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Re: ACLU December 2017 report:
"Choosing Incarceration"

A RESPONSE BASED ON REALITY

The ACLU issued a 30 page report this month castigating Kansas prosecutors for what the organization couches as our refusal to utilize diversions as an alternative to incarceration. Prosecutors, according to the narrative presented by the ACLU, simply choose to send people to prison and reject out of hand, without reason or justification the humane alternative of diversion.

What could have been a beneficial effort to enlighten and make salient suggestions to policy makers concerning how diversion might be expanded in Kansas is instead a disappointing, invective-filled screed replete with sweeping generalizations and more omissions and mischaracterizations than factually defensible assertions. Frankly, it's hard to know where to start dismantling the erroneous picture of our criminal justice system put forth by the ACLU.

Diversion in the Real World

What is diversion? State statute defines it as a "*supervised performance program prior to adjudication*"[1] In other words, diversion is an opportunity to hold someone accountable without a formal conviction. *Kansas Statutes Annotated* 22-2906 provides a laundry list of factors the prosecutor is to consider before granting diversion. Additionally, off grid crimes (Jessica's Law child sex offenses, Capital Murder and 1st Degree Murder) and severity level 1, 2 and 3 nondrug crimes (2nd Degree Murder, Aggravated Kidnapping and other serious crimes) and severity level 1 and 2 drug crimes (for instance, Sale of Meth) are not eligible under the statute.

1 K.S.A. 22-2906(3).

Diversion programs typically require the defendant to pay restitution[2], maintain employment, complete drug treatment or anger management as necessary and achieve certain education goals—all contingent on the person staying out of trouble for a set period of time. Because there is not a conviction[3], state law[4] does not allow a defendant who is placed on diversion to be supervised by a probation officer (court services and community corrections). Meaning, it falls on the County Attorney or District Attorney to "supervise" the diversion of the suspect. Our staff members are not probation officers, they don't make home visits or go to job sites. Instead, we provide a list of requirements to defendants placed on diversion and it falls on the defendant to meet the requirements and show proof of the same. We work with diverted subjects but if they cannot meet the requirements of the diversion contract, their diversion is withdrawn and they are placed back on the trial docket.

A person with drug/alcohol or mental health issues or a history of sexual or physical abuse will need more help and intensive supervision than a staff member in a prosecutor's office can provide. The reality is that most county attorney's offices in Kansas employ a single attorney with 1 or 2 staff members—many of whom are ***not*** full time and instead supplement their work as part time prosecutors with a private practice, some even doing criminal defense work in neighboring counties.

The ACLU's report glosses over reality, blithely opining that if we would just offer diversion to everyone, people with addiction and complex histories of abuse would *ipso facto* never go to prison. Does the report assume access to addiction and trauma specialists in all communities (truly a false assumption in rural counties)? Are county prosecutors supposed to ask our respective county commissions to add such professionals to our own staffing tables? The inescapable reality is that many addicts relapse and sometimes engage in criminal conduct to feed their habits. How exactly does a diversion program run out of the county prosecutor's office address this reality?

The report formally recommends that Kansas law be amended to require, "prosecutors to make all defendants aware, at the time of arrest, that they can request diversion." Is the ACLU stuck in such an echo chamber that it seriously believes Kansas want prosecutors to amend the law and offer diversion to "all defendants?" Child abusers? Drug dealers? Quadruple

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2 For example, Sedgwick County collected over $126,000 in restitution from adults placed on diversion in 2016.
3 In fact, K.S.A. 22-2910 prohibits prosecutors from requiring convictions as a condition to diversion.

murderers?[5]

The False "Choice" – Prison instead of Diversion

Diversion is not a one-to-one alternative to incarceration. Diversion is an alternative to *conviction*. The ACLU's narrative incorrectly frames the issue in the inverse – suggesting that prosecutors refuse to allow diversion and instead "choose" to send people directly to prison.

In fact, defendants sentenced under the Kansas sentencing grid go to prison[6] when (1) convicted of a "presumptive prison" offense or (2) placed on probation for a "presumptive probation" offense and then being sent to prison after multiple violations of probation terms.

