

IN THE SUPREME COURT OF THE STATE OF KANSAS

KANSAS CROSSROADS FOUNDATION)	
And KARENA WILSON,)	
)	
Petitioners,)	
)	Case No. 119493
vs.)	
)	
LARRY MARKLE, in his official capacity)	
as County Attorney of Montgomery County,)	
)	
Respondent.)	

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

COMES NOW Respondent, Larry Markle, by and through counsel of record, and provides the following Response to Petitioners’ Petition for Writ of Mandamus pursuant to the Court’s Order of August 29, 2018, and Supreme Court Rule 9.01(c)(3):

I. INTRODUCTION

Petitioners, Kansas Crossroads Foundation (hereinafter “KCF”) and Karena Wilson (hereinafter “Wilson”) allege that they have suffered an “injury” or have an interest in whether the Montgomery County Attorney’s office is properly enforcing K.S.A. 22-2907 et seq., regarding diversion programs. The Petitioners allege that the diversion program in Montgomery County is insufficient and are requesting this Court to issue an order compelling Larry Markle, the County Attorney in Montgomery County, to alter his current diversion program.

For the reasons set forth below, Respondent requests the Court deny this Petition as neither of the Petitioners have standing to bring a writ for mandamus, the relief requested is improper as the statute at issue relates to the discretion of a County Attorney, and the

Petitioners are attempting to stretch the language of the statutes at issue beyond the intent of the legislature.

II. RESPONSE TO PETITION FOR WRIT

Respondent provides the following Response to the allegations and averments by Petitioners in their Petition for Writ of Mandamus:

I. JURISDICTION

Respondent admits that the Supreme Court of Kansas may exercise jurisdiction over this matter pursuant to K.S.A. 60-801 et seq., Art. III, § 3 of the Kansas Constitution, and Rule 9.01(a) of the Rules of the Kansas Supreme Court.

However, to the extent that Petitioner is alleging that no other Court has jurisdiction over this matter, Respondent disagrees as this Petition for Writ could have and should have been filed in the District Court of Montgomery County. This Court's jurisdiction is concurrent and a writ can also be brought in a lower court. *Ambrosier v. Brownback*, 304 Kan. 907, 909, 375 P.3d 1007 (2016).

Petitioners are only attacking the Montgomery County diversion program and the Petitioners would not have standing to bring this action against any other County; therefore, any holding in this matter would not have implications in any other county and this Court should decline to exercise jurisdiction.

II. PARTIES

Respondent admits that he is the County Attorney for Montgomery County, Kansas.

Respondent is without sufficient information or knowledge to admit or deny KCF's status as a 501(c)(3) organization or the status of its incorporation or exactly what services

KCF offers. Upon information and belief, after consultation with the Kansas Department of Health and Environment, it is Respondent's understanding that KCF does not in fact employ any licensed counselors in order to provide rehabilitation services for "drug and alcohol addiction". *See* Affidavit of Larry Markle, attached hereto as Exhibit A, ¶ 4. Further, upon information and belief, KCF operates more as an employment agency in and around Montgomery County offering to assist in locating employment for individuals that commit to its "program". *See* Exhibit A, ¶ 3, including all subparts.

Respondent admits that Petitioner Wilson was prosecuted in Montgomery County based on felony charges filed in June 2017, and pursuant to a plea deal which reduced her charges to misdemeanors, is currently serving a probation sentence. Respondent denies that Petitioner Wilson was eligible for diversion at the time of her charges in June 2017 in that she was originally charged with a felony, had two prior misdemeanor counts involving drugs and drug paraphernalia in 2014, and had made statements to employees of the Montgomery County Attorney's office about committing a felony by possessing methamphetamine. *See* Affidavit of Lisa Montgomery, attached hereto as Exhibit B, ¶ 10, including all subparts.

III. STATEMENT OF FACTS

Respondent admits he was appointed to serve as County Attorney for Montgomery County in 2006 and has continued to do so since that date. As part of his duties as County Attorney, Respondent and the Montgomery County Attorney's office maintains a written diversion program and has done so since Respondent's tenure. Respondent admits that he exchanged correspondence with the ACLU regarding Montgomery County's diversion program.

Respondent denies Petitioners' characterization of the Montgomery County diversion program. Since Respondent has been County Attorney for Montgomery County there has been a written diversion policy consistent with the Kansas Statutes. *See* Exhibit A, ¶ 5, including all subparts. The written diversion policy is open to the public and all attorneys and has been accessed by the public and attorneys on a regular basis. *See* Exhibit A, ¶ 5a.

