

NEW YORK
CITY BAR

**TASK FORCE ON
MASS INCARCERATION**

JOHN F. SAVARESE
CHAIR
51 W. 52ND STREET
NEW YORK, NY 10019
Phone: (212) 403-1235
Fax: (212) 403-2235
JFSavarese@wlrk.com

September 21, 2016

CAROL MILLER
SECRETARY
51 W. 52ND STREET
NEW YORK, NY 10019
Phone: (212) 403-1356
cmiller@wlrk.com

Chief Judge Patti B. Saris
Chair, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Inclusion of a Sentencing Departure for Successful Alternatives to Incarceration

Dear Judge Saris:

We write on behalf of the Task Force on Mass Incarceration of the New York City Bar Association (the “City Bar”) to urge you to adopt an amendment to the United States Sentencing Guidelines Manual (the “Guidelines Manual”) expressly authorizing a downward departure for judge-involved intensive presentence supervision programs. We also ask the Commission to facilitate the study and development of those programs.

With over two million people behind bars, the United States has the highest incarceration rate in the world.¹ Recognizing that our country is at a critical juncture in the debate over mass incarceration, in September 2015 the City Bar formed the Mass Incarceration Task Force, which is comprised of judges, prosecutors, defense attorneys, and other criminal law experts, to explore how best to reduce the rate at which our country incarcerates its people.

Mass incarceration imposes costs on both individual defendants and society. As former Judge John Gleeson of the Eastern District of New York has observed, the human costs are devastating: “Lives are ruined, families are destroyed, and communities are weakened.”² Indeed, in 2006 an estimated 1 million substance-involved parents, with more than 2.2 million minor children, were incarcerated.³ Almost seventy-four percent – 1.7 million – of those children are twelve years or younger, and “are at a much higher risk of juvenile delinquency,

¹ BUREAU OF JUSTICE STATISTICS, *Correction Populations in the United States*, tbl. 1 (2014).

² *United States v. Leitch*, No. 11-CR-00039 JG, 2013 WL 753445, at *2 (E.D.N.Y. Feb. 28, 2013).

³ Cassie Rodenberg, *The No-Help Cycle: Jail Fails Addicts*, SCIENTIFIC AM. (April 30, 2013), available at <http://blogs.scientificamerican.com/white-noise/the-no-help-cycle-jail-fails-addicts/>.

adult criminality and substance misuse than are minor children of parents who have not been incarcerated.”⁴

These social costs are reason alone to address the ever-growing prison population. However, the economics of mass incarceration are similarly compelling. As of April 28, 2016, 196,134 inmates were held in federal correctional facilities across the country.⁵ Housing these individuals costs approximately \$30,619.85 per prisoner each year,⁶ which represents a staggering twenty-five percent of the entire Department of Justice budget for the Fiscal Year 2016.⁷

Alternative to incarceration programs – *i.e.* presentence programs designed to result in sentences not involving incarceration – can and do reduce the number of persons sent to prison, in ways that benefit both communities and defendants. These “no-entry” programs are a critical component of any effort to address our mass incarceration crisis, and they can readily be expanded in the federal system, substantially reducing incarceration costs. Most importantly, however, they *work*.

For example, in one recent case a defendant who participated in an alternative to incarceration program reformed herself so completely that the Government agreed to drop all charges against her following a period of supervision.⁸ Through the program, this defendant regained her sobriety, established stable family relationships, regained custody of her children, and found employment – all of the often-elusive accomplishments that society expects of criminal defendants. Moreover, that case is hardly unique. More than a third of the defendants who successfully completed one of the two alternative to incarceration programs in the Eastern District of New York have had the charges against them dismissed, and successes can be seen throughout the twenty-two federal programs currently in operation.⁹ The Guidelines Manual, however, does not even authorize a *departure* for these defendants.¹⁰

⁴ *Id.*

⁵ See *Total Federal Inmates*, FED. BUREAU OF PRISONS (May 2, 2016), available at https://www.bop.gov/about/statistics/population_statistics.jsp.

⁶ See *Annual Determination of Average Cost of Incarceration*, FED. BUREAU OF PRISONS (March 9, 2015), available at <https://www.federalregister.gov/articles/2015/03/09/2015-05437/annual-determination-of-average-cost-of-incarceration>. This report contains the most recent numbers published by the Federal Bureau of Prisons.

⁷ Compare *FY 2016 Budget Summary*, U.S. DEP’T OF JUSTICE, available at https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/02/2016_budget_summary_pages_5-12.pdf (providing the DOJ’s requested Fiscal Year 2016 budget of \$28,653,702), with *Federal Prison System (BOP)*, U.S. DEP’T OF JUSTICE, available at http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/30_bs_section_ii_chapter_-_bop.pdf (providing the BOP’s requested Fiscal Year 2016 budget of \$7,344,700).