To be clear, the only way the stark dichotomy framed by the ACLU – that prosecutors chose prison instead of diversion – holds water is if that organization is seriously advocating that prosecutors should offer diversion to people charged with serious person felonies or people with person felony convictions in their past.[7] While it seems unlikely that is their ultimate goal, their report would be a harder sell if the ACLU had to acknowledge that they are actually accusing prosecutors of being draconian for refusing to offer diversion to people accused of presumptive prison offenses like Aggravated (Great Bodily Harm) Battery, Aggravated Sexual Battery, Sexual Exploitation of a Child or Sale of Methamphetamine. "*Kansas prosecutors chose prison for people Kansas law says are presumed to go to prison*," doesn't have the same morally condemnatory ring to it, I suppose.

Even if one assumes the ACLU instead meant to suggest that presumptive probation cases should be offered diversion more frequently and perhaps just overstated the "choice" prosecutors make—a quick examination of the realities of probation under Kansas law is also instructive.

Defendants in presumptive probation cases do not go to prison until they have been placed on probation[8], then failed at said probation, then been given intermediate sanctions (the "quick dip") under SB 2170, then given a second chance at probation, then failed a second time and, depending on the specific findings the judge would be required to make[9], given a third

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4. K.S.A. 21-4704b
5. Note that murder in Kansas is up 46%, rape is up 11% and robbery is up 26% since 2014: http://www.kansas.com/news/politics-government/article176788606.html
6. Upward dispositional departure sentences are a third, rarely used option available to the court only if the prosecutor files written notice to the defense.
7. At least one prior person felony for drug crimes and two or more for all non-drug crimes.
8. Unless the defendant commits a new felony while already on probation. In these cases, the judge still has the option of re-instating the original probation.
9. The judge would have to make the specific finding that public safety/welfare requires incarceration.

chance with a second intermediate sanction ("quick soak"). If a defendant then failed at probation for a third time, only then could he go to prison. Note also under SB 2170, "technical violations" like positive drug tests, are no longer a solely sufficient basis to revoke probation and impose the sentence.

Given these realities, the argument that millions in savings await the state if diversion were simply offered to more presumptive probation defendants is demonstrably without merit. Probationers who successfully complete probation will never go to prison—as such, there are no prison costs to be saved. That leaves people placed on probation who ultimately fail at probation and go to prison. Offering diversion to these people would have saved the state millions? Upon what basis are we to conclude that a person who could not successfully complete probation—despite the supervision of a state probation officer with access to SB 123 treatment funds who was afforded fully three bites at the probation apple before ultimate revocation—would have succeeded on a diversion program supervised by a county attorney or his/her support staff?

In reality, diversion works for people with little criminal history who committed relatively low level crimes. In other words, people who are unlikely to go to prison even if convicted and placed on probation.

"Mr. Rawlins vs. Mr. Cheyenne"

To explain the consequence of prosecutor's supposed either/or choice to send people to prison and withhold diversion, the ACLU employed the example of Mr. Rawlins and Mr. Cheyenne, named for the respective counties. The two hypothetical men are charged with the same unidentified crime and face a three year sentence. Because Rawlins County offers diversion, Mr. Rawlins avoids prison while Mr. Cheyenne is sentenced to 3 years of prison because his county did not offer diversion for this offense. Note that both counties do have diversion policies and that the December of 2015 version of Cheyenne County's program can be found on-line at http://cncoks.us/files/documents/Diversion-Policy.pdf. It includes felonies as diversion eligible crimes.

So, of what hypothetical crime might they have been convicted? Though the report does not say, because the men faced a 36 month sentence, a working knowledge of the Kansas sentencing grid provides the possible answers. It had to have been (1) a severity level 5 non-drug offense, like Involuntary Manslaughter, Reckless Aggravated Battery (resulting in great bodily harm), Aggravated Sexual Battery, or Robbery or (2) a severity level 6 offense like Indecent

Solicitation of a Child -- but only for a defendant with a prior person felony conviction, making him a criminal history category "D" [10]; or finally, (3) a person who possessed methamphetamine, cocaine or heroin [11] after already having one or more prior convictions for a person felony[12].

