April 3, 2020

Honorable William P. Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

RE: The use of the PATTERN risk assessment in prioritizing release in response to the COVID-19 pandemic

Dear Attorney General Barr:

On behalf of The Leadership Conference on Civil and Human Rights (The Leadership Conference), a coalition of more than 220 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, and the undersigned organizations and individuals, we write to express our grave concerns with your March 26, 2020 memo to the Federal Bureau of Prisons ("Bureau of Prisons" or "Bureau"), concerning the prioritization of home confinement in response to the COVID-19 pandemic. We ask that you rescind this memo in its entirety, and want to share particular concerns with the use of PATTERN — a risk assessment system built as a result of the First Step Act — as a factor in determining which currently incarcerated individuals may receive "priority treatment" in transfer and release decisions. Further, we ask that you immediately work to safely reduce the federal prison population using your broader existing authority, as well as the expanded authority afforded to you under the Coronavirus Aid, Relief, and Economic Security Act (CARES) Act.[1]

COVID-19 is spreading rapidly in cramped U.S. prisons and jails, where hundreds of thousands of vulnerable people face sickness and death. Already, hundreds of prisoners and staff have tested positive, and the first federal prisoner died from COVID-19 on March 22, 2020. **This is a health emergency that urgently requires expedited releases from incarceration to enable social distancing and to protect people in prison and jail, correctional staff, and communities.**

On March 26, 2020, you issued a memorandum directing the Bureau of Prisons to transfer some vulnerable people from prisons to home confinement in the name of minimizing their exposure to COVID-19.[2] We believe the restrictions you identify in this memo for home confinement eligibility are extremely troubling. In particular, you indicate the Bureau should rely upon an assessment tool, PATTERN, which numerous civil rights and legal organizations have previously warned is problematic and likely to perpetuate racial disparity in decision-making.[3] Moreover, your directive to the Bureau regarding PATTERN's use for home confinement decisions during an emergency health crisis was not its intended use, and limits transfer prioritization to those assessed as "minimum risk." **The use of a tool like PATTERN to make life or death decisions is alarming and serves to justify leaving tens of thousands of people — mainly people of color — unprotected and at the mercy of a deadly pandemic.**

Your memo instructs that only people who receive a "minimum" risk score from the PATTERN tool will receive "priority treatment." According to data furnished by the Department of Justice in February, individuals classified as minimum risk are the smallest cohort of the federal prison population, compared to the groups identified as low, medium, or high risk. Also, based on an analysis of PATTERN using a sample of the federal prison population, and reported by the National Institutes of Justice, only 7 percent of Black men in the sample were classified as minimum, compared to 30 percent of White men.[4] This indicator alone should give the Department of Justice great pause in moving forward with the memo's directive.

Experts have repeatedly criticized PATTERN, noting that the tool is scientifically unverified, and that the assumptions built into its design encode bias against Black people, Latino people, poor people, unhoused people, and people with mental illness.[5]

Given the unprecedented and immediate risk that COVID-19 poses to people in prison and prison workers, we categorically reject the use of PATTERN or any other recidivism risk assessment tool to justify leaving vulnerable people incarcerated.

Recommendations

1) The undersigned organizations and individuals recommend that the Department of Justice and Bureau of Prisons use their many authorities to decarcerate as many people as

possible through all avenues of release, from all facilities under their control, as soon as possible. No release should be conditioned on electronic monitoring, nor should those afforded accelerated release be subject to heightened surveillance.

2) The undersigned organizations call on the Department of Justice and Bureau of Prisons to abandon the use of PATTERN and all other recidivism risk assessment tools for any form of release recommendation or decision-making, now and in the future.

3) PATTERN risk scores cannot inform assessment of medical risk and should not play any role in determining who receives access to adequate healthcare. As jail and prison protocols are developed to facilitate accelerated release and accommodate CDC safety guidelines for those incarcerated and facility personnel, punitive measures such as solitary confinement must not take the place of adequate health care. Moreover, institutional protocols must ensure that public health measures do not have collateral effects on the behavioral records—automated and otherwise—of those incarcerated.

Our Specific Concerns with PATTERN

I. **Predictions of recidivism are wholly inappropriate for informing medical release and public health in the context of a pandemic.**
   - Because PATTERN's forecast of "general recidivism" is based on an incredibly broad definition of "re-offend",[6] it is highly likely to produce assessments that are biased against Black people and people of color, and that disproportionately impact those experiencing homelessness, or living with mental health issues.
   - The memo says that the risks of detention must be weighed against the risks of release; however, the "general recidivism" score produced by PATTERN does not help in making this assessment.
   - When tools conflate the likelihood of arrest for *any* reason with risk to public safety, a large number of people will be labeled a threat without sufficient justification. Risk assessments that include minor offenses or technical violations in their definition of "risk" will inflate risk scores and incarceration rates and exacerbate racial inequalities. In the context of COVID-19 and this memo, this means a much higher risk of illness and of fatality.

