

**Public Comment of Andrea James,
Executive Director
The National Council for Incarcerated and
Formerly Incarcerated Women and Girls
to
The U.S. Commission on Civil Rights
Women in Prison: Seeking Justice Behind Bars
March 21, 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.¹

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,² 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.

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

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

The National Council appreciates the Commission’s critical oversight and engagement with the numerous problems related to the incarceration of women and girls. We invite you, however, to go beyond considering ways to ameliorate the unconscionable conditions inside federal prisons to reimagining the criminal justice system itself. This Commission’s work will have a greater impact if it explores innovations such as bail funds,³ participatory defense,⁴ or statutes that keep primary caregivers out of prison and at home with their children,⁵ while encouraging the exercise of the executive branch’s clemency power.

In particular, we suggest that the Commission focus its attention on the disparate impact that conspiracy laws have on women and on the painfully slow implementation of the First Step Act. These two topics encapsulate many of the ills that plague the criminal justice system today.

II. Conspiracy

a. Conspiracy Law Overview

Conspiracy law related to drug trafficking allows prosecutors to leverage the legal system to extort information or a plea from a defendant. In order to prove guilt for a conspiracy to manufacture or distribute drugs, all the government has to show is 1) an agreement between two or more people to 2) violate a federal law.⁶ To be guilty of a drug conspiracy, a person does not have to do anything; an overt act is not required.⁷ Nor is it necessary to know all the players in the conspiracy or be aware of what co-conspirators are doing.⁸ Any action, even one that is entirely legal, is sufficient if that act benefits the drug operation in some way.⁹ Furthermore, many of the usual protections afforded to defendants do not apply, including the prohibition against hearsay testimony, double jeopardy, or *ex post facto* enforcement of the law.¹⁰

In 1988, Congress used conspiracy laws to apply the mandatory minimum sentences designed for “drug kingpins” to everyone involved in the drug operation. Even the low-level seller on the street could (and still can) be held responsible for all the drugs that had been sold by anyone in the same organization.¹¹ As a result, the prison population soared, tripling by 1994 and growing 450% between 1986 and 1998.¹² The use of conspiracy laws to make more people subject to prosecution for even minor involvement in drug trafficking has

³ Robin Steinberg, Lillian Kalish, and Ezra Ritchin, *Freedom Should be Free: a Brief History of Bail Funds in the United States*, The Bail Project (2018), <https://bailproject.org/freedom-should-be-free/>

⁴ *About Participatory Defense*, Participatory Defense Network, <https://www.participatorydefense.org/about>

⁵ An Act Relative to Criminal Justice Reform, Mass Stat. ch. 69 § 207, <https://malegislature.gov/Laws/SessionLaws/Acts/2018/Chapter69>

⁶ See *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003).

⁷ *United States v. Shabani*, 513 U.S. 10, 11 (1994).

⁸ See, e.g., *United States v. Reed*, 575 F.3d 900, 924 (9th Cir. 2009).

⁹ *Braverman v. United States*, 317 U.S. 49, 53 (1942).

¹⁰ Charles Doyle, Congressional Research Service, R41223, *Federal Conspiracy Law: a Brief Overview*, 19 (2016). <https://fas.org/sgp/crs/misc/R41223.pdf>

¹¹ 21 U.S.C. 846.

¹² Eric E. Sterling, Esq., *Drug Laws and Snitching: a Primer*, Frontline (Jan. 1999) (citing Federal Bureau of Prisons Statistics), <https://www.pbs.org/wgbh/pages/frontline/shows/snitch/primer/>

disproportionately affected women. According to the Department of Justice, in 2016, 56% (or 6,300) of women were serving federal sentences for a drug offense, compared to 47% of men (75,600).¹³ More than half of the incarcerated females have minor children, most more than one.¹⁴

b. Results of National Council Survey

The National Council is currently surveying women inside federal prisons to acquire more information about their experiences being prosecuted and imprisoned for drug conspiracy charges.¹⁵ The results demonstrate that prosecutors use coercion to extract pleas.

- 57% of the women we surveyed said that that the pressure on them to plea to a conspiracy charge was a 10 on a 10-point scale;
- Nearly one in five reported that prosecutors threatened to arrest or otherwise harm a loved one to coerce a plea;
- 25% stated that prosecutors made gender-based threats, e.g. saying that unless they accepted a plea, they would never see their children again; and
- 85% said that they were threatened with much harsher sentences if they exercised their right to trial.

The results also expose several different ways women are victimized within the system:

- 38% reported discrimination (e.g. harsher sentences) based on gender;
- Nearly one in five reported actions by prosecutors that violate the rules of professional responsibility that govern the practice of law (e.g. speaking to a defendant without a lawyer present); and
- 27% described neglect by their lawyers that appear to meet the legal standard for ineffective assistance of counsel.