Respondent has expended a significant amount of time in developing a diversion program for first time domestic violence offenders. *See* Exhibit A, ¶ 5c. This program began in 2007 with Four County Mental Health Services and is now administered by BIP Services. *See* Exhibit A, ¶ 5c.

Diversions are routinely granted and entered into for first time DUI, first time domestic violence, and other minor offenses. *See* Exhibit A, ¶ 5d. Diversions are not routinely granted for felonies unless there are extenuating circumstances. *See* Exhibit A, ¶ 5e.

Respondent denies Petitioners' summary of the charges and prosecution of Petitioner Wilson. Petitioner Wilson was in fact charged with Felony Theft in violation of K.S.A. 21-5801(a)(1). *See* Exhibit B, ¶ 4a. Further, Respondent's office was familiar with Petitioner Wilson based on an ongoing investigation regarding a separate case wherein the office was evaluating whether Petitioner would be charged with possession with intent to distribute methamphetamine. *See* Exhibit B, ¶ 3b., including all subparts. The Montgomery County Attorney's office was also aware that Petitioner Wilson had two prior arrests for misdemeanor counts involving drugs and paraphernalia in 2014. *See* Exhibit B,

¶ 10b. As discussed in more detail below, based on this, Petitioner Wilson was not eligible for diversion and lacks standing in this matter.

Respondent denies that Petitioner KCF has been “injured” based on the Montgomery County diversion program. As discussed in more detail below, KCF lacks standing in this matter as it cannot show an injury or interest specific and peculiar to it, and not one that it shares with the community in general.

IV. GROUND S FOR RELIEF

Respondent denies Petitioners’ interpretation of the statute as discussed in more detail below. Respondent notes that other District Attorneys and County Attorneys in Kansas do not support the conclusions being proffered by the ACLU regarding the Kansas diversion programs. *See* “A Response Based on Reality” by Marc Bennett, District Attorney for Sedgwick County, Kansas, attached hereto as Exhibit C.

V. RELIEF SOUGHT

As argued in more depth below, Respondent denies that the Petitioners are entitled to the Relief requested, and would request an Order from this Court denying Petitioners requested relief, denying Petitioners’ Writ for Mandamus, and for whatever other relief the Court deems just and proper.

III. POINTS AND AUTHORITIES

A. SUMMARY OF POINTS AND AUTHORITIES

1. Neither of Petitioners have standing to bring this Petition for Writ of Mandamus as neither KCF nor Wilson can show an injury or interest specific and peculiar to themselves, and not one that they share with the community in general.

2. A writ of mandamus is not appropriate in this matter as the statute at issue provides for discretionary duties of a County Attorney.

3. Petitioners' Petition must fail because their interpretation of the statute is erroneous and not what the legislature intended.

B. PETITIONERS LACK STANDING TO BRING THIS PETITION FOR WRIT OF MANDAMUS

As an initial matter, neither of the Petitioners have the requisite standing to bring this Petition for Mandamus. “[M]andamus will not ordinarily lie at the instance of a private citizen to compel the performance of a public duty[.]” *Kansas Bar Ass'n v. Judges of Third Judicial Dist.*, 270 Kan. 489, 491, 14 P.3d 1154 (2000) (citation and quotation omitted). Petitioner must be able to show “an injury or interest specific and peculiar to himself, and not one that he shares with the community in general[.]” *Id.* (citation and quotation omitted). In this case, neither KCF nor Wilson can show an injury or an interest “specific and peculiar” to itself.

As it relates to KCF, as noted above, KCF is not in fact a drug and alcohol rehabilitation program. *See* Exhibit A, ¶ 4. Instead, it operates similar to an employment agency helping to secure employment for individuals with a criminal and drug backgrounds. *See* Exhibit A, ¶ 3, including all subparts. Therefore, any “injury or interest” it has in having more individuals offered diversion versus incarceration is no different than any employer in the Montgomery County area.

Further, it is important to note, any individual that would be eligible for a diversion programs is also likely eligible for **probation** instead of incarceration. *See* Exhibit A, ¶

10. Therefore, there is no change in the number of individuals that are incarcerated as opposed to available for employment if offered the diversion program. Typically, incarceration only results based on a probation *violation*. See Exhibit A, ¶ 11, including all subparts. Any violation of probation would also likely lead to someone being removed from the diversion program. See Exhibit A, ¶ 11, including all subparts.

