

**Statement of Patricia L. Richman  
National Sentencing Resource Counsel  
Federal Public and Community Defenders  
First Step Act Implementation: Stakeholder Engagement Sessions  
September 29, 2022**

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Thank you for inviting the views of the Federal Public and Community Defenders on the First Step Act's (FSA) risk assessment tool, PATTERN ("Prisoner Assessment Tool Targeting Estimated Risks and Needs"). My name is Patricia Richman, and I am National Sentencing Resource Counsel for the Federal Public and Community Defenders.<sup>1</sup> Federal Public and Community Defenders, along with other appointed counsel under the Criminal Justice Act, represent 80 to 90 percent of individuals charged with federal crimes.

Since the FSA's enactment, we have submitted detailed comments and testimony to BOP, DOJ and Congress about the implementation of the FSA's correctional reforms, which I incorporate here.<sup>2</sup> Most recently, I worked with the

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<sup>1</sup> For the past four years, I have had the opportunity to closely observe implementation efforts by the Department of Justice (DOJ) and Bureau of Prisons (BOP). In 2019, I served as detailee counsel to Senator Dick Durbin, where I assisted his oversight of DOJ's development and release of its risk assessment tool, PATTERN. After leaving the Senate Judiciary Committee, I returned to the Defenders, where I train attorneys around the country about the FSA's back-end reforms, track FSA litigation against the BOP, and receive reports about implementation successes and failures on a near-daily basis.

<sup>2</sup> See Letter from David Patton & Jon Sands, Co-Chairs, Federal Public & Community Defenders Legislative Committee, and Lisa Freeland, Chair Defender Services Advisory Group, to Hons. Dick Durbin & Chuck Grassley (May 4, 2021), <https://bit.ly/2UK2gSf>; Letter from David Patton and Jon Sands, Co-Chairs, Federal Public & Community Defenders Legislative Committee to Office of General Counsel, Federal Bureau of Prisons,

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Brennan Center to produce a report analyzing the status of the FSA's prison reforms and to make several recommendations, which I have attached as an exhibit and also incorporate here.<sup>3</sup>

Before turning to substance, I would like to thank DOJ for the steps it has taken over the past year to “honor the [FSA’s] promise” of “a path to an early return home for eligible incarcerated people who invest their time and energy in programs that reduce recidivism.”<sup>4</sup> The final Earned Time Credit Rule (ETC Rule) that DOJ promulgated in January, 2022, was transformative; we have been so glad to see thousands return home as a direct result of its adoption.

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*Re: Comments on Docket No. BOP 1176P, RIN 1120-AB76, “FSA Time Credits”* (Jan 22, 2021) (FD ETC Comment), <https://bit.ly/3keZSgV>; *Hearing on the Fed. Bureau of Prisons and Implementation of the First Step Act Before the Comm. on the Judiciary of the H. Subcomm. on Crime, Terrorism, and Homeland Sec.*, 116th Cong. (Statement of David Patton at 5), (Oct. 17, 2019), <https://bit.ly/3kfSAJF> pdf; Letter from David Patton and Jon Sands, Co-Chairs, Federal Public & Community Defenders Legislative Committee, to David B. Muhlhausen, *Re: DOJ First Step Act Listening Session on PATTERN* (Sept. 13, 2019) (2019 PATTERN Letter) <https://bit.ly/36C7vGd>.

<sup>3</sup> Ames C. Grawert & Patricia L. Richman, *The First Step Act’s Prison Reforms: Uneven Implementation and the Path Forward*, Brennan Center for Justice (Sept. 23, 2022), <https://bit.ly/3DSJmwX>.

<sup>4</sup> Press Release, *Justice Department Announces New Rule Implementing Federal Time Credits Program Established by the First Step Act* (Jan. 13, 2022) (quoting Attorney General Merrick B. Garland), <https://bit.ly/3DSJGvF>.

