

**Written Testimony of Andrea James,  
Executive Director  
The National Council for Incarcerated and  
Formerly Incarcerated Women and Girls  
to  
United States House of Representatives  
Committee on the Judiciary  
Subcommittee on Crime, Terrorism and Homeland Security  
October 17, 2019**

**I. Introduction**

The National Council for Incarcerated & Formerly Incarcerated Women and Girls is the only national advocacy organization founded and led by incarcerated and formerly incarcerated women and girls. Organizing began in a federal prison yard with a group of women who were tired of policy makers instituting criminal justice reform without consulting any formerly incarcerated people – those who understand the harm the current system inflicts and have the expertise to create an alternative system that recognizes each person’s humanity.

While still incarcerated, these women founded “Families for Justice as Healing,” which is now doing profound criminal justice reform work in the Boston area. In 2015, Andrea James received a Soros Justice Fellowship and used her 18 months of support to launch the National Council – a platform of connectivity, networking, and support of advocacy organizations led by incarcerated and formerly incarcerated women and girls across the country. In its short history, the National Council has already had a significant impact, including acting as the voice of the incarcerated women who helped draft the Dignity Act, which mandated that women in federal prison receive adequate feminine hygiene supplies and have appropriate and adequate visitation and communication with their children.<sup>1</sup>

The National Council is committed to abolishing incarceration for women and girls. As formerly incarcerated women, we believe a prison will never be the place to appropriately address the economic and psychological reasons women end up in prison. Prison most often causes further social and economic harm and does not effectively result in an increase in public safety. The prison experience increases trauma in women and, if they are mothers, to the children they are separated from. It deepens poverty in the individual lives of incarcerated people and the overall economic stability of their communities.

Although our long-term goal is to end the incarceration of women and girls, we are also working to address conditions of confinement for those still living inside prisons. Through our “Reimagining Communities” project,<sup>2</sup> a national infrastructure for supporting community-based initiatives led by incarcerated, formerly incarcerated, and directly affected women and girls, we support prison reform programs that are designed with the input of incarcerated women and work to keep people out of the legal system.

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<sup>1</sup> <https://justiceroundtable.org/dignity-act-for-incarcerated-women/>

<sup>2</sup> <https://www.nationalcouncil.us/reimagining-communities/>

## II. Haphazard Implementation

### a. Retroactive Provisions

#### i. Slow Progress

The National Council opposed the First Step Act because we felt that it did not sufficiently reduce the number of people in federal prisons who need to come home.<sup>3</sup> Now that the First Step Act has become law, we are committed to its implementation so that elderly and chronically ill incarcerated people can return to their homes and families where they belong. We have, however, found implementing the FSA to be very slow, opaque, and frustrating.<sup>4</sup> According to NPR, as of April 1, 500 people had been released under the First Step Act.<sup>5</sup> On July 19, 2019, the Justice Department announced that 3,100 people were being released based on the recalculation of good time credits to allow for 54 days a years for good behavior rather than 47. Even if true, that is deceptive. People incarcerated in the federal system spend the last 6-12 months of their sentence in a halfway house. Taking an extra seven days off a sentence for every year served, someone would have to have served more than 25 years to have six months shaved off a sentence and thus be able to be released from prison rather than a halfway house. Furthermore, 3,100 people represents 1.7% of the total 2018 federal prison population of 179,898, hardly a watershed moment in ending mass incarceration.<sup>6</sup>

- Of those 3,100 [at least 900](#) were transferred to ICE to be deported or to state custody;
- The [New York Times](#) profiled two “beneficiaries” of the First Step Act: one received 4.5 months off detention in a halfway house from a life sentence for selling crack

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<sup>3</sup> Estimates of the number of people who will be affected by the First Step Act are hard to come by and vary widely. In an Op-Ed in the Washington Post Mathew Charles, the first person released under the FSA, stated that eventually 150,000 people would benefit from the earned-time credits. An article in McClatchey put the number at 53,000. Compare Charles Matthews, *I was released under the First Step Act. Here’s what Congress should do next*. Washington Post (Feb. 1, 2019) with Andrea Drusch, *Trump’s Prison Plan to Release Thousands of Inmates*, McClatchey (Dec. 21, 2018), <https://www.mcclatchydc.com/news/politics-government/congress/article223414935.html>. The U.S. Sentencing Commission has declined to estimate the impact on the prison population for most of the provisions of the First Step Act.

