comprised the bulk of an individual's risk score, while dynamic factors (like participation in rehabilitative programming) were underweighted; (2) There were limited opportunities for high- and medium-risk individuals to reduce their risk levels and thereby transition earlier to community corrections; and (3) The tool's weight for prior criminal history scores inherently produced a racially disparate effect.

According to reports, the Department of Justice released a new version of PATTERN in January 2020 after receiving and incorporating public feedback. The Sentencing Project welcomes positive updates to the tool, including those that add new dynamic weight factors (like the amount of time since the person's last infraction) and removal of certain racially biased risk factors (like age at first conviction).

However, major concerns regarding PATTERN's efficacy and fairness remain. As cited by the [American Bar Association](#) Criminal Justice Section's recent assessment of First Step Act implementation, a December 2020 report by the Independent Review Committee found the revised tool had undergone numerous changes that were not publicly disclosed. The tool greatly increased the weight of general criminal history and violent criminal history in the risk algorithm. These changes are likely to prevent many people from advancing downward along risk categories regardless

of how much rehabilitative programming they complete. The intention of incentivizing programming participation is thus ineffectual for those individuals assessed as most likely to recidivate, a direct contradiction of the First Step Act's intention. The Sentencing Project urges the Department of Justice to share information publicly on how many people, along with demographic details, have been able to lower their risk level since implementation of PATTERN.

Moreover, a [January 2021 NIJ report](#) identified several major scoring and risk factor calculation errors that placed people in higher risk categories than intended. When these errors were discovered, 11 percent of men and 10 percent of women were reassigned to different risk categories, many of whom moved to a lower category. This means that until those failures were corrected, many individuals had incorrectly been barred from transfer to home confinement under the Bureau of Prison's (BOP's) interpretation of the CARES Act, which granted the DOJ authority to expand home confinement eligibility to help reduce overcrowding during the pandemic. The health and safety of these individuals was thus needlessly jeopardized.

Finally, the development of a comprehensive and integrated needs assessment is of equivalent importance to ensure the effectiveness of PATTERN and the ultimate success of the corrections reforms prioritized in the First Step Act. To date, information about this critical element of the tool has not been shared publicly. Given the string of mishaps involved with the ongoing development of PATTERN, providing opportunities for independent review and analysis of the needs portion is critical.

Programming and Earned Time Credits

The earned time credit system was designed to provide incentives for programming participation by allowing certain individuals to apply credits toward early transfer out of prison and into less restrictive settings like halfway houses, home confinement, or supervised release.

While two and a half years have passed since the First Step Act became law, the earned time credit system is not yet operational. According to a [June 2020 DOJ report](#), no one has been granted early release based on earned time credit, and it is unclear whether anyone has even been awarded any credits.

The First Step Act left the BOP responsible for determining which types of programs would qualify for time credits as well as the rules and calculations associated with accruing and applying credits toward release. An ongoing problem is that the BOP's proposed rules are restrictive and incomplete. In November 2020, the Trump administration's DOJ [proposed a rule](#) on how the earned time credit system would operate, but the rule presents several serious concerns and has left many unanswered questions about the implementation of the incentives system. It is unclear whether the Biden administration plans to maintain this rule.

One concern with the proposed rule is the share of the federal prison population that it would exclude from earning time credits. From its inception, the First Step Act has restricted eligibility based on a person's type of conviction, which has excluded [more than half](#) of the BOP population,

and the proposed rule would further [expand the list of exclusions](). A [December 2020 Independent Review Committee (IRC) report]() found no significant difference in the recidivism risk profiles of people who are eligible and ineligible for earned time credits, suggesting that the DOJ could safely roll back the list of exclusions in order to deepen the impact of the First Step Act and hasten the release of more individuals into community supervision.

Moreover, the list of approved rehabilitative programming and productive activities yield a small amount of earned time credits. Earning 30 days of credit would require 720 hours of programs or activities, and only [15 programs]() would provide credits of more than three weeks. The rule also makes it too easy to lose time credits. For example, infractions like an unexcused absence from work or a program assignment could result in the forfeiture of up to 30 days of credits. This forfeiture rate, combined with the difficulty of earning credits in the first place, provides minimal incentive to participate in programming as Congress intended with the passage of the First Step Act. Rolling back the harsh penalties and increasing the amount of credit associated with approved programming would bolster opportunities for early release — a recommendation the [IRC has backed]() and one the DOJ should support.

Another concern is that the proposed rule would only grant credits for programs that people complete, rather than all programs in which they participate. Program participants should receive credits for any level of participation, as there are myriad situations in which people are prevented from completing programs through no fault of their own. Transfers, program suspensions or closures, and staffing and resource limitations can prevent individuals from completing the programs they start.

The COVID-19 pandemic has spotlighted this problem. Since March 2020, the BOP has suspended most rehabilitative programming to facilitate social distancing in prisons. While program suspensions have been necessary to mitigate the spread of the virus inside facilities, it should not be used as a justification for placing the earned time credit system on hold. People held in federal prisons have endured great suffering and risk during the pandemic, and should not be punished for program suspensions that have taken place.

SENTENCING

The First Step Act's sentencing reforms aimed to limit mandatory minimums for drug offenses and weapons enhancements, provide retroactive sentence reductions to people imprisoned under the 100 to 1 crack cocaine disparity, and expand the use of compassionate release as a means to provide early release for elderly and terminally ill people incarcerated in federal prisons.