I would also like to thank DOJ for increased transparency<sup>5</sup> in its recent reports.<sup>6</sup> In those reports, DOJ has confirmed long-standing stakeholder fears that the FSA’s use of risk assessment tools would “exacerbate racial and socioeconomic disparities.”<sup>7</sup> In November 2021, the Bureau of Justice Statistics reported that the vast majority of Black people in BOP custody—more than 70 percent—were classified by PATTERN as medium or high risk.<sup>8</sup> Then, in December 2021, NIJ reported that PATTERN overpredicts<sup>9</sup> the likelihood that Black, Hispanic, and

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<sup>5</sup> Although transparency has increased, there is room for improvement. Dr. Melissa Hamilton, an expert in risk assessments, recently explained to Congress that although recent reports are “helpful in providing a host of various statistics to provide outsiders a better understanding of PATTERN. . . . this is not a fully acceptable alternative to making publicly available an anonymized version of the dataset(s) for independent researchers. I have discovered various statistical and textual errors in the NIJ Report itself. As with the revelation of problems in the initial PATTERN development by new consultants, verification of the work of these consultants might well be better confirmed by others.” See *Hearing on the ‘The First Step Act, The Pandemic, and Compassionate Release: What Are the Next Steps for the Federal Bureau of Prisons? Before the United States House of Representatives Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security Oversight*, 117th Cong. 4 (Jan. 21, 2022) (statement of Dr. Melissa Hamilton), <https://bit.ly/3xT5nI7>.

<sup>6</sup> See Off. of Att’y Gen. *U.S. Dep’t of Justice, First Step Act Annual Report* (Apr. 2022), <https://perma.cc/A49Q-8LHN> (April 2022 DOJ Report); Nat’l Inst. Justice, *2021 Review and Revalidation of the First Step Act Risk Assessment Tool* (Dec. 2021), <https://perma.cc/3C6X-KC97> (December 2021 NIJ Report); E. Ann Carson, Bureau of Justice Statistics, *Federal Prisoner Statistics Collected under the First Step Act* (Nov. 2021) (BJS Report), <https://perma.cc/3YFZ-8GW2>; Nat’l Inst. Justice, *2020 Review and Revalidation of the First Step Act Risk Assessment Tool* (Jan. 2021), <https://bit.ly/3cNrm93>.

<sup>7</sup> See, e.g., Statement for the Record of the ACLU, Justice Roundtable, and The Leadership Conference in Response to DOJ April 3 and 5 Listening Sessions (Apr. 12, 2019), <https://bit.ly/3dK5z5D>; see also Nat’l Inst. Justice, *Stakeholder Statements Submitted in Response to NIJ’s First Step Act Listening Sessions* (Jul. 2020), <https://bit.ly/3kjGm2E>.

<sup>8</sup> Carson, BJS report.

<sup>9</sup> According to NIJ, “overprediction means that the instrument assigns a higher recidivism risk score for the race group relative to white group.” See NIJ, *Predicting Recidivism: Continuing to Improve the Bureau of Prisons’ Risk Assessment Tool, PATTERN* (Apr. 19, 2022), <https://bit.ly/3BNfqjd>

Asian people will be arrested or returned to custody for rules violations after leaving prisons.<sup>10</sup>

DOJ has taken some steps to respond to these disparities. In April 2022, it announced that it had revised the cut points for the general risk scales in order to, *inter alia*, “help mitigate the effects of various racial and ethnic disparities associated with the previous risk groupings.”<sup>11</sup> Even with these changes, significant disparities persist. In April, DOJ estimated that 56.9 percent of Black men would remain in the higher risk categories, in contrast to only 34.8 percent of white men.<sup>12</sup>

DOJ must move faster and more aggressively to remediate these problems. Although we are glad that DOJ is soliciting the views of outside voices, we are concerned to find the DOJ still in “listening mode.” The time for meaningful collaboration and a two-way dialogue between DOJ and external stakeholders is long past due. Since before the FSA’s enactment, Defenders—along with many others—have submitted detailed comments and testimony proposing reforms and specific changes to mitigate bias in risk assessment.<sup>13</sup> Despite this, as I speak today, a racially biased tool continues to dictate who benefits from the FSA’s reforms. We urge DOJ to accelerate its work by immediately publishing a proposal to correct PATTERN’s deficiencies that includes specific deliverables, due dates, and a continuing commitment to greater transparency.