⁸ *United States v. Dokmeci*, Nos. 13-CR-00455 (JG), 13-CR-00565 (JG), 2016 WL 915185, at *14 (E.D.N.Y. March 9, 2016).

⁹ See generally *Alternatives to Incarceration in the Eastern District of New York: The Pretrial Opportunity Program and the Special Options Services Program, Second Report to the Board of Judges on Alternatives to Incarceration* 14 (August 2015), available at <https://www.nyed.uscourts.gov/news/second-report-board-judges-alternatives-incarceration-2015>.

¹⁰ *Dokmeci*, n.8, *supra*, 2016 WL 915185, at *4.

The successful track record of alternative to incarceration programs is further buttressed by the remarkable success of these kinds of programs in the states, whose experience with alternatives to incarceration provided the models for the federal programs that have been developed in the past five years.¹⁰ Nationwide, seventy-five percent of graduates from a drug court program—a specialized alternative to incarceration program—remain arrest-free for at least two years after leaving a drug court program.¹¹

The federal alternatives to incarceration programs also enjoy wide support; more than half of federal district judges (almost sixty percent) favor revisions to the Guidelines Manual that would provide “more options for judges to address offenders’ violations of the conditions of their supervision (e.g., more alternatives to incarceration).”¹² In addition, these programs can save a substantial sum of taxpayer dollars; the Eastern District of New York reports savings of more than \$2.1 million from 2013 to 2015 – the equivalent of 839 months of imprisonment.¹³ Nationwide, taxpayers save more than three dollars for every dollar invested in drug courts.¹⁴

The well-documented successes of these programs should be reflected in the Guidelines Manual. Although a judge is authorized under current law to impose a non-prison sentence after a defendant’s successful participation in a drug court or other judge-involved intensive presentence supervision program, *see* 18 U.S.C. § 3553(a),¹⁵ the Guidelines Manual’s silence on such authorization is a significant and misleading omission. The Guidelines Manual remains a critical point of reference that, in practice, heavily impacts the sentences imposed by judges across the country. By adopting an amendment apprising federal judges of the specific authority to impose a lower sentence because of a defendant’s participation in an alternatives to incarceration program, the Commission can promote the continued success and expansion of these programs. Alternatively, by ignoring these programs, the Commission risks falling short of its mandate to ensure that the Guidelines “reflect . . . advancement in knowledge of human

¹⁰ *See, e.g.*, James M. Cole, Deputy Attorney General, *U.S. Dep’t of Justice, Speech at New York University School of Law on Alternatives to Incarceration: The Use of “Drug Courts” in the Federal and State Systems* (May 21, 2012), available at <http://www.justice.gov/opa/speech/deputy-attorney-general-james-m-cole-speaksalternatives-incarceration-program-use-drug> (“Rigorous studies have shown how [state] drug courts work and have validated that they reduce both recidivism rates and public safety costs. In fact, they’ve been found to reduce crime more than any other sentencing option.”).

¹¹ *See* Nat’l Assoc. of Drug Ct. Professionals, *Drug Courts Work*, at <http://www.nadcp.org/learn/facts-and-figures> (discussing results of research regarding efficacy of drug courts).

¹² *See, e.g.*, U.S. SENTENCING COMM’N, *Results of 2014 Survey of United States District Judges: Modification and Revocation of Probation and Supervised Release*, tbl. 5 (2015) (finding that almost 60% of federal district judges favor revisions to the Guidelines Manual that would provide “more options for judges to address offenders’ violations of the conditions of their supervision (e.g., more alternatives to incarceration)”); U.S. SENTENCING COMM’N, *Results of Survey of United States District Judges, January 2010 through March 2010*, tbl. 11 (2010) (noting that more than half of district judges favored greater sentencing alternatives in numerous kinds of cases); Molly Treadway Johnson & Scott A. Gilbert, FEDERAL JUDICIAL CENTER, *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center’s 1996 Survey* 15 (1997) (finding that nearly two-thirds of federal district judges and chief probation officers stated that more offenders should be eligible for alternatives to incarceration).

¹³ *See Alternatives to Incarceration in the Eastern District of New York*, *supra* note 9, at 20.

¹⁴ *Id.*

¹⁵ *See, e.g., Gall v. United States*, 552 U.S. 38, 46 (2007) (observing that a district judge must explain a departure from the Guidelines but that the Guidelines themselves are merely advisory).

behavior as it relates to the criminal justice process.”¹⁶ In short, while federal judges already possess the authority to take into consideration a defendant’s participation in such a program when sentencing the defendant, the imprimatur of the Commission is extremely important to judges’ sentencing decisions; and would, in addition, encourage judges to establish alternatives to incarceration programs in more districts.