<sup>4</sup> The National Council is not alone in this assessment. Even staunch supporters of the First Step Act are expressing alarm. See, e.g., Press Release, Families Against Mandatory Minimums, *FAMM to BOP: Implement Key Prison Reforms Now* (Mar. 5, 2019), <https://famm.org/famm-to-bop-implement-key-prison-reforms-now/>; Douglas Berman, *Spotlighting Concerns About Organization Tasked with Helping Justice Department Develop and Implement Risk and Needs Assessment Tools Under FIRST STEP Act*, Sentencing Law and Policy (Apr. 12, 2019) (quoting Sen. Mike Lee: “I don’t see a lot of good faith in implementing this law right now . . . it’s become increasingly clear to me in the last few days that some Department of Justice officials at least don’t like the First Step Act, and they seem not to care that Congress passed this law and that President Trump signed this into law.”), [https://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2019/04/spotlighting-concerns-about-organization-tasked-with-helping-justice-department-develop-and-implemen.html](https://sentencing.typepad.com/sentencing_law_and_policy/2019/04/spotlighting-concerns-about-organization-tasked-with-helping-justice-department-develop-and-implemen.html).

<sup>5</sup> Ayesha Rascoe, *3 Months into New Criminal Justice Law, Success for Some and Snafus for Others*, NPR Morning Edition (Apr. 1, 2019).

<sup>6</sup> Jacob Kang-Brown, Eital Schattner-Elmaleh, Oliver Hinds, *People in Prison in 2018*, Vera Institute of Justice (Apr. 2019), <https://www.vera.org/publications/people-in-prison-in-2018>.

cocaine that was reduced under the Obama Administration. The other received two weeks off of home confinement from a 22-year sentence for drug conspiracy.

The National Council worked hard to include retroactive application of the Fair Sentencing Act of 2010 into the First Step Act. In April, the Justice Department issued a press release announcing this provision “has resulted in 826 sentence reductions and 643 early releases.”<sup>7</sup> The U.S. Sentencing Commission estimated that 2,660 eligible people were in BOP custody as of May 26, 2018, meaning 55% of those entitled to sentence reductions had received them by April 2019.<sup>8</sup> By August 14, 2019, that number had climbed to 63%.<sup>9</sup> But that means that nearly 1,000 people are owed sentenced reductions, some of whom may be over-serving their sentences, a violation of both their constitutional and human rights. It is worth noting, however, that the vast majority of motions for a reduction in sentence come from defendants. Prosecutors account for the rest. As of mid-August the BOP had not filed a single motion to reduce a sentence. Another note of concern is that only 32 of the sentence reductions have been given to women.<sup>10</sup>

*b. Prospective Provisions*

*i. Earned Time Credit*

The greatest impact of the FSA will be in providing earned-time credits for participating in programming – which may benefit some 100,000 incarcerated people, a rough estimate of eligible people in federal prison, although the Sentencing Commission has declined to provide a specific number.<sup>11</sup> There are currently approximately 180,000 people under BOP control, meaning that nearly half (45%) will not benefit from this program at all. The statute denies the chance to earn a sentence reduction to incarcerated people who fall into 68 different categories. The earned-time credits also do not apply to courses that people completed before the effective date of the statute. This is a double-penalty because incarcerated people are not allowed to repeat courses, so anyone who took the initiative to get training now has fewer options for obtaining earned-time credits. Congress should review the list of ineligible people and narrow it down to open up educational possibilities to a wider group.

I would also note that the statute says that the earned-time credit program is effective immediately, meaning that people who were enrolled in courses on December 18 should get credit for them. We have heard about women who are declining offered spots in courses

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<sup>7</sup> Press Release, Dep’t of Justice, *Department of Justice Announces First Step Act Implementation Progress* (Apr. 8, 2019), <https://www.justice.gov/opa/pr/department-justice-announces-first-step-act-implementation-progress>

<sup>8</sup> U.S. Sentencing Commission, *Sentence and Prison Impact Estimate Summary S. 756, The First Step Act of 2018* (as enacted on December 21, 2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/January\\_2019\\_Impact\\_Analysis.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/January_2019_Impact_Analysis.pdf)

<sup>9</sup> <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20190903-First-Step-Act-Retro.pdf> .