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<sup>10</sup> December 2021 NIJ Report at 4.

<sup>11</sup> April 2022 DOJ Report at 14.

<sup>12</sup> April 2022 DOJ Report at 14-15.

<sup>13</sup> *See supra*, note 2; *see also* Stakeholder Statements, *supra* note 7.

Now, turning to today's agenda. For the reasons explained below, and in prior submissions incorporated here, the Department should rework PATTERN's inputs and scoring scheme to reduce embedded bias and improve people's ability to reduce their risk score. In addition, the Department should redefine "recidivism" to include only convictions.

**I. Refinements to PATTERN's inputs and scoring scheme.**

**A. *Criminal History***

DOJ should revise PATTERN to correct its overemphasis on criminal history.<sup>14</sup> Under the currently approved version of PATTERN (1.3), a person can be assigned from 0 to 40 points for criminal history; and 40 points alone can trigger designation as "medium risk" on the male and female general risk scales. This is inconsistent with Congress' requirement that "prisoners at each risk level have a meaningful opportunity to reduce their classification during the period of incarceration."<sup>15</sup> Not only that, but the effect of criminal history is multiplied across PATTERN through other inputs that also count criminal history.<sup>16</sup>

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<sup>14</sup> See Jennifer L. Skeem & Christopher T. Lowenkamp, *Risk, Race, and Recidivism: Predictive Bias and Disparate Impact*, 54 CRIMINOLOGY 680, 705 (2016) (raising the possibility that "efforts could be undertaken in the risk assessment domain to rely less heavily on criminal history").

<sup>15</sup> 18 U.S.C. § 3632(a)(5); *see also* 18 U.S.C. § 3632(a)(4) (requiring the method for reassessing recidivism risk be "based on factors . . . that are dynamic and that can reasonably be expected to change while in prison").

<sup>16</sup> These factors include: sex offender, history of escape, history of violence, all incident reports, serious incident reports, and time since last serious incident report.

Experts have long warned that an overemphasis on static factors like criminal history in risk assessment can embed racial disparities and lead to unfairness. This is because criminal history is not just the product of participation in crime, but also of biased practices throughout the criminal legal system (for example, overpolicing underprivileged neighborhoods, disparate victim reporting, prosecutorial decisions).<sup>17</sup>

One proposal to mitigate these problems would be to reduce the heavy weight criminal history carries and incorporate a “decay factor” in its calculation.<sup>18</sup> “[A]ny presumption that the vast majority of offenders pose a constant and lifelong risk is not supported by empirical evidence,” and studies show a “significant decay in the predictive ability of a prior criminal event.”<sup>19</sup> “All of this empirical knowledge strongly calls for recidivism premiums and risk assessment tools to curtail the use of criminal history from a temporal perspective.”<sup>20</sup>

PATTERN does not follow this approach. Instead, a person’s criminal history upon entry to the BOP (usually, as calculated at the time of sentencing by the

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<sup>17</sup> See Amy Baron-Evans & David Patton, *A Response to Judge Pryor’s Proposal to “Fix” the Guidelines: A Cure Worse than the Disease*, 29 FED. SENT’G. REP. 104, 112 (Dec. 1, 2016-Feb. 1, 2017) (collecting studies); see also Radley Balko, Op-Ed., *There’s Overwhelming Evidence that the Criminal-Justice System is Racist. Here’s the Proof*, WASH. POST (Updated Jun. 10, 2020), <https://wapo.st/3xTx6bF>.

<sup>18</sup> See Melissa Hamilton, *Back to the Future: The Influence of Criminal History on Risk Assessment*, 20 BERKELEY J. CRIM L. 75, 123 (2015) (compiling studies).

<sup>19</sup> *Id.* at 124.