Further, similar to the requirements of probation, K.S.A. 22-2909(c) requires an individual that accepts a diversion agreement to pay fines and to participate in an alcohol and drug evaluation *by a licensed provider*, which KCF is not. Therefore, KCF's alleged "injuries" of having to transport and spend resources on those who are on probation would still be in place if more individuals were granted diversion. See *State v. Clevenger*, 235 Kan. 864, 867, 683 P.2d 1272 (1984) ("Thus, diversion is equal to punishment for a first offense except for the incarceration.").

As it relates to Wilson, based on her past history and the original charges, she was not eligible for diversion and therefore was not injured. See Exhibit B, ¶ 10, including all subparts. Wilson was initially charged with Felony Theft in violation of K.S.A. 21-5801(a)(1). See Exhibit B, ¶ 4a. Wilson was not considered for diversion due to her history with the Montgomery County Attorney's office, including an ongoing investigation regarding a separate case wherein the office was evaluating whether Petitioner would be charged with possession with intent to distribute methamphetamine and two prior arrests for misdemeanor counts involving drugs and paraphernalia in 2014. See Exhibit B, ¶¶ 3b., 10, including all subparts.

K.S.A. 22-2908(a)(3) specifically allows a prosecutor to consider the factor of

“whether the offender is a first-time offender...” in determining whether to offer diversion. In addition, the Montgomery County Attorney’s office diversion programs does not apply to felony charges. *See* Exhibit A, ¶ 5e. Further, as Wilson plead guilty to lesser charges and accepted probation, which she has since violated, she is no longer a candidate for diversion and her claims are moot. *See* Exhibit B, ¶ 8.

Therefore, as an initial matter, Petitioners’ Petition should be dismissed based on lack of standing. In the alternative, if Petitioners’ Petition is not denied, Respondent would request that this matter be referred to a District Court pursuant to Rule 9.01(d) of the Rules of the Kansas Supreme Court for testimony on this issue.

C. A WRIT OF MANDAMUS IS NOT AN APPROPRIATE REMEDY AS THE STATUTE AT ISSUE IS DISCRETIONARY

A writ of mandamus should be issued only when a respondent’s “legal duty is clear,” and should not be invoked to control a public official’s discretion. *Kansas Medical Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 620, 244 P.3d 642 (2010); *Kansas Bar Ass’n v. Judges of the Third District*, 270 Kan. at 491. Simply put, “mandamus cannot be invoked to compel a discretionary act.” *Ambrosier*, 304 Kan. at 907.

By the clear language of the statute, who is eligible for diversion and who should be offered diversion is at the discretion of the County Attorney:

After a complaint has been filed charging a defendant with commission of a crime and prior to conviction thereof, and after the district attorney has considered the factors listed in K.S.A. 22-2908, **if** it appears to the district attorney that diversion of the defendant would be in the interests of justice and of benefit to the defendant and the community, the district attorney **may** propose a diversion agreement to the defendant. The terms of each diversion agreement shall be established by the district attorney in accordance with K.S.A. 22-2909.

K.S.A. 22-2907(1) (emphasis added).

This Court has previously held that the application of a diversion policy is at the discretion of the County Attorney. In *State v. Greenlee*, this Court upheld a prosecutor's discretionary policy to not allow diversion to any defendant charged with drug offenses even though the prosecutor did not have a written policy in compliance with K.S.A. 22-2907. 228 Kan. 712, 721, 620 P.2d 1132 (1980). The Court noted that the "overall effect" of K.S.A. 22-2907 was "merely to make the process of diversion more formal by setting a few *procedural* standards and establishing some degree of uniformity in *procedure*." *Id.* at 718 (emphasis added). This Court in *Greenlee* further noted:

There is no statutory right of any defendant to be granted diversion and certainly there was no such right at common law. The statutes **merely establish a procedure** to be followed by the county or district attorney and certain factors which are to be considered if diversion is to be considered. The prosecutor, after following the procedures and considering all the factors "may propose a diversion agreement to the defendant." The prosecutor is not required to propose diversion to any defendant.

Id. at 719-720.