Mandatory Minimums

Data provided by the U.S. Sentencing Commission shows that the First Step Act's prospective sentencing reforms may have led to small declines in sentence lengths for eligible offenses.

Between 2018 and 2020, the average sentence for oxycodone fell by 11 months (50 to 39 months), heroin fell by 3 months (69 to 66 months), fentanyl fell by 13 months (74 to 61 months), powder cocaine fell by 8 months (74 to 66 months), crack cocaine fell by 4 months (78 to 74 months), and methamphetamine fell by only one months (96 to 95 months). The average sentence length for marijuana trafficking has remained unchanged.

For eligible offenses involving weapons, sentence reductions have been more substantial: the average sentence imposed decreased from 151 months in 2016 to 138 months in 2020.

However, these declines are entirely insufficient to reduce over-incarceration and address excessive sentences for drug crimes.

Retroactivity of the Fair Sentencing Act

A key feature of the First Step Act is its retroactive application of the crack cocaine sentencing disparity reduction included in the Fair Sentencing Act of 2010. As of July 13, 2021, the BOP reports that 3,811 orders for Fair Sentencing Act retroactive sentence reductions have been granted. According to Sentencing Commission data, the average sentence reduction is six years, and the overwhelming majority of beneficiaries (92%) are black. While the promising impact of this provision on advancing the interests of justice cannot be overstated, we remain concerned about inconsistencies in how the DOJ has interpreted this portion of the law.

In July 2019, Reuters reported that DOJ prosecutors were fighting petitions for reduced sentences. To back these appeals, prosecutors argued that sentences should be based on the amount of drugs alleged to be involved in the investigation or the person's trial, not the amount specified in the individual's indictment. The Department appealed dozens of releases that had already been granted, threatening to send those individuals back to prison. While it appears many of these cases have now been resolved, The Sentencing Project urges the Department to share information with stakeholders about its intentions and priorities regarding petitions for resentencing in crack cocaine cases sentenced prior to enactment of the Fair Sentencing Act. Please also share with stakeholders information regarding how many cases the Department is currently appealing in which an individual was found eligible for a sentence reduction.

Compassionate Release

The First Step Act aims to increase "the use and transparency of compassionate release" by expanding eligibility criteria and allowing incarcerated people to appeal the BOP's compassionate release decisions directly to a court. If the BOP denies or does not respond to a request for 30 days, a federal court may grant a petitioner's request.

Despite the expansion of eligibility criteria under the First Step Act, the BOP has continued to deny compassionate release requests at alarming rates and has issued decisions with complete opacity. In the first year following the law's enactment, the BOP director granted only 55 compassionate release requests (or 3% of the requests filed), without tracking reasons for denials.

What's most concerning is that the BOP's approval rate has decreased during the COVID-19 pandemic, despite the fact that national and international health organizations promptly raised the alarm about the uniquely deadly impact the virus would have on correctional facilities. In the first 13 months of the pandemic, the BOP received over 30,969 compassionate release requests, yet it approved only 36 cases, or 0.1%. These shortcomings have had tragic implications: over 43,000 people incarcerated in federal facilities have contracted COVID-19, and at least 240 have died from the disease. Thirty-five of those who died were waiting for a decision on compassionate release petitions.

If a global pandemic that is disproportionately deadly for the elderly and medically vulnerable does not qualify as an "extraordinary and compelling circumstance" for compassionate release, it's difficult to imagine what would qualify under the BOP's criteria. Indeed, federal prosecutors have followed BOP's lead by almost universally opposing petitions for compassion release when in court.

Even in recent months, federal prosecutors have opposed compassionate release for the most vulnerable, including Gwen Levi, a 76-year-old grandmother and lung cancer survivor. Her case received widespread notoriety when the Bureau of Prisons returned her to custody from home confinement after she missed a phone call from officials while in a computer class. Fortunately, a federal judge granted her compassionate release petition in early July against the Department's objections. Many federal judges have interpreted the pandemic as a qualifying circumstance, granting 99% of the 3,221 total requests that have led to compassionate release.

The Sentencing Project urges the Department of Justice to reconsider its harsh and unjustifiable approach to compassionate release petitions from people in federal custody. Congress clearly recognizes this component of law as necessary for creating a fairer and more humane justice system by creating opportunities to reconsider the effectiveness of sentences many years, sometimes decades, after sentencing when justice priorities may have shifted. Indeed, criminological research demonstrates that most people age out of crime and present limited likelihood of recidivism in old age. Continued incarceration in these circumstances often do not advance public safety interests. Your recognition of these dynamics is critical because of the important role you play in achieving our nation's ideals of justice.

MOVING FORWARD

Appropriate implementation of the First Step Act offers an important opportunity for the federal justice system to overcome some of the extremes of mandatory minimum sentencing, reduce recidivism, and build a more humane and rehabilitative prison system. Unfortunately, the full promise of the First Step Act has not yet been realized.

In its next steps, the Department of Justice must prioritize transparency on all fronts of the law's implementation, including the status of revalidation of PATTERN, availability of rehabilitative programming within BOP, and prosecutors' intentions regarding retroactivity and compassionate

release petitions. The Sentencing Project wishes to support you in this work and welcomes dialogue with you about how it can be achieved fairly and equitably.