II. **Limiting release to people with a "minimum" risk score will produce significant racial bias**
   - By conditioning release decisions on PATTERN risk scores, the Bureau of Prisons is poised to leave Black people and people of color disproportionately exposed to harm. Under this memorandum, only 7 percent of Black men currently incarcerated would receive "priority treatment," whereas 30 percent of White men would.[7] This disparity is the byproduct of historical patterns in the ways different racial groups are treated differently by the criminal justice system.

- Black people and people of color are treated more harshly than similarly situated White people at each stage of the legal system, which results in serious distortions in the data upon which PATTERN relies.[8] Historical court and arrest data primarily reflect the past and present operations of the criminal justice system, recording who police chose to arrest, how judges choose to rule, and which people are granted longer or more lenient sentences. By relying on this data, PATTERN systematically overestimates the risk of people of color. There are no technical fixes to these problems that could make PATTERN and similar tools safe and fair to use.
- These biases are compounded by the fact that people of color have increased risk of illness and death from COVID-19 infection, due to structural health inequalities.
- The choice of PATTERN's risk thresholds — in other words, the process of determining how many individuals are rated minimum or low risk by PATTERN — was not done with this pandemic in mind. Under this memo, an individual who is assessed as having an 89 percent chance of "success" upon release (meaning they would not be rearrested or have a technical violation within 3 years) would not be prioritized for potential release.[9]

III. We are in an unprecedented situation, and historical arrest data are irrelevant to any assessment of public safety risk, especially during a pandemic.
- PATTERN's validity rests on the assumption that criminal history data can serve as a reliable and neutral measure of underlying criminal activity, but such records cannot be relied upon for this purpose.
- Any predictions based on historical arrest data are ill-suited to make predictions about public safety risk in the current moment. Given the extraordinary circumstances under which we are currently living, historical crime data amount to "zombie" data — meaning the data used to build these models do not apply to our current conditions.
- Despite fears of increased criminal activity, local police are reporting that crime levels (including violent crime) have plummeted to some of the lowest levels seen in years.[10] Thus, there is strong reason to believe that the likelihood of arrest for any crime would be much lower than historical patterns indicate.
- Moreover, part of the promise of PATTERN was that it would give people the opportunity to reduce their risk scores by participating in programming. Yet, not enough time has passed for people to take advantage of this opportunity. As a result, it is unlikely anyone has had the chance to meaningfully alter their risk score, let alone be reassessed.[11]

In conclusion, our communities for years have warned decision-makers — including the Department of Justice — and the public about the risk of predictive technologies in high-stakes human decision-making systems. Tools like PATTERN are unfair, biased, and wrong on their own merits. But using them in a process to decide who gets the right to access social distance

and freedom in the worst global pandemic in generations is particularly wrong. Therefore, we urge you to use your existing and expanded authority under the CARES Act to transfer as many people as possible into home confinement, without any of the limitations articulated in your memo, given that hundreds of thousands of lives are at stake. If you have any questions, please feel free to contact Sakira Cook, Director, Justice Reform Program, The Leadership Conference on Civil and Human Rights, at cook@civilrights.org.

Sincerely,

Organizations

1. 334 East 92nd Street Tenant Association
2. A Little Piece of Light
3. ACLU
4. AI NOW
5. Alabama Justice Initiative
6. All of Us or None, Bakersfield
7. Alliance of Families for Justice
8. Alternate Roots
9. American-Arab Anti-Discrimination Committee
10. Autistic Women & Nonbinary Network
11. Beauty After the Bars
12. Believers Bail Out
13. Bend the Arc
14. Black and Pink Boston
15. Block Builderz
16. Buried Alive Project
17. Carceral Tech Resistance Network
18. California Coalition for Women Prisoners
19. California Legal Research
20. Campaign for Youth Justice
21. Center for Disability Rights, Inc.
22. Center for Justice Research - Texas Southern University
23. Center for Law and Social Policy (CLASP)
24. Center on Privacy & Technology at Georgetown Law
25. Charles Hamilton Houston Institute for Race and Justice
26. Church of Scientology National Affairs Office
27. CJI
28. Coalition for Women Prisoners NYS
29. College and Community Fellowship