Unlike the prosecutor in *Greenlee*, the Montgomery County Attorney's office does have a written diversion policy, which was attached to the Petitioners' Petition for Writ as Exhibit B. However, Petitioners, or more specifically the ACLU, simply do not agree with the *sufficiency* of the diversion program in Montgomery County. Nothing in K.S.A. 22-2907 et seq., states specifically what must be included in the written policies and guidelines beyond what is listed in K.S.A. 22-2907(2), which is addressed below. *See also State v. Kacsir*, 45 Kan.App.2d 409, 251 P.3d 362 (2011) (holding "the decision to divert in Kansas

resides with the county or district attorney” and that the statute provides the *authority* to district attorneys to develop and enforce more specific rules).

Therefore, Petitioners’ Petition for Writ of Mandamus should be denied as it is merely attempting to compel a discretionary action which is prohibited.

D. PETITIONERS’ INTERPRETATION OF THE RELEVANT STATUTES IS NOT CONSISTENT WITH CASE LAW OR THE LEGISLATIVE HISTORY

Respondent strongly disagrees with Petitioners interpretation of K.S.A. 22-2907.

This Court has previously stated the standard for statutory interpretation as follows:

When called upon to interpret a statute, we first heed a statute’s express language, giving ordinary words their ordinary meaning.

If a plain reading of the text of a statute yields an ambiguity or a lack of clarity, statutory construction becomes appropriate. In such circumstances, a court must move outside the text of the provision at issue and examine other evidence of legislative intent, such as legislative history, or employ additional canons of statutory construction to determine the legislature’s meaning.

Should a statute’s meaning not be evident from its plain language, we move from interpretation to construction, employing study of legislative history, application of canons of statutory construction, and appraisal of other background constructions. Further when examining statutes to determine legislative intent, we must consider various provisions of an act in *pari materia* with a view toward reconciling and bringing them into harmony if possible. In addition, we have often noted that a specific statute controls over a general statute.

State v. Raschke, 289 Kan. 911, 914, 219 P.3d 481 (2009) (internal citation and quotation omitted).

Petitioners’ interpretation of K.S.A. 22-2907 is erroneous and should not be adopted by this court. First, Petitioners have requested this Court to issue “an order compelling Respondent to create diversion polices and guidelines that fully and accurately describe the

entire diversion program, including what charges are eligible and what factors are disqualifying.” However, as admitted by Petitioners, and is in fact attached to the Petition as Exhibit B, Montgomery County Attorney’s office does in fact have a written diversion program which lists in detail in Paragraph 3, subparts (a) – (e), who is and who is not eligible for diversion. In addition, K.S.A. 22-2908 provides further guidance and restrictions on who can and cannot be offered diversion.

Further, as argued in detail above, the final determination of who is eligible for diversion is at the *discretion* of the County Attorney. Therefore, Petitioners’ first request for relief must be denied.

Second, Petitioners have requested this Court to issue “an order compelling Respondent to provide written notice of diversion to all defendants in accordance with Respondent’s clearly defined legal duty under K.S.A. §22-2907(3).” Petitioners’ interpretation of K.S.A. 22-2907(3) is clearly erroneous and nonsensical. Petitioners appear to be arguing that *all defendants* **regardless** of whether they are eligible for diversion, should be provided a copy of the diversion program.

This proposition is clearly not what the legislature intended and is simply not feasible. *See* Exhibit A, ¶ 6, including all subparts; Exhibit C.

Using last year as an example, in 2017, Montgomery County filed 350 felony cases, 111 misdemeanors, and 3,618 traffic cases. *See* Exhibit A, ¶ 6a. If you assume that the Montgomery County Attorney’s offices spends one hour preparing the “notices” the ACLU proposes are required, that would equal 4,079 additional hours of staff time, or 102 weeks of work. *See* Exhibit A, ¶ 6b. Montgomery County would have to hire at least two full-

time staff people just to prepare and mail these notices. *See* Exhibit A, ¶ 6b. At \$15.00/hour that would be \$61,185.00 for just salaries, not to mention benefits package for KPERS, health insurance, worker’s comp, etc. *See* Exhibit A, ¶ 6b.

Mailing the “notices” would cost approximately \$2.00 per notice at an additional cost of \$8,158.00 for supplies such as paper, copying, postage, etc. *See* Exhibit A, ¶ 6c.

Such additional costs would have to be funded somehow, and the legislature has suggested no such provision in the statute.

Further, the word “shall” in a statute is only sometimes mandatory and is often only directory. In *Rashchke*, this Court noted “prior decisions of this court have interpreted the legislature’s use of the word ‘shall’ in some contexts as