



Thursday, February 29, 2024

## Re: Misleading Claims on Expanded Earned Sentence Credits

Dear Esteemed Members of the General Assembly,

We write to you to ask that the General Assembly adopt the House Budget language striking Item 390(R)(2), thereby fully enacting expanded the Earned Sentence Credits legislation, as passed in the 2021 General Assembly Special Session.

A recent letter from the Office of the Attorney General laid out a misleading, inaccurate argument. Below we provide a reasoned, evidence-based examination of the considerable public safety, fiscal, and community benefits that will ensue by striking this language while addressing those misrepresentative claims.

## Summary

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Virginia Attorney General Jason Miyares' letter to the General Assembly dated February 27, 2024, regarding the Enhanced Earned Sentence Credit (EESC) program distorts the data and provides an inaccurate analysis of the public safety and fiscal impacts of the program in an attempt to justify continued restrictions on eligibility for enhanced credits.

Virginia remains among the safest states in the union. The violent crime rate in Virginia in 2022 was over 38% lower than the national average.<sup>1</sup> In fact, earned sentence credit systems have been found to reduce recidivism and improve work opportunities in rigorous comparisons,<sup>2</sup> including following the recent federal First Step Act signed by President Trump.<sup>3</sup>

Expanding earned sentence credits has generated millions in savings already, driving the reduction of Virginia's prison population by more than 2,000 and facilitating the closure of four prisons.<sup>4</sup> Honest accounting indicates that eliminating the budget amendment will save at least \$28 million and as much as \$118 million, money that we encourage the Commonwealth to invest in Virginia Victims Assistance Network and Virginia Sexual and Domestic Violence Action Alliance who are facing critical funding shortages (their budget requests went unaddressed in the Governor's budget) and evidence-based public safety and rehabilitation efforts.

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<sup>1</sup> FBI Crime Data Explorer. Violent Crime Trend in Virginia 2022. <https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/crime-trend>

<sup>2</sup> Lawrence, Alison (2009). "Cutting Corrections Costs: Earned Time Policies for State Prisoners 2," Nat'l Conf. of State Legislatures.

<sup>3</sup> Bhati, Avinash (2023). "First Step Act: An Early Analysis of Recidivism." Council on Criminal Justice (August). <https://counciloncj.foleon.com/first-step-act/fsa/>

<sup>4</sup> Weston, Helen (January 26, 2024). "Under Governor Youngkin, Prison Reform is Working." *Richmond Times-Dispatch*. [https://richmond.com/opinion/column/commentary-under-gov-youngkin-prison-reform-is-working/article\\_c87eef0-b952-11ee-a8f2-67f40241ffea.html](https://richmond.com/opinion/column/commentary-under-gov-youngkin-prison-reform-is-working/article_c87eef0-b952-11ee-a8f2-67f40241ffea.html)

The fact that the population of people ineligible for EESCs have had a lower recidivism rate than those who are eligible for EESCs is precisely why the Commonwealth would benefit from expanding the EESC program – and the incentives for rehabilitation that it provides – to everyone in VADOC custody.

The legislature has recognized as much in recent legislative sessions by defeating each and every bill aimed at codifying the budget language restrictions in whole or in part. **This demonstrates that the legislature has already made a determination against the language in the governor’s budget.** To allow the language to remain would short-circuit the legislative process and undermine the legitimacy of the body.

As set out below, the Attorney General has failed to make a convincing argument for the continued limitation of the EESC program. **Eliminating Item 390(R)(2) from the state budget will not harm public safety, and it will generate cost savings and respect the will of the legislature.**

## Public Safety

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### Recidivism

The Attorney General’s claim that the EESC program should not be expanded because people who are eligible for it are more likely to recidivate is both deeply flawed and misleading.

Firstly, the Attorney General claims that in FY23 three people released under EESC were rearrested for capital murder. The Commonwealth of Virginia abolished capital murder in 2021, well before anyone was released as a result of EESCs upon its enactment in 2022. It is disappointing that Virginia’s top law enforcement officer would publicly claim that people were arrested for a crime that no longer exists.