<sup>20</sup> *Id.* at 125.

district court) is set in stone throughout their term of imprisonment.<sup>21</sup> So, even if twelve years have passed since a person was sentenced to sixty days' imprisonment for petty theft, PATTERN will continue to count it.<sup>22</sup> This differs from how the U.S. Sentencing Guidelines instructs courts to calculate criminal history. For example, short sentences of at least sixty days and less than a year and one month are not counted towards criminal history if they were "imposed more than ten years prior to the defendant's commencement of the instant offense."<sup>23</sup> DOJ should incorporate the periodic recalculation of criminal history scores into PATTERN to reflect its diminishing predictive value over time.

### **B. *Disciplinary Infractions.***

PATTERN also embeds bias and unfairness by giving disciplinary infractions heavy dynamic weight. A single guilty disciplinary infraction for a man in BOP custody could conceivably trigger the addition of points under several categories of the general recidivism scale: "all incident reports" (+1); "serious incident reports" (+1); "time since last incident report" (less than 3 months, +3). Further, it appears that a single disciplinary event could also receive points if it is deemed to be

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<sup>21</sup> Criminal history is defined as "[t]he number of criminal history points taken from the most recent BRAVO available." December 2021 NIJ Report. This is typically "derived from the US Sentencing Guidelines Criminal History Points, as reflected in the final judgment and the [Statement of Reasons]. If not found in either the Judgment or [Statement of Reasons], use the points assessed by the [U.S. Probation Office] in the [presentence report]." See Bureau of Prisons Program Statement 5100.08, CN-1 at 8 (Sept. 14, 2019), [https://www.bop.gov/policy/progstat/5100\\_008cn.pdf](https://www.bop.gov/policy/progstat/5100_008cn.pdf)

<sup>22</sup> *Id.*

<sup>23</sup> See U.S.S.G. §4A1.1 App. Note 2.

“violent” or an “escape” by triggering the variables of “history of violence” (+7) or history of escape.”<sup>24</sup>

The piling on of points for disciplinary infractions is problematic for several reasons. First, the prison disciplinary process comes with weak procedural protections, raising questions of factual accuracy and reliability. In addition, the disciplinary regime affords prison officials broad discretion, potentially incorporating their biases.<sup>25</sup> “Social scientists have demonstrated that there is a relationship between race and disciplinary infractions in prison,” although many have “failed to consider the role that racial bias play.”<sup>26</sup>

Second, the acts that can qualify for discipline are often relatively minor. For example, BOP’s inmate discipline program counts the following as infractions: malingering, feigning illness, obscene language, being unsanitary or untidy, or being absent from an assignment.<sup>27</sup> Disciplinary infractions can also vary widely across prisons, meaning that an infraction often says more about the place of a person’s incarceration and its culture than that person’s conduct. A November 2021

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<sup>24</sup> In a 2020 example of scoring people under PATTERN, DOJ gave several examples where individuals who committed a serious violent incident in prison were penalized through infractions enhancements, and by adding 7 points under “history of violence.” See Dep’t of Just., *The First Step Act of 2018: Risk and Needs Assessment System – UPDATE*, 32 (Jan. 2020), <https://bit.ly/3Sy9qS4>.

<sup>25</sup> See Andrea C. Armstrong, *Race, Prison Discipline, and the Law*, 5 UC IRVINE L. REV. 759, 761, 762 (2015) (exploring the “potential implications of implicit bias research in the prison disciplinary context”).

<sup>26</sup> See Katie M. Becker, *Race and Prison Discipline: A Study of North Carolina Prisons*, 43 N. CAROLINA CENT. L. REV. 2, 3-4 (gathering studies).

<sup>27</sup> Bureau of Prisons, Program Statement 5100.08, Inmate Discipline Program (2011).

