



TESTIMONY OF
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IN SUPPORT OF HB 2063
KANSAS HOUSE JUDICIARY COMMITTEE

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Thank you, Chairman Finch, and members of the Judiciary Committee for affording us the opportunity to provide testimony on HB 2063.

The American Civil Liberties Union (ACLU) of Kansas is a non-partisan, non-political membership organization dedicated to preserving and strengthening the constitutional liberties afforded to every resident of Kansas. We work to preserve and strengthen our constitutional rights and freedoms through policy advocacy, litigation, and education. We proudly serve over 10,000 supporters in Kansas and represent more than 1 million supporters nationwide.

The ACLU of Kansas, and a 17-member coalition of which we are part called Kansans for Smart Justice, strongly support HB 2063. HB 2063 would require that eligible defendants be offered an opportunity to apply for diversion, be provided with a written explanation from prosecutors when the application is denied, and would conduct some limited data collection on diversion. This bill is identical to one (HB 2681) that passed a Kansas House committee in 2016.

Diversion is an important tool in the community safety toolbox. Local prosecutors have broad discretion in their use of diversion, a tool that allows individuals to avoid criminal charges if they follow a prescribed program of treatment, services, restitution, or community service. Individuals who fail to follow the prescribed program are charged. Diversion can be appropriate for those with minimal criminal records, who would be charged with non-violent offenses, who have contributing conditions like mental illness or behavioral health issues, or who simply pose no threat to public safety. In cases of these types, public safety, community interests, and cost containment may all be better served through diversion.

The ACLU of Kansas supports HB 2063 because:

- **The Kansas prison population continues to climb to all-time highs even as crime falls to all-time lows.** Across the United States, the prison population has seen dramatic growth over the last forty years. The United States is now the world's largest jailer, with 4% of the global population and nearly a quarter of the global prison population. In Kansas, the size of the prison population has *quadrupled* since the 1970s – to roughly 9,845 on 1/27/17 – even though crime in the state has fallen steadily during the same period. Significantly, the incarcerated population exceeds the system's operating capacity of 9,654.

- **Expanded use of diversion would result in fewer incarcerated people and savings for taxpayers.** Diversion is not widely used in Kansas, especially for felony cases. Local prosecutors have sole, full discretion over when to grant diversion. Currently, **just 5% of all felony cases in Kansas are handled through diversion—barely half the national average.** Data from the U.S. Department of Justice shows that, nationally, over 9% of all felony cases are sent to diversion. Moreover, there are enormous disparities in the use of diversion across Kansas. Some prosecutors do not use diversion at all, while some of the state’s largest jurisdictions—ones where caseloads strain resources, and where diversion could help alleviate some of the stress—use diversion at very low rates.

If Kansas were to employ diversion simply at the same rate as the national average, it could reduce the state’s prison population by 8% and reduce taxpayer spending on incarceration by \$6.8 million.

- **HB 2063 will encourage prosecutors to use diversion more widely.** HB 2063 continues to vest in local prosecutors the exclusive power over policy on and use of diversion. The ACLU of Kansas supports maintaining that level of control and discretion by local prosecutors. However, without compelling local prosecutors to use diversion, HB 2063 will encourage greater use of this tool. It will have a significant effect by:
 - Making it clear that the Kansas Legislature considers diversion an appropriate tool in the community safety toolbox. Diversion should not be limited to the most exceptional cases. Instead, it should be routinely considered by prosecutors when diversion would advance community interests, where the offender poses no danger to the community, or where a program of mental health/substance abuse treatment would be better for all involved. Rather than treating diversion as something offered only in the rarest instances, Simply by bringing some level of standardization to the process, HB 2063 will make a statement that diversion should be considered more often.
 - Making individuals aware that diversion could be an option will result in its increased use. Prosecutors are prohibited from offering individuals a diversion; instead, offenders must specifically request it. Especially when they lack the assistance of counsel, offenders are frequently unaware that diversion even exists much less that they must proactively request it. HB 2063 creates a standardized application form and requires its distribution to offenders. As a result, individuals who might not have otherwise asked for a diversion will request one. Some of these individuals will be good candidates for diversion, and result in increased use of the tool without any adjustment in local policies on diversion eligibility by prosecutors.
 - Requiring prosecutors to respond in writing to diversion applicants. Although some local prosecutors already follow this policy, many do not. A written response is important out of basic fairness, but also to help all parties understand the limits of the jurisdiction’s diversion policy. Local policies on diversion can be confusing (even in those jurisdictions where a written policy is publicly available) or appear

to be unevenly applied; written responses to applicants will ameliorate this confusion and help identify good candidates for diversion.

These influences will increase the use of diversion, **without adding significant burdens on local prosecutors.** Many county attorneys already follow the process the bill establishes, and do so without any administrative burden. Even if use of diversion were to increase, it would not add untenable burdens on local prosecutors. This is clear from the fact that Kansas Sentencing Commission data clearly shows that many of the state's smaller counties use diversion at much higher rates than larger counties with larger prosecutorial staffs. For example, the 24th Judicial District has the highest rate of diversion in the state—fully 25% of all felony cases in that district are diverted. The 24th Judicial District has a total population of less than 20,000 people, yet had 49 diversions in 2015—more than 25 of the 31 Judicial Districts, including many with much larger populations. The 14th, 25th, and 31st Judicial Districts similarly have high diversion rates.

- **The data collection requirement of the bill will significantly add to our understanding of the criminal justice system in Kansas.** The only data currently available on diversion in Kansas is the raw number of felony diversions by judicial district, compared to the raw number of felony dispositions. We know very little about how many diversion applications are made, how many are denied, or the demographics of those involved. This data is important for policy-makers and prosecutors at all levels, and would be helpful to the state's ongoing attempts to address issues in the correctional system. Data collection would also help Kansans to understand whether the state is mimicking national trends on diversion, where national studies suggest that people of color are between 30 and 42% less likely to be granted a diversion for the very same crimes as whites.
- **The bill will make meaningful progress in addressing the three biggest challenges the Kansas Department of Corrections has identified for itself: overcrowding/capacity issues, provision of mental health services, and reducing recidivism.**

On behalf of the ACLU of Kansas and Kansans for Smart Justice, we thank the committee for holding hearings on this important topic and strongly encourage you to adopt HB 2063.