Beyond this factual error, the Attorney General’s discussion of recidivism implies that the EESC program is responsible for increased recidivism. **The Attorney General supplies no evidence to support this claim and fails to account for multiple variables that are known to impact recidivism.** These flaws render the Attorney General’s conclusions inaccurate and unreliable.

Notably, the Attorney General does not provide any evidence that the recidivism rate for people with EESC-eligible offenses increased after implementation of the EESC program. The comparison of recidivism rates of EESC-eligible offenses and non-EESC-eligible offenses is misleading, because it is well-established that EESC-eligible offense categories have higher recidivism rates. For example, the April 2021 Recidivism study states plainly that *“Inmates who commit Property or Public Order crimes as their most serious offenses are more likely to recidivate.”*<sup>5</sup>

In fact, some of the offenses associated repeatedly with the lowest recidivism risk, as confirmed by Department of Corrections’ researchers, are offenses such as homicide in the first and second degree, manslaughter, and arson — offenses that are currently excluded from eligibility for EESCs.<sup>6</sup> **Thus, the Attorney General’s letter simply identifies a pattern that existed before the implementation of the EESC program and continues today.**

Academic research<sup>7</sup> and the Department of Corrections<sup>8</sup> have both identified factors that *are* associated with increased recidivism, like youth and untreated Substance Use Disorder. Both of those traits are inherently more common among the drug, property, and public order convictions that are the vast majority of EESC-eligible sentences. **Suggesting that increased recidivism is attributable to the EESC program is inaccurate and entirely unsupported by the data cited by the Attorney General.**

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<sup>5</sup> VADOC Research-Evaluation Unit (2021), “VADOC Recidivism” (April). <https://vadoc.virginia.gov/media/1683/vadoc-recidivism-summary-report-2021-04.pdf>

<sup>6</sup> <https://vadoc.virginia.gov/media/1783/vadoc-recidivism-crime-type-over-time-report-2022.pdf>

<sup>7</sup> Huebner, B. M. (2006). Drug abuse, treatment, and probationer recidivism. Chicago: Illinois Criminal Justice Information Authority

<sup>8</sup> <https://vadoc.virginia.gov/media/1783/vadoc-recidivism-crime-type-over-time-report-2022.pdf>

If the Attorney General prefers that the incentives toward rehabilitation provided by the EESC program be extended to those with the lowest recidivism risk, he should join us in seeking to extend the program to everyone, rather than curtailing it further. The Commonwealth could then reinvest the savings generated by the EESC program into programs that prioritize treatment, restorative justice, and job training to further reduce the chance of recidivism.

## **Technical violations are not new crimes**

The Attorney General's letter exaggerates the significance of the arrest statistics for EESC-eligible people who have been released, because those statistics include arrests for technical probation violations, which **are not new crimes**.

The letter collectively describes 1,569 new arrests for EESC releases, but does not specify how many of these alleged violations are technical probation violations, which include such minor actions as lying (about anything) to a probation officer, not reporting a change of address immediately, or missing a meeting with a probation officer. Researchers have found that **technical violations without new crimes are the most common reason people are rearrested**.<sup>9</sup> Technical violations alone account for 30% of rearrests, six times as many as all violent felony rearrests combined.

Further, the number of arrests says nothing about the number of convictions that result. Arrests are far more common than convictions: for example, in FY21, there were 979 robbery arrests in Virginia,<sup>10</sup> but just 190 convictions for robbery as a primary offense.<sup>11</sup> Many people who are arrested for crimes are never charged at all, later have the charges dropped, or are found innocent.

Not only do the arrest statistics that the Attorney General cites fail to make the case against the EESC program, but his letter drastically distorts the data to exaggerate the risk of recidivism from the EESC program.

## **COMPAS is a biased and inaccurate system**

The Attorney General's analysis of the COMPAS risk assessment scores for people released under EESC fails to acknowledge the flaws and biases repeatedly associated with the system. The COMPAS assessment has been shown to have a strong racial bias, disproportionately assigning crime risk to people of color. "African Americans were more likely than Caucasians to be given higher scores regardless of their recidivism rates," as Dartmouth College researchers found in 2018,<sup>12</sup> when in fact African Americans are more likely to *not* recidivate relative to their scores.