<sup>10</sup> *Id.*

<sup>11</sup> U.S. Sentencing Commission, *Sentence and Prison Impact Estimate Summary S. 756, The First Step Act of 2018* (as enacted on December 21, 2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/January\\_2019\\_Impact\\_Analysis.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/January_2019_Impact_Analysis.pdf).

because they are afraid that they will not get credit for them. This deprives them of a chance to learn and also makes them ineligible for any programming for the next year as a penalty for turning down an opportunity. This ambiguity is especially hard for long-timers, as they cannot risk taking another course that will not give them credits because there are so few offerings still open to them.

*ii. Recidivism Assessment Tool*

The earned-time credit program is premised on developing a recidivism assessment tool to gauge each person's chance of recidivism and channel them into appropriate courses accordingly. The person's rating (minimum, low, medium, high) will determine what programming they are eligible for and whether they ultimately may be released early. The National Council objects to determining appropriate programming for incarcerated people in terms of assumed and projected failure – namely recidivism. The premise of this exercise should not be that people will commit crimes once they are able to return home, i.e. recidivate. Instead, we should attempt to measure how well prepared each incarcerated person is for successful reentry into society.

The use of algorithms to predict someone's behavior invites abuse, as risk assessment tools for determining pre-trial release have shown. Justice Department's first public act in implementing that program – naming the Hudson Institute as the “host” for the development of the recidivism assessment tool – further reinforces our impression that the First Step Act is neither groundbreaking nor bipartisan.<sup>12</sup> We urge the Department to reconsider this decision and create a community oversight board that truly represents the political spectrum and makes a place for formerly incarcerated people to join the conversation.

Even with more even-handed leadership, the National Council is skeptical that this system can be implemented in a way that fully respects the individual circumstances and background of each incarcerated person. At the very least, this risk assessment tool must be developed based on the principles listed below. This list is adapted from principles put together by the Leadership Conference for pre-trial risk assessments and to which 130 non-profit organizations, including the National Council, subscribed.<sup>13</sup>

1. The criminal justice reform community, especially incarcerated and formerly incarcerated people, must have significant input in designing the recidivism assessment instrument. The tool must then be “trained” and revalidated by independent data scientists who will work under meaningful community oversight. Specifically, the instrument should not be considered valid if it has any indication of racial bias.

The National Council therefore expresses concern that two of the three the social scientists in charge of developing this tool have professional backgrounds in the criminal justice system.

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<sup>12</sup> Press Release, Dep't of Justice, *Department of Justice Announces Progress in First Step Act Implementation* (Apr. 8, 2019), <https://www.justice.gov/opa/pr/department-justice-announces-first-step-act-implementation-progress>

<sup>13</sup> Leadership Council, *The Use of Pre-trial “Risk Assessments”: A Shared Statement of Civil Rights Concerns*, <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf>

This group has two men and one woman, none of whom are people of color or appear to have any connection to communities who are impacted by the criminal justice system. In order for their work to be legitimate, this group must be expanded to include social scientists from a wider demographic and political spectrum.

2. Recidivism instruments must presume that incarcerated people will successfully return to their communities at the end of their sentences and be designed to presume eligibility, i.e. a minimum or low rating, for early release. Under the FSA, incarcerated people who engage in programming are automatically eligible for early release to a halfway house or home incarceration unless they maintain a medium or high recidivism rating. In that case, their release is left up to the discretion of the Warden. In accordance with basic concepts of fairness and due process, a person's release should not depend on a computer formula and the whim of a single person. Instead, anyone denied the benefits of the FSA should be entitled to a hearing and legal representation.

### *iii. Compassionate and Home Detention Release*

The First Step Act was designed in part to give life to the statutory provision that allowed the BOP to file a motion to sentencing court to allow someone to be released for “an extraordinary and compelling” reason.<sup>14</sup> Over the years, the BOP neglected to use this mechanism to make it possible for the elderly, people with illnesses, and others with compelling circumstances to go home. Accordingly, the First Step Act gave incarcerated people the right to file a motion for compassionate release 1) after they had exhausted all administrative appeals or if their Warden did not respond within 30 days, whichever is earlier.<sup>15</sup>

The impact of this change in the law has been, and will continue to be, minimal. First, the requirements are still extremely demanding, pertaining primarily to people with terminal illnesses or debilitating medical conditions such as Alzheimers that make self-care impossible. To be considered for compassionate release, healthy people must be over 70 years old and have served 30 years or be over 65 and have served 10 years or 75% of their sentence, whichever is greater.<sup>16</sup>

As of July 23, 2019, **51** petitions for compassionate release had been approved, an increase from 34 during 2018.<sup>17</sup> This is still a miniscule number compared to the number of elderly and ill people who need to be home.