So, the hypothetical defendants both had to have been charged with a crime that our state law defines as "presumptive prison." In other words, crimes that the public policy of Kansas says are deserving of incarceration. There is no *presumptive probation* grid box on either the drug or non–drug grid that would result in a 36 months sentence.

Was the ACLU suggesting that the hypothetical Mr. Rawlins should have received diversion for involuntary manslaughter, robbery, aggravated sexual battery or, possession of methamphetamines after a prior person felony conviction?

Investment

What does it take to run a diversion program? In Sedgwick County, we have 8 full time employees in the office of the District Attorney who do nothing but handle diversion – 3 for adult cases, 1 for traffic and 4 for juvenile. Our budget currently earmarks $331,631 annually for diversion staff.

Since 2013, the Office of the District Attorney in Sedgwick County has taken several deliberate steps to expand diversion by adding diversion-eligible crimes, cutting the diversion application fee in half and accepting people with a prior non-person felony conviction after the passage of time.

Despite these efforts in 2016 we had 113 applications for diversion in nondrug criminal cases, 209 for misdemeanor traffic offenses[13] and 41 applications in drug cases for a total of 363 applications. That same year, 3,729 criminal cases were filed in Sedgwick County, of which 3,221 were felonies. As such, the 154 applications for criminal and drug diversion (excluding

10. Any fewer convictions in their criminal history would not have resulted in a 36 month sentence under Kansas law.
11. It cannot be first time possession of marijuana because both first AND second time possession of marijuana are now misdemeanors. So, if charged with felony possession of marijuana, a defendant facing presumptive prison would have to have been convicted twice before in separate cases of possession of marijuana AND picked up conviction(s) along the way for one or more *additional* person felonies.
12. While one could cobble together two or three presumptive probations charges and run them consecutive to reach 36 moths, as stated above, presumptive probation cases don't result in the choice between prison and diversion set up by the ACLU's hypothetical.
13. Traffic includes DUI, Minor in possession of alcohol, minor in consumption of alcohol and transport open container of alcohol.

misdemeanor traffic) constituted 4.7 percent[14] of the 3,221 felonies filed in 2016.

After review of the applications, we rejected 21% of the criminal and drug applicants[15], while 13% of the applications remained pending at the end of the year.[16] 7% of the applicants[17] withdrew their applications during the process. During the year, 8 people placed on criminal diversion and 12 people on drug diversion violated their diversion contract.

The ACLU makes the blanket statement that Sedgwick County diverted only 2% of our cases without acknowledging how few people apply for diversion in the first place; how many applications were still pending at the end of the year, how few of those who apply are rejected and how few of those who are accepted ultimately violate diversion.

Contrary to the ACLU's hyperbolic assertion that "Diversion programs are a well-kept secret, with many eligible applicants totally unaware of the option's existence," the truth is that ***each*** person charged with a felony in Sedgwick County is provided a copy of our diversion guidelines at the time of their first appearance. Their report offers the additional unsupported generalization that people must surely be discouraged from applying for diversion because of the "patchwork" of diversion rules across the state and the supposed complexity of the process. This ignores the fact that all people charged with a crime—misdemeanor or felony—are appointed counsel if they can't afford one. Defense counsel are more than capable of explaining both the benefits of diversion and the process and advocating for their clients who apply.

Additionally, the ACLU's suggestion that fines and fees discourage application is also without merit. In 2016, Sedgwick County collected a total of $957.00 in fines from the 200+ people placed on criminal and drug cases. Court costs, lab fees and restitution are also collected but are statutory and would have been collected had defendants been convicted and placed on probation.

Perhaps, instead of attacking prosecutors for low diversion numbers the ACLU could have inquired as to why so few citizens are interested in pursuing diversion. Does the defense bar steer clients away from diversion? Do people have less disposable income to spend on applications? Does the Office of the District Attorney simply screen out more low level, low criminal history cases at the initial charging decision leaving fewer people accused of diversion

14. Sedgwick County does not track how many drug or criminal applicants were for misdemeanor crimes vs felonies. So, this 4.7% may be (is likely) high.
15. 28 criminal applications and 5 drug applications.
16. 14 criminal applications and 7 drug applications.

eligible crimes? Did the passage of SB 123 in 2003 and HB 2170 in 2013 have any impact on the relative interest in diversion applications?