Conspiracy laws have completely reversed the intent of Congress. Leaders of drug organizations are able to provide substantial assistance to prosecutors by identifying other members of the conspiracy, thus obtaining lenient sentences.¹⁶ The minor players, mostly women, have no information to trade and thus are given crushing decades-long sentences while the real perpetrators go free. We ask the Commission to highlight this grave injustice which remains largely hidden from the public.

¹³ E. Ann Carson, PhD, *Prisoners in 2016*, USDOJ Bureau of Justice Statistics (Jan. 2018), NCJ251149, p. 13, <https://www.bjs.gov/content/pub/pdf/p16.pdf>

¹⁴ Lauren E. Glaze and Laura M. Maruschak, *Parents in Prison and Their Minor Children*, USDOJ, Bureau of Justice Statistics (Jan. 2009), NCJ222984, p. 2, <https://www.bjs.gov/content/pub/pdf/pptmc.pdf>

¹⁵ Copies of the conspiracy survey and the First Step Act survey (discussed below) are attached to this comment.

¹⁶ U.S. Sentencing Commission, *The Use of Federal Rule of Criminal Procedure 35(b)* (Jan. 2016), <https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/Rule35b.pdf>

III. First Step Act

a. Overview

The First Step Act (FSA), signed into law by President Trump on December 21, 2018, is meant to be a bipartisan effort towards federal criminal justice reform.¹⁷ Title I of the FSA provides a mechanism for determining each incarcerated person's recidivism risk and creates incentives for those who are deemed low-risk to participate in "recidivism reduction programs."¹⁸ The National Council notes its extreme concern at using computer algorithms to predict future behavior. We believe that these algorithms are inherently biased and will disproportionately identify people of color as "high risk," limiting their access to programming and the time reductions given for successful completion.¹⁹ As the FSA requires program evaluation as it is implemented, we urge the Commission to monitor carefully the demographics of participants so that the opportunity to earn "time credits" that will allow earlier release to a halfway house or home confinement will be fairly distributed.²⁰ We also recommend that the Commission make sure that the annual appropriation of \$75 million dollars from 2019-2023 to carry out the law is actually funded. The President's 2020 budget only allocates 14 million dollars for FSA programming, further demonstrating that the FSA is political theater, not serious reform.²¹

Other provisions relevant to women include prohibiting the use of restraints on pregnant and postpartum incarcerated women under most circumstances. Prison officials must now report when restraints are used on these women.²² Title IV includes several provisions reducing mandatory minimums outright and expanding the "safety valve" exception to include people with minor criminal histories.²³ It also reauthorizes the Second Chance Act of 2007 and requires the BOP to place incarcerated people in prisons within 500 miles of their homes.²⁴ Finally the FSA increases the maximum amount of possible home confinement time for those people deemed low-risk and expands the "Elderly Home Detention Pilot Program," to make compassionate release more accessible by allowing incarcerated people to bring their own compassionate release motions.²⁵

¹⁷ Brandon Sample, *First Step Act: A Comprehensive Analysis* (Dec.19, 2018)

<https://sentencing.net/legislation/first-step-act>.

¹⁸ First Step Act, Pub. L. No. 115-391, §§ 101-02, S. 756, 115th Cong. (2018).

¹⁹ Vincent Sutherland, *With AI and Criminal Justice, the Devil Is in the Data*, ACLU (Apr. 9 2018), <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/ai-and-criminal-justice-devil-data>; Beryl Lipton, *The First Step Act's First Steps Are Stalled*, MuckRock (Jan. 22, 2019), <https://www.muckrock.com/news/archives/2019/jan/22/algorithms-first-step-act/>

²⁰ *Comprehensive Analysis*, at Section 610.

²¹ Justin George, *First Step Act Comes Up Short in Trump's 2020 Budget*, The Marshall Project (Mar. 12, 2019), <https://www.themarshallproject.org/2019/03/12/first-step-act-comes-up-short-in-trump-s-2020-budget>

²² First Step Act, at § 301.

²³ *Id.*, at § 402.

²⁴ *Id.*, at § 601.

²⁵ *Id.*, at §§ 602-03.

b. National Council Survey

As one of only a few organizations with members currently behind bars, we hear stories every day about the difference between how prison officials say the system is working and how it actually works. The recent scathing report by the DOJ's Office of the Inspector General on the conditions of confinement of incarcerated women in the federal system confirms the lived experience of every member of the National Council.²⁶ The sad truth is that any reform is useless if it is not implemented well. The First Step Act is the latest example. The Bureau of Prisons claims it is implementing the law but the view from the prison bunk is very different.