The COMPAS system's predictions of criminal behavior overall have also been demonstrated to be unreliable. Researchers who directly compared its predictions with those of laypeople found that "COMPAS is no more accurate or fair than predictions made by people with little or no criminal justice expertise."<sup>13</sup>

Even if COMPAS were an accurate system, the Attorney General fails to offer analogous information on COMPAS scores for those who were not released on EESCs, making a meaningful comparison impossible.

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<sup>9</sup>CSOSA Congressional Budget Justification Fiscal Year 2021 (2020), "Community Supervision Program." Court Services and Offender Supervision Agency. <https://www.csosa.gov/wp-content/uploads/bsk-pdf-manager/2020/02/CSP-FY2021-Congressional-Budget-Justification-02062020.pdf#page=22>

<sup>10</sup> Virginia State Police Public Reporting Site. Robbery Arrests Q3 2020 - Q2 2021, [https://va.beyond2020.com/va\\_public/View/disview.aspx](https://va.beyond2020.com/va_public/View/disview.aspx)

<sup>11</sup> Virginia Criminal Sentencing Commission, Interactive Sentencing Event Dashboard, FY19-21. <https://public.tableau.com/app/profile/vacrimsentcommission/viz/2019-2021SentencingEventDashboard/InteractiveStoryboard>

<sup>12</sup> Julia Dressel, Hany Farid. The accuracy, fairness, and limits of predicting recidivism. *Sci. Adv.* 4, eaao5580 (2018). DOI: [10.1126/sciadv.aao5580](https://doi.org/10.1126/sciadv.aao5580)

<sup>13</sup> Julia Angwin, Jeff Larson, Surya Mattu, Lauren Kirchner. Machine Bias. *Pro Publica*. May 23, 2016. <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>

# Fiscal Impact

VADOC originally assumed implementing the EESC program would cost the taxpayer approximately \$7.3 million annually, but the legislature subsequently removed almost \$4 million of implementation funding from the budget. [SB30](#) currently proposes recouping 21 unnecessary and unfilled reentry FTEs and four IT-related positions that were originally allotted for implementation of the more complicated ESC expansion (Item 390(6)(S)). Clearly, the costs of implementing the program are overstated.

**Further, eliminating Item 390(R)(2) will generate substantial cost savings during the biennium – \$28.4 million in direct costs at least – by releasing additional incarcerated people.**

According to the Department of Corrections, “*direct inmate costs...are the expenditures that vary in direct proportion to the population.*” In other words, direct inmate costs like food and medical expenditures are the marginal burden of incarcerating a single additional person. In FY22, total direct inmate costs were \$237,548,200 over an average daily population of 23,288, equaling \$27.95 per person in daily direct expenditures by the department. **Every month a person is released sooner than expected will reduce the cost to the department by \$838.50 in direct costs.**<sup>14</sup>

We estimate that approximately 2,160 people would be released during the biennium if Item 390(R)(2) were removed from the budget, making the cost savings in “direct inmate costs” alone (e.g. food, medical, etc.) approximately \$28.4 million during the biennium.

## Saving Model 1 - “Direct Inmate Cost” Savings

Releases <sup>15</sup>	Year 1 Savings	Year 2 Savings	Biennial Savings
Immediate - 560	\$5,712,255	\$5,712,255	\$11,424,510
Year 1 - 800	\$4,420,208	\$8,160,364	\$12,580,572
Year 2 - 800	\$0	\$4,420,208	\$4,420,208
Total - 2160	\$10,132,463	\$18,292,827	\$28,425,290

Savings in direct inmate costs do not take into account additional savings that could be achieved by reducing fixed costs, such as closing additional VADOC facilities (and eliminating corresponding energy bills, facility maintenance, etc.). This scenario would substantially increase actual cost savings.