BJS report confirmed that there are wide disparities in how disciplinary programs are administered across BOP. A random selection of five institutions demonstrates the point:

|                                        | Population<br>(#) <sup>28</sup> | Total<br>Infractions<br>(#) | Rate of<br>Infractions by<br>Person on<br>Average | Total at<br>Greatest<br>Severity<br>(#) | Rate of Infractions<br>at Greatest<br>Severity (%) |
|----------------------------------------|---------------------------------|-----------------------------|---------------------------------------------------|-----------------------------------------|----------------------------------------------------|
| Big Sandy,<br>USP                      | 1249                            | 1196                        | 0.95                                              | 366                                     | 30%                                                |
| Allenwood,<br>USP                      | 550                             | 760                         | 1.4                                               | 143                                     | 18%                                                |
| Atlanta<br>USP<br>(medium<br>security) | 1767                            | 1192                        | 0.67                                              | 576                                     | 48%                                                |
| Marianna-<br>FCI                       | 503                             | 86                          | 0.17                                              | 49                                      | 57%                                                |
| Terminal<br>Island-FCI                 | 705                             | 95                          | 0.13                                              | 26                                      | 27%                                                |

As this sample shows, both the rate and severity of infractions vary widely across institutions.

Finally, the heavy weight of disciplinary infractions in PATTERN also lends itself to abuse by staff. Reports of retaliation and abuse of individuals who are incarcerated in BOP are common.<sup>29</sup> An abusive correctional officer could strategically use disciplinary infractions to threaten incarcerated people with an

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<sup>28</sup> Note that the population numbers in this Table were from December 31, 2020, as published on BOP's website. The data included may not be exact matches to BJS. See Bureau of Prisons, *Population Statistics* (Dec. 31, 2020), available at <https://bit.ly/3ClR4P7>.

<sup>29</sup> See, e.g., Letter from Hon. Ron Wyden, & Hon. Jeffery A. Merkeley, United States Senators (D-Or.) to Collette Peters, Dir. Of Fed. Bureau of Prisons (Aug. 18, 2022) (requesting an update about press reports of “retaliation and violence against inmates at FCI Sheridan for speaking about their experiences regarding unaddressed medical needs; small cell confinement; and limited access to family and lawyers as a result of the pandemic”), <https://bit.ly/3Cexggt>.

increased risk score, and a corresponding loss of the ability to apply earned time credits.

**C. *Number of programs completed.***

DOJ should clarify which programs are counted under the “number of programs completed” variable and consider amending it to require “participation” rather than “completion.” PATTERN provides people the opportunity to reduce their risk score based on the the number of programs they have “successfully completed.” NIJ has defined this variable as “The number of ACE, Brave, Challenge, Drug Education, Life Connections, Parenting, Skills, Sex Offender Residential Treatment, STAGES, and Step-Down courses successfully completed during the current incarceration.”<sup>30</sup> Programs are combined into groupings, with the maximum (11+) triggering a reduction of 8 to 12 points, depending on the scale. It is unclear what programs this variable includes: All programs? Only the ten specifically listed? Those included in the approved program guide?<sup>31</sup>

The “completion” requirement is also problematic. In the context of earned time credits, BOP agreed with comments that “by focusing on completion, BOP diminishes the value of participation and weakens the incentive structure Congress enacted,” and that “there are myriad situations where people would successfully

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<sup>30</sup> December 2021 NIJ Report at 12; *see also 2020 Review and Revalidation of the First Step Act Risk Assessment Tool*, App’x A (Jan. 2021) (Operationalization of PATTERN variables), <https://bit.ly/3DVQvwj> (listing “Adult Continuing Education (ACE), Parenting, Life Connections Program, Brave, Challenge, Skills, Sex Offender (residential or nonresidential), Stages, and Step-Down Courses.”)

<sup>31</sup> *See* Bureau of Prisons, *First Step Act Approved Programs Guide* (Aug. 2022), <https://bit.ly/3LJUCxo>.

participate in an approved program and—through no fault of their own—be prevented from, or delayed in, completing it.”<sup>32</sup> In addition, BOP agreed that “[t]ransfers, program resource and staffing limitations, and facility movement restrictions all impact program completion, as do length of sentence, program availability and waitlists.” BOP should clarify what programs are counted by this variable and consider eliminating the “completion” requirement.

**D. *Work programs completed.***

PATTERN limits the number of points that can be awarded for “work programs completed” to a maximum of 2 or 4 points, depending on the scale. This variable is too narrowly defined and accorded too little weight.