30. Community Justice Exchange
31. Cornell University
32. Council on American-Islamic Relations (CAIR)
33. CRIFC
34. Criminal Justice Policy Program, Harvard Law School
35. Criminal Justice Program, UCLA School of Law
36. Critical Race Studies Program, UCLA School of Law
37. CURE (Citizens United for Rehabilitation of Errants)
38. Defender Impact Initiative
39. Defending Rights & Dissent
40. Dignity and Power Now
41. Dream Deferred
42. Dream Deferred Inc
43. Drug Policy Alliance
44. Entre Hermanos
45. Equal Justice Under Law
46. Equality California
47. Essie Justice Group
48. Fair and Just Prosecution
49. Faith in Texas
50. FAM Queen Team
51. Families for Justice as Healing
52. Fjah
53. Florida Legal Services, Inc.
54. Free Hearts
55. Giving Others Dreams - G.O.D
56. Harm Reduction Coalition
57. Haverford College
58. Health in Justice Action Lab, Northeastern University School of Law
59. Human Rights Watch
60. IBW 21st Century Police Accountability Task Force
61. Innocence Project
62. Jewish Council for Public Affairs
63. Just Futures Law
64. Justice For Housing
65. Justice Strategies
66. Justice Support Group
67. JusticeLA
68. Juvenile Law Center
69. LatinoJustice PRLDEF

70. Lawyers' Committee for Civil Rights Under Law
71. The Leadership Conference Education Fund
72. The Leadership Conference on Civil and Human Rights
73. Legal Action Center
74. Legal Services for Prisoners with Children
75. Life After Release
76. Life for Pot
77. Massachusetts Against Solitary Confinement
78. Massachusetts Bail Fund
79. Matters of the Heart
80. Media Alliance
81. MediaJustice
82. Media Mobilizing Project
83. Mijente
84. MomsRising
85. NAACP
86. NAACP Legal Defense and Educational Fund, Inc.
87. National Action Network
88. National Association of Criminal Defense Lawyers
89. National Association of Social Workers
90. National Bar Association
91. National Council for Incarcerated & Formerly Incarcerated Women & Girls
92. National Council of Churches
93. National Disability Rights Network
94. National Immigration Law Center
95. National Lawyers Guild
96. NETWORK Lobby for Catholic Social Justice
97. New Beginnings Reentry Services, Inc.
98. New Direction Coaching & Consulting, LLC
99. New Haven Women's Resettlement Working Group
100. NYU Law Center on Race, Inequality, and the Law
101. OVEC-Ohio Valley Environmental Coalition
102. Participatory Defense Hubs
103. People's Paper Co-op
104. Pillars of The Community Participatory Defense
105. PolicyLink
106. Presbyterian Church (USA) Office of Public Witness
107. Pretrial Justice Institute
108. Prison Policy Initiative
109. Public Justice Center

110. ReEntry Matters
111. Reintegrated Voices
112. Release Aging People in Prison/RAPP
113. Reproductive Justice Inside
114. Resilience OC
115. Richmond Community Bail Fund
116. Rise and Resist
117. Robert F. Kennedy Human Rights
118. S.T.O.P. - Surveillance Technology Oversight Project
119. Silent Cry Inc.
120. Silver State Equality-Nevada
121. Southeast Asia Resource Action Center
122. State Vs Us Magazine
123. T'ruah: The Rabbinic Call for Human Rights
124. Texas Civil Rights Project
125. The Bail Project
126. The Black Sex Worker Collective
127. The Daniel Initiative
128. The Decarceration Collective
129. The Greenlining Institute
130. The Healing Project
131. The National Council for Incarcerated and Formerly Incarcerated Women and Girls
132. The National Reentry Network for Returning Citizens
133. The Tadini House
134. The Talking Drum Incorporated
135. The United Methodist Church - General Board of Church and Society
136. Tucson Second Chance Community Bail Fund
137. UCLA School of Law
138. Upturn Toward Justice in Technology
139. UnidosUS
140. Union for Reform Judaism
141. Union Theological Seminary
142. United Methodist Women
143. University of Chicago Law School
144. Washington Lawyers' Committee for Civil Rights and Urban Affairs
145. What's Next Washington
146. Witness to Mass Incarceration
147. Women Against Mass Incarceration
148. Women on the Rise
149. Women Who Never Give Up, Inc