The total departmental expenditures, which include “direct inmate costs” and fixed costs, are \$42,432 per person.<sup>16</sup> This equals \$116.25 per person in daily direct expenditures by the department. **Assuming the closure of additional facilities, the maximum cost savings to the department could be as high as \$118.2 million over the biennium.**

<sup>14</sup> VADOC FY22 Annual Report, Page 16. <https://vadoc.virginia.gov/media/1813/vadoc-financial-annual-mis-report-2022.pdf>

<sup>15</sup> Denise Lavoie and Sarah Rankin, Virginia law stops early inmate releases, angering families. Associated Press. July 4, 2022. <https://apnews.com/article/entertainment-prisons-virginia-robert-ford-f8dde969ef981c58174704258e24cc54>

<sup>16</sup> VADOC FY22 Annual Report, Page 11. <https://vadoc.virginia.gov/media/1813/vadoc-financial-annual-mis-report-2022.pdf>

## Saving Model 2- Total (“Direct Inmate” and Fixed) Cost Savings <sup>17</sup>

Releases	Year 1 Savings	Year 2 Savings	Biennial Savings
Immediate - 560	\$23,761,920	\$23,761,920	\$47,523,840
Year 1 - 800	\$18,387,200	\$33,945,600	\$52,332,800
Year 2 - 800	\$0	\$18,387,200	\$18,387,200
Total - 2160	\$42,149,120	\$76,094,720	\$118,243,841

## Conclusion

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A closer look at the evidence presented by the Attorney General refutes the notion that the current implementation of EESC has had any detrimental impact on public safety. Closer examination of the fiscal considerations shows that rather than extreme cost burdens, substantial net savings can be reliably expected.

Consequently, the statement from the Attorney General is both a misleading representation of incomplete data and clear evidence of an agenda against incentives for rehabilitation, a proven method of improving public safety and saving taxpayer funds.

Already, the limited expansion of earned sentence credits has produced positive systemic change in Virginia’s justice system. **Virginia has led the nation in decarceration <sup>18</sup> since its enactment**, reuniting thousands of families, expanding the taxbase, and strengthening communities, **even as Virginia remains one of the safest states in the nation**. Hundreds of millions of dollars will be available for more beneficial purposes than extended human warehousing because EESC’s enactment has driven the closure of four prisons.

Most importantly, EESCs have incentivized active rehabilitation. Thousands of people behind bars have been inspired to engage in the rehabilitation that keeps all of us safer and makes fewer victims.

Lawmakers across the aisle agree that earned sentence credits are sound policy. Earned credits were a hallmark of the First Step Act in 2018, passed with strong bipartisan support and signed into law by President Trump. Since then, analysis by the Council on Criminal Justice finds that “[r]ecidivism rates were 37% lower for people released under the FSA.”<sup>19</sup>

Experts across the ideological spectrum agree: the Nolan Center for Justice calls earned sentence credits a “**public safety force multiplier**,”<sup>20</sup> explaining “[a]llowing people in prison to earn time off their sentences by engaging in educational programs, workforce training, mental health treatment, or other proven rehabilitative programs

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<sup>17</sup> First-year savings in both models for non-immediate releases assume a flat release rate per month and a release rate of 10% of the eligible population each year. This equals 66.67 people released each month. People released during the first month of the Fiscal Year accrue savings for the entire year. People released in the second month accrue savings for 11 months, etc.

<sup>18</sup> Bureau of Justice Statistics (2023). “Prisoners in 2022 – Statistical Tables,” NCJ 307149. <https://bjs.ojp.gov/document/p22st.pdf>

<sup>19</sup> Bhati, Avinash (2023). “First Step Act: An Early Analysis of Recidivism.” Council on Criminal Justice (August). <https://counciloncj.foleon.com/first-step-act/fsa/>

<sup>20</sup> Nolan Center for Justice (2022). “Expanding the Use of Earned Credits in Prison Increases Public Safety.” <https://conservativejusticereform.org/expanding-the-use-of-earned-credits-in-prison-increases-public-safety/>

*increases community safety, keeps prisons more secure, ensures correctional staff safety, and allows taxpayer dollars to be used more efficiently.”*

Not only should we avoid artificially limiting those benefits, but the Commonwealth should actively extend those incentives to those with “mixed charges” and everyone else who will eventually rejoin society.

Expanding earned sentence credits is principled, evidence-based policy. It’s shameful to see the Attorney General attempt to represent it as otherwise.

Thank you for your time and consideration. We trust you will decide upon principle and evidence.

Respectfully,



Gin Carter,  
Cofounder  
The Humanization Project

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