First, the variable does not appear to include non-UNICOR work assignments. It is defined as “the number of technical and vocational courses completed during the current incarceration,” including federal industry employment UNICOR.<sup>33</sup> In other words, it seems that a person could spend 10 years diligently working in a non-UNICOR job as a janitor while in prison but see no reduction in their risk profile as a result.

Second, even if other types of work *do* count under this variable, only “completed” programs result in the subtraction of points. NIJ has specified that for UNICOR employment, working at least one day constitutes completion, but it does

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<sup>32</sup> See FSA Time Credits, 87 Fed. Reg. 2705, 2711 (codified at 28 C.F.R. 523 & 541).

<sup>33</sup> December 2021 NIJ Report at 12.

not define the meaning of “completion” for any other work programs included in the variable. In the context of the earned time credit rule, however, BOP has agreed that a “prison job is not a ‘program to complete,’ because it has no set duration, and its success is based on continued employment and supervisor evaluations.”<sup>34</sup> That logic applies with equal force here: a person’s continuing and successful employment should be counted in their favor as reducing their risk of recidivism. It should not count just once but be credited repeatedly over the period of a person’s successful employment. For example, a person could earn a reduction in their risk score for every year of successful employment.

In sum, DOJ should broaden the definition of this variable to include ongoing work assignments, remove the “completion” requirement, and give this variable greater dynamic weight in reducing a person’s risk score.

## **II. Recidivism**

DOJ should reorient PATTERN to focus on predicting the risk of reconviction, rather than mere rearrest or return to custody (which can encompass technical violations of supervised release). As we explain in our Brennan Center report:

Arrest is a poor proxy for criminal activity, as it may reflect policing decisions—where officers are deployed and their biases in making arrests—rather than actual criminality. Designing a risk assessment tool based on arrest patterns also means relying on data

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<sup>34</sup> FSA Time Credits at 2710 (agreeing with comments).

tainted by decades of discriminatory policing, a concern raised by stakeholders years ago.<sup>35</sup>

For this and other reasons, DOJ should redefine recidivism to include only convictions,<sup>36</sup> and also consider narrowing the *type* of convictions to exclude petty offenses and misdemeanors.<sup>37</sup> Although DOJ has in the past rejected such calls on the ground that a narrower definition would be unworkable because of data limitations,<sup>38</sup> there is evidence to the contrary. For example, the United States Sentencing Commission has repeatedly managed to compile reconviction information about large groups of released people for its recidivism reports.<sup>39</sup> Further, U.S. Probation creates thousands of presentencing reports each year that count only convictions, suggesting that the federal government has access to this information.

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<sup>35</sup> Grawert & Richman, *First Step* at 4.

<sup>36</sup> *See id.* at 6.

<sup>37</sup> The Independent Review Committee similarly recommended that NIJ and its consultants explore the feasibility of employing a “felony arrest only” outcome measure. While Defenders agree that the definition should be narrowed, we are concerned that the use of arrest as a proxy for criminal conduct embeds inequity and racial disparities. *See* Independent Review Committee, *Report of the Independent Review Committee Report Pursuant to the Requirements of Title I Section 107(g) of the First Step Act (FSA) of 2018* (P.L. 115-391) 3 (December 21, 2020).

<sup>38</sup> *See* U.S. Dep’t of Just., *The First Step Act of 2018: Risk and Needs Assessment System—Update* at 13-14 (Jan. 2020), <https://bit.ly/3SfiGut>.

<sup>39</sup> *See, e.g.*, USSC, *Recidivism Among Federal Offenders* 4 (2019), <https://bit.ly/3r9WnKR> (including data regarding reconviction); USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 15 (2016), <https://bit.ly/2NCafYW> (using three different measures of recidivism, including rearrest, reconviction & reincarceration); USSC, *Recidivism Among Federal Drug Trafficking Offenders* 4 (2017) <https://bit.ly/3dLDZ7W> (same).

### **III. Conclusion**

We are grateful for today's listening session, and hope that there will be additional opportunities for feedback and discussion moving forward. The Federal Public Community Defenders are eager to partner with the Department of Justice to expand the reach and improve the fairness of the FSA's prison reforms.

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# **EXHIBIT A**