Although the First Step Act has been heralded as a major step in criminal justice reform, the Bureau of Prisons has done little to make women aware of the law. Of the women we surveyed, only 10% of inmates received information about it directly from prison officials, although 21% had received relevant BOP memos.²⁷ In contrast, 40% heard about the FSA from family and friends and 74% learned about it from other incarcerated people. Half obtained information from advocacy organizations and a third got their information from news organizations. Ten percent acquired information from lawyers providing legal updates, and 15% obtained information about the FSA from other sources.

These survey results demonstrate that incarcerated women are receiving their information about the FSA from various sources, with the least reliable – family, friends, and other incarcerated people – being the most common. Very few incarcerated women are actually receiving information from the BOP, the agency tasked with implementing the law. Given this dearth of information, it is no surprise that very few people have benefitted from the Act some three months after its passage. Those who are incarcerated are left alone to figure out whether the law applies to them.

Although the First Step Act has a timetable for its implementation, 48% of the women surveyed stated that it was “unknown” when they might see some of the benefits of the Act. Seventeen percent gave answers such as “July 2019” or “six months” that reflected knowledge of the time allotted to develop risk assessment tool but ignorance of the provisions already in effect. The remaining women responded that it would take between one and three years before anything happened, a reflection of the time allocated for establishing effective programming. Few were aware that some provisions of the Act are already in effect whereas others will not be available for months or until 2020. Here are some typical responses regarding timeframe:

- “When they get around to it.”
- “The Prison is not helpful with any information about the FSA. They aren't correctly applying the credits nor communicating with us about when or how it will affect any of our sentences. They seem to act as if it is not official or real at this time.”

²⁶ Office of Inspector General, *Review of the Federal Bureau of Prison's Management of Its Female Inmate Population* (Sept. 2018), <https://oig.justice.gov/reports/2018/e1805.pdf#page=1>

²⁷ Even more concerning, only 3% gained information from prison counselors and 4% obtained information from prison staff.

- “When we ask the Warden or any administrator who is high [up] they either don’t know, or they’ve never heard of it, or say it doesn’t apply to you.”
- “No prison officials ever tell us anything that might assist us to return home early.”

This indifference and bureaucratic lethargy will lead to women overserving their sentences, violating the fundamental civil right of personal liberty. Based on media reports, the number of people released so far is tiny, meaning that those who are eligible for immediate release due to age, health condition, or retroactive sentence recalculation, remain behind bars. This is unacceptable. Nor should women who are entitled to a recalculation of their good time credits have to wait until July 2019 – or longer – for a simple mathematical calculation, especially if the result is eligibility for immediate release.

The National Council urges this Commission to monitor implementation of the First Step Act to make sure that the modest benefits it gives to incarcerated people are not nullified by bureaucracy and neglect. Specifically, we would suggest closely monitoring the required reporting to ensure that the Act is being administered fairly and efficiently.

Thank you for your efforts to educate the public about the conditions in America’s prisons and to make sure that promises to incarcerated women are kept.

SAMPLE SURVEYS

National Council of Incarcerated and Formerly Incarcerated Women and Girls
100 R Warren Street, Roxbury, MA 02119

We want to hear from women who were convicted on federal conspiracy charges to help tell your stories to the public. If you wish to participate, please answer the following and return to us. We hope to chronicle your experience, including what induced you to take a plea deal — threat of a long prison term/separation from family if you went to trial, forfeiture of property, etc. Or, if you went to trial, did anyone, such as the prosecutor, your attorney, or both try to convince/coerce you into accepting a plea instead.

Name and Reg# _____

Institution _____

Charges _____

Court _____; Case # (if known) _____

Date you were sentenced: _____ Length of sentence _____

(if you need more space to answer the following, please add additional pages and note which # you are responding to)

- 1 When you met with a prosecutor to discuss your charges, were you accompanied by a public defender or any other counsel? Y/N
- 2 If you were not accompanied by counsel, why not?
 - a. I didn't think I needed a lawyer
 - b. I had not asked for a public defender yet
 - c. I could not afford a lawyer and had not been assigned a public defender
 - d. I had a public defender but she/he was not available
 - e. Other: _____
- 3 Was there anyone else present to witness the conversation (stenographer, cop, another DA, etc.)? Y/N If yes, who? _____
- 4 Were you were told you would suffer negative consequences for going to trial Y/N
- 5 If yes, describe those consequences (circle all that apply):
 - a. Longer prison sentence
 - b. Gender-based threat ("Children will grow up without a mother;" "you'll go to prison and be sexually assaulted;" etc)
 - c. Property would be forfeited
 - d. Loved One would be arrested/prosecuted/harmed in some way
 - e. Other _____

Please provide all the details you recall:

National Council of Incarcerated and Formerly Incarcerated Women and Girls
100 R Warren Street, Roxbury, MA 02119

6 On a scale of 1-10, how much did the promise of negative consequences influence your decision to take a plea, if you did.