150. Working Families Party

151. WV Citizens for Clean Elections

152. Young Women's Freedom Center

Individuals

1. Chelsea Barabas; Doctoral Candidate, MIT

2. Ruha Benjamin, PhD; Associate Professor, Princeton University

3. Meredith Broussard, PhD; Associate Professor, New York University

4. Joy Buolamwini; Founder, Algorithmic Justice League

5. Sasha Costanza-Chock, PhD; Associate Professor, MIT

6. Kate Crawford, PhD; Distinguished Professor, Co-Founder, Co-Director, AI Now Institute, NYU

7. Colin Doyle; Criminal Justice Policy Program, Harvard Law School

8. Bernard E. Harcourt, PhD; Professor of Law & Political Science, Columbia University

9. Stefan Helmreich, PhD; Professor & Elting E. Morison Chair, MIT

10. Martha Minow; 300th Anniversary University Professor, Harvard University

11. Cathy O'Neil, PhD; Author, Weapons of Math Destruction

12. Rodrigo Ochigame; Doctoral Candidate, HASTS, MIT

13. Heather Paxson, PhD; Professor of Anthropology, MIT

14. Seth J. Prins, PhD MPH; Assistant Professor, Columbia University

15. Vincent Southerland; Executive Director, Center on Race, Inequality, & the Law, NYU School of Law

16. Meredith Whittaker, Co-Founder, AI Now Institute and Minderoo Research Professor, NYU

17. Jordi Weinstock; Lecturer on Law, Harvard Law School

---

[1] Coronavirus Aid, Relief, and Economic Security Act available at
https://www.congress.gov/116/bills/s3548/BILLS-116s3548is.pdf

[2] Office of the Attorney General, "Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic," Memorandum for Director of the Bureau of Prisons, March 26, 2020.

[3] The Leadership Conference on Civil and Human Rights, *Comment Letter to Department of Justice on PATTERN First Step Act, available at* https://civilrights.org/resource/comment-letter-to-department-of-justice-on-pattern-first-step-act/

[4] U.S. Department of Justice, *The First Step Act of 2018: Risk and Needs Assessment System*, *available at* https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/the-first-step-act-of-2018-risk-and-needs-assessment-system_1.pdf

[5] We outline our specific concerns below.

[6] U.S. Department of Justice, *The First Step Act of 2018: Risk and Needs Assessment System - UPDATE*, January 2020, at 12. ("A return to BOP custody or a re-arrest within three years of release from BOP custody, excluding all traffic offenses except driving under the influence (DUI) and driving while intoxicated (DWI).") *See also* Brandon L. Garrett, Megan T. Stevenson, *Open Risk Assessment*, Behav Sci Law. 2020; 1–8.

[7] U.S. Department of Justice, *The First Step Act of 2018: Risk and Needs Assessment System*, p. 62, Table 8 *available at* https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/the-first-step-act-of-2018-risk-and-needs-assessment-system_1.pdf.

[8] Decades of research have shown that, for the same conduct, African-American and Latino people are more likely to be arrested, prosecuted, convicted and sentenced to harsher punishments than their white counterparts. For decades, communities of color have been arrested at higher rates than white communities, even for crimes that these racial groups engage in at comparable rates. Megan Stevenson & Sandra G. Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. Rev. 731, 769-770 (2018). For example, African Americans are 83 percent more likely to be arrested for marijuana compared to whites at age 22 and 235% more likely to be arrested at age 27, in spite of similar marijuana usage rates across racial groups. Ojmarrh Mitchell & Michael S. Caudy, Examining Racial Disparities in Drug Arrests, Just. Q., Jan. 2013, at 22. Similarly, African-American drivers are three times as likely as whites to be searched during routine traffic stops, even though police officers generally have a lower "hit rate" for contraband when they search drivers of color. Ending Racial Profiling in America: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the Comm. on the Judiciary, 112th Cong. 8 (2012) (statement of David A. Harris). This leads to an overrepresentation of people of color in arrest data.

[9] Of particular concern is the requirement for a person to have a "minimum" risk score in order to be prioritized for release. In order to be assessed in the *broad* category of minimum risk, an individual must be assessed as "minimum" risk for **both** general and violent recidivism. This requirement will result in a large number of Black and Latino people being deprioritized for release, given historic racial disparities in arrest rates.

[10] *See* Simone Weichselbaum, Weihua Li, "As Coronavirus Surges, Crime Declines in Some Cities," The Marshall Project, Mar. 27, 2020, *available at* https://www.themarshallproject.org/2020/03/27/as-coronavirus-surges-crime-declines-in-some-cities. ("In fact, in Chicago, Detroit, Los Angeles and San Francisco, recent data show big drops in crime reports, week over week. The declines are even more significant when we compare this year with the same time periods in the three previous years.")

[11] According to the Department of Justice, as of January 15, 2020, every person currently incarcerated received an "initial" PATTERN score and was "assigned to participate in evidence-based recidivism reduction programs." Less than three months have passed since that date — too little time for those incarcerated to have been reassessed based on the completion of programming.