An effective amendment need not be extensive or complex. We suggest a simple statement, included in Chapter 5H of the Guidelines Manual, similar to the following:

The court may depart downward, including to a sentence that does not include a term of incarceration, following a defendant’s successful participation in a judge-involved intensive supervision program.

As noted above, the potential benefits of such an amendment are tremendous; programs like these can eliminate or shorten the terms of incarceration that otherwise might be appropriate for the participants, while simultaneously reducing recidivism rates and helping those participants to become productive members of their families and communities, rather than becoming prison inmates. The consequences of failing to encourage alternatives to incarceration programs are just as stark, and they produce the social and economic costs described above.

We also suggest that the Commission create a new page on its website that provides interested judges, prosecutors, defense attorneys, and pretrial or probation officers with vital information about the various federal judge-involved intensive supervision programs across the country. The Commission can further promote the development, evaluation, and improvement of these programs by gathering, analyzing, and disseminating data on the various programs that courts employ.¹⁷

The Sentencing Reform Act of 1984 (“SRA”) obligates the Commission to establish sentencing policies that “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process”¹⁸ If the Guidelines are to continue serving their important role as benchmarks consistent with our needs and values, they must be amended to encourage alternative to incarceration programs that have been proven to work in the states and have already begun to proliferate in the federal system. The Commission should also take on the continued study and evaluation of such programs in order to enable itself to fulfill its obligations under the SRA.

We urge the Commission to adopt an amendment to the Guidelines Manual that recognizes a downward sentencing departure for successful participation in judge-involved

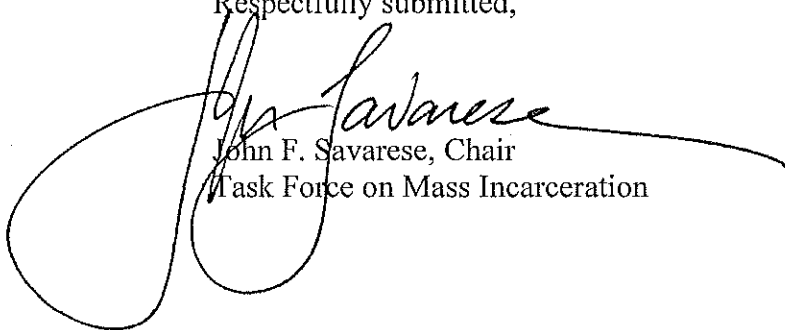
¹⁶ 28 U.S.C. § 991(b)(1)(C).

¹⁷ Although some courts, like the United States District Court for the Eastern District of New York, have begun collecting and analyzing data themselves, the Commission is uniquely equipped and positioned to provide a professional, objective analysis of long-term trends. See *Alternatives to Incarceration in the Eastern District of New York*, *supra* note 9, at 14–21.

¹⁸ 28 U.S.C. § 991(b)(1)(C).

intensive presentence supervision programs, and to facilitate the further development and study of such programs. Thank you for your consideration of this letter.

Respectfully submitted,



John F. Savarese, Chair
Task Force on Mass Incarceration

Cc: Hon. Charles R. Breyer, Vice Chair, U.S. Sentencing Commission
Ms. Dabney Friedrich, Commissioner, U.S. Sentencing Commission
Ms. Rachel Barkow, Commissioner, U.S. Sentencing Commission
Hon. William H. Pryor, Jr., Commissioner, U.S. Sentencing Commission
Ms. Michelle Morales, Ex-Officio Commissioner, U.S. Sentencing Commission
Ms. J. Patricia Wilson Smoot, Ex-Officio Commissioner, U.S. Sentencing Commission

Eric Tirschwell, Chairman, Practitioners Advisory Group
Nanci Clarence, Vice-Chair, Practitioners Advisory Group
Sara E. Silva, First Circuit Representative, Practitioners Advisory Group
Paul B. Bergman, Second Circuit Representative, Practitioners Advisory Group
Tina O. Miller, Third Circuit Representative, Practitioners Advisory Group
James O. Broccoletti, Fourth Circuit Representative, Practitioners Advisory Group
James E. Boren, Fifth Circuit Representative, Practitioners Advisory Group
David F. DuMouchel, Sixth Circuit Representative, Practitioners Advisory Group
David S. Rosenbloom, Seventh Circuit Representative, Practitioners Advisory Group
Angela Campbell, Eighth Circuit Representative, Practitioners Advisory Group
Knut S. Johnson, Ninth Circuit Representative, Practitioners Advisory Group
Pamela Mackey, Tenth Circuit Representative, Practitioners Advisory Group
Gordon Armstrong, Eleventh Circuit Representative, Practitioners Advisory Group
Adam Lurie, D.C. Circuit Representative, Practitioners Advisory Group
James W. Grable, Jr., At-Large Representative, Practitioners Advisory Group
Ronald Levine, At-Large Representative, Practitioners Advisory Group
Michael McCrum, At-Large Representative, Practitioners Advisory Group