1 2 3 4 5 6 7 8 9 10

7 When did the prosecutor first threaten to charge you with conspiracy?

- a. Did you have appointed counsel? Y/N
- b. Had you consulted with counsel? Y/N
- c. Had you sought pre-trial release? Y/N
- d. Had you bonded out? Y/N
- e. Had you been released under some other mechanism? Y/N

8 Did you give the prosecutor any information that would exonerate you, that is show your lack of knowledge or innocence (example: X will tell you I never sold drugs, or I was working when Y happened and have a photo or paychecks to prove it)? Y/N

- a. If so, what did you say?

9 Did you know the English language well enough to understand what you were being advised to do? Y/N

- a. If no, was there anyone to interpret for you? Y/N

10 Were you told that you would need to provide information against other people, such as a family member, spouse, friend, etc. in order to get a sentence reduction? Y/N

- a. If yes, who were you supposed to implicate?

11 Were you ever told that you could avoid prison if you would help the prosecution convict other individuals? Y/N

12 Do you feel as if you were discriminated against or treated more harshly because you are a woman? Y/N

- a. If yes, how?

10. If you would like, please tell us your story in as much detail as you would like. Is there anything about your case and your decision to either plead guilty or go to trial that you think is noteworthy and that we should know about.

Liability Release Form

I hereby release the National Council and others from any liability related to the answers I've provided in this survey. **Read carefully and sign either A or B.**

- A.** I give the National Council and any affiliated organization with the "Conspiracy Project" permission to use my answers to this survey as they deem appropriate. This project might lead to future media exposure and I wish to participate in the project, plus give my consent to be referenced/contacted by media. If so - sign here:

- B.** I want to participate in the survey, but prefer to remain anonymous and do NOT want my name used in any media or publication. If so, sign here:

Date: _____



The National Council for Incarcerated and Formerly Incarcerated Women and Girls

SURVEY REGARDING IMPLEMENTATION OF THE FIRST STEP ACT

The First Step Act is only as good as its implementation. If the Bureau of Prisons is not providing accurate information about the provisions in the law and/or not calculating good time credits accurately, then even the limited improvements in the Bill will be meaningless. The National Council for Incarcerated & Formerly Incarcerated Women and Girls needs your input regarding how the First Step Act is being put into practice so that we can monitor the BoP effectively and make sure that it fulfills its obligations under the law.

Note: The National Council cannot advocate for individuals nor provide legal advice related to your specific case, although we might be able to refer you to someone who can. Instead we are working to identify systematic flaws in the First Step Act that we can bring to the attention of legislators and government officials. We need your input to fulfill our mission of advocating for incarcerated women and girls to bring as many of you home as possible.

1. How and when did you first hear about the First Step Act?

2. Have you received any information about the FSA directly from prison officials?

If yes, then what sort of information?

3. What are your sources of information about the First Step Act? Circle all that apply and underline the main source of your information

- a. Written BoP memos
- b. Information from prison counselors related to your case
- c. General information from prison staff
- d. Family and friends
- e. Other incarcerated people
- f. Advocacy organizations
- g. Other (please specify): _____

4. Are you expecting relief from the First Step Act? **Yes** **No** **Don't Know**

5. If yes, circle all that apply:

Please return to the National Council, 100R Warren Street, Roxbury, MA 02119

- a. Reduced sentence based on retroactive application of the Act
 - b. Reduced sentence based on rehabilitation credits to be earned in the future
 - c. Other; Please specify: _____
6. What were you convicted of and what is your current sentence? How much time do you hope to get off of your sentence based on the First Step Act?
- a. Conviction:

 - b. Current Sentence:

 - c. Anticipated Reduction:
7. How long do prison officials estimate it will take to recalculate sentences for people who are eligible for a reduction?
8. Does your facility already have programs that can provide you rehabilitation credits? **Yes** **No**
Don't Know
- a. If yes, do you know how many programs?

 - b. If yes, how long will it take you to be able to participate in one (i.e. is there a waitlist?)

 - c. If no, are programs being planned? **Yes** **No** **Don't Know**

 - d. How long will it take for programs to be available?
9. Have you tried to contact your lawyer/public defender regarding how the FSA affects you? **Yes**
No
10. Have you reached your lawyer? **Yes** **No**
11. Did you receive useful information from that communication? (Do not repeat what your lawyer told you on this survey). **Yes** **No**
12. Is there anything else we should know? Explain below. Add extra pages if needed.