In Sedgwick County, we put extensive resources into our diversion programs. We discuss the process at the local criminal law committee meeting held each month—which lead directly to several improvements in our system over the past several years. In juvenile offender cases, we received 438 applicants out of the 1,165 juvenile offender cases[18] filed in 2016. Of those who applied, we accepted 291 juveniles into diversion in 2016 (24% of the juvenile offender cases filed); 260 in 2014; and 289 in 2013.

How many counties have the resources to hire full time diversion staff for the prosecutor's office? Again, the State does not fund diversion, County Attorney and District Attorney budgets come from county coffers.

Percentages

The report rejects out of hand the suggestion that local resources drive in any way the availability or viability of diversion. In support, they cite to the fact that western Kansas counties, with lower populations actually grant diversion at nearly 9% while larger counties are as low as 2%. General statistics may have their place, but are decidedly irrelevant to a meaningful assessment of diversion in Kansas.

Looking again at Cheyenne and Rawlins counties, the 2016 report from the Kansas Sentencing Commission[19] states that each of these counties sentenced 3 felony cases that year. These are counties with populations of 2,679 and 2,506 respectively. Sedgwick County by comparison filed more felony cases in 2016 (3,221) than the total population of either county.

According to the ACLU's report, Rawlins County diverted 37% of its cases in 2016 while Cheyenne County diverted none. The ACLU does not state how many felonies or what type of felonies either county filed in 2016, but if we were to assume Rawlins County filed twice as many felony cases as it sentenced, 6 cases with 3 sentenced means that, at most, they placed 2 people on diversion. With all due respect, diverting 2 of 6 felonies filed—or even 3 of 10 or 7 of 20— annually, does not constitute a robust diversion *program*.

As for Cheyenne County, if the felonies they filed were all severity level 3 nondrug offenses—that are not diversion eligible by state law—they would have 0% diversion. That

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17. 9 criminal applications and 3 drug applications.
18. 310 felonies and 855 misdemeanors.

would not constitute a failure, the county attorney would simply be following state law. Conversely, if two of the felonies were for 3rd time DUI (not diversion eligible under state law) and the rest were 3rd time domestic violence cases which are served in county jail not prison – there is no cost savings because none of the defendants were eligible to go to prison in the first place.

The truth is, I don't know how many felonies either county charged last year or what kinds of felonies were filed. The ACLU did not request that kind of information from Sedgwick County and they have not shared whether they obtained that specific information from these two counties. But without those details, any conclusions that *anyone* purports to draw about Rawlins or Cheyenne Counties and the efficacy of their respective diversion programs is based not on fact but supposition.

Rawlins and Cheyenne Counties are interesting because when it comes to felonies sentenced in 2016, they are representative of many western Kansas counties—counties the ACLU suggests larger counties could easily emulate.

The Sentencing Commission 2016 annual report states that Douglas County sentenced 349 separate felony cases; Shawnee County 1,088, Johnson County 1,793 and Sedgwick County 3,410. Of the sentences imposed in Sedgwick County, 77% were non-drug offenses [20]. Sedgwick County also sentenced 40 murders, 23 Rapes, 126 Aggravated Assaults and 120 Robberies[21]. We have over 65 defendants pending homicide cases as of today's date. How many of the felonies filed in western Kansas counties were for crimes of violence? If we are comparing larger metropolitan counties to western Kansas, should we know what percentage of the felonies filed in a given county are diversion eligible under state law?

Again, compared to the 3,410 felony cases Sedgwick County sentenced in 2016, what follows is a list of the number of felons sentenced in counties across western Kansas in 2016: Wallace (9); Greeley (5); Hamilton (5) ; Stanton (4) Morton (4) Logan (16); Wichita (4) Kearney (9); Stevens (28); Gove (0); Sheridan (2); Decatur (3); Haskell (14); Smith (7); Osborne (7); Stafford (6); Barber (10); Clark (6) Hodgeman (6); Ness (3); Graham (4); Norton (4); Edwards (8); Kiowa (17); Rush (14); Rooks (19); Phillips (15).