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<sup>14</sup> See USSG 1B1.13 and BOP Program Statement 5050.50 for information on what is considered a “extraordinary and compelling” circumstance. the grounds for compassionate release set by the US Sentencing Commission are inconsistent with the BOP’s guidance, adding unnecessary confusion and ambiguity to an already complex process.

<sup>15</sup> 18 U.S.C. 3582(c).

<sup>16</sup> BOP Program Statement 5050.50 at 6.

<sup>17</sup> Press Release, Dep’t of Justice, *Department of Justice Announces the Release of 3,100 Inmates Under First Step Act, Publishes Risk And Needs Assessment*, (July 19, 2019), <https://www.justice.gov/opa/pr/departement-justice-announces-release-3100-inmates-under-first-step-act-publishes-risk-and>.

#### *iv. Home Detention*

In addition, the First Step Act allows for people with medical conditions or who are over 60 and have served 2/3 of their sentence or over 65 and have completed 50% to apply for home detention. So far [328 petitions for elderly home confinement](#) had been approved.<sup>18</sup> There are 10,267 people [over the age of 60](#) in federal prisons,<sup>19</sup> meaning that 3% of the elderly population has been released to home confinement under the First Step Act.

We have received dozens of messages from women in federal prisons about the impediments to applying for compassionate release or home detention. One major problem is calculating time served. No one seems to know whether good time credits can count towards time served for the purposes of qualifying for release or home detention under the Act. Although there is no reason why they shouldn't apply to the First Step Act, case managers are refusing to count time credits. One manager told an applicant "show me in the First Step Act where it says that good time credits count." We have had to advise women to send their requests for release to their family members to send back to the Warden because prison staff refuse to forward the request based on idiosyncratic determinations of how much time a woman has served.

Typical of the confusion is an email we received from a woman at Coleman FCI, who was told she had been approved for home detention and could leave on September 3, 2019. A few days before her departure, her case manager called her in to say that there had been an error in calculating her release date, meaning she would not be able to leave after all. He also could not tell her what her "correct" release date was. She told us that "This is something that has been going on here[:] giving people dates then taking them back. No one has left here for home confinement under the home confinement 2/3rd First Step Act. That is a law and the BOP does not want to comply with it."<sup>20</sup>

### **III. Moving Forward**

The "bait and switch" approach to implementing the First Step Act must end.

First, Congress must make the following clear to the BOP:

- Good time credits and any other reductions in sentence apply to calculations of time served for the purpose of determining eligibility for compassionate release or home detention;
- People must be given earned-time credit for any course they were attending on December 18, 2018 or which they started after that date;
- Case Managers and other staff must not interfere with or delay applications for benefits under the First Step Act;
- Development of the Recidivism Assessment Tool must include input from incarcerated and formerly-incarcerated people to have any chance of accurately predicting chances of recidivism.

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<sup>18</sup> <https://www.bop.gov/inmates/fsa/index.jsp> (last visited Oct. 13, 2019).

<sup>19</sup> [https://www.bop.gov/about/statistics/statistics\\_inmate\\_age.jsp](https://www.bop.gov/about/statistics/statistics_inmate_age.jsp) (last visited Oct. 13, 2019).

<sup>20</sup> Email from Coleman FCI to Phyllis Hardy (Aug. 29, 2019) (on file with the National Council).

Second, Congress must amend the law to make the earned-time reward for coursework retroactive.

Finally, and most importantly, Congress must stop tinkering with the machinery of incarceration. Making the conditions of imprisonment marginally better does nothing to address the crisis of mass incarceration. Instead of steps, we must think about leaps forward.

- We must preserve families by repealing the provisions in the American Safe Families Act that allow the states to steal the children of incarcerated mothers by forcing them into closed adoptions after 15 months of separation.
- We must repeal the 1994 Crime Bill and with it the mandatory minimum sentences and other policies that have led to mass incarceration of black and brown people and our children
- We must pass a federal Primary Caretakers Bill that requires federal judges to justify in writing sentencing primary caregivers of minor children to prison, traumatizing both the parent and children.