In fact, excluding Garden City, Dodge City, Hays, Great Bend and Colby, most western

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19. Chapter 1, pages 6-10.
20. Page 95 – appendix 1 – 117/124 pp.

Kansas counties deal in single and low double digit felonies each year. That these offices are able to divert 1, 2 or even 5 or 6 people in one year charged with unidentified felonies[22] is commendable, but to suggest that larger offices can simply follow suit ignores the reality of the real numbers we face.

Other Issues Omitted in the Report

While the ACLU's report took pains to skewer prosecutors for "choosing" to deny diversion, the report discounted the discretion we use each day when making initial charging decision, taking time only to warn in typical hyperbolic language that prosecutors—"the most powerful official that no one knows"—decide "without consulting anyone" whether to charge cases and whether to offer diversion.

There is no case to divert if the prosecutor who reviews the case does not believe a case should be charged. We exercise the discretion to charge or decline cases based on our ethical rules (KRPC 3.8[a]) and case law. Was the crime serious enough to constitute a felony or should it be referred to the municipal court as a misdemeanor? Does the victim want to prosecute the case after restitution has already been paid? Is the evidence insufficient to establish guilt? Before policy makers engage in a discussion as to whether more cases should be diverted, it must first be acknowledged that a prosecutor initially assessed the case as worthy of formal felony charging[23].

The report's argument that millions would be saved by placing people on diversion offers no support or explanation. Based on what? Did the authors simply conclude that if placed on diversion a presumptive prison defendant would never go to prison or commit a new crime? That a presumptive probation defendant would have been successful on diversion where he failed on probation? Without the infrastructure to support diversion programs in county prosecutor's offices – what makes the authors conclude that diversion will save incarceration costs? We might as well put an arbitrary cap on the number of felony crimes we can file each year. That too would keep incarceration costs down.

In conclusion, if the legislature wants to address how we as a state ensure that people with drug and alcohol issues, mental illness and histories that include abuse should have a pathway to accountability and rehabilitation without a conviction, the prosecutors of Kansas stand ready to

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21. Chapter 1, page 6; 28/124 pp.
22. Are we talking about criminal damage to property and auto burglary or robbery and aggravated sexual battery?
23. In Shawnee County where grand juries are utilized, the threshold decision is whether to present the case to the grand jury.

have that discussion. If the legislature wants to discuss ways that we can ensure diversion eligibility is uniform across the state—again, we are ready to contribute.

But such a discussion will require a commitment to adequately fund any programs implemented, an open and honest dialog and a statewide approach based on facts not invective and omissions. The prosecutors of this state engaged with the ACLU and provided the information requested and hoped the results might further this conversation. The report now disseminated is a disappointing and unprofessional effort to mislead through omission, misstatement and hyperbole.

The retort already offered by the ALCU is that they simply used the numbers we provided. Really? If your neighbor tells you the stats came out and his son batted .300 last summer for his high school baseball team, but conveniently withholds the fact that his son went 1 for 3 in the only game in which he played – you might be inclined to conclude he was, at best, disingenuous. Numbers on a page mean nothing until they are interpreted and explained. We may have provided raw data but the ACLU chose to spin it. Look no further than the hyperbolic and intentionally misleading hypothetical of Mr. Rawlins and Mr. Cheyenne. After the most basic examination, the entire construct falls immediately apart. No prosecutor faces the dilemma of sending someone to prison for 36 months or, in the stark alternative, the freedom of diversion—unless the ACLU wants to come out and say that it is seriously suggesting we need to divert people for crimes like Involuntary Manslaughter. It is simply a false narrative. We had hoped for more from the ACLU.

Kansas prosecutors remain committed to engaging with policy makers to improve the current system of justice, to enhance the availability of treatment options and alternatives to incarceration and to doing so in a framework that protects public safety.

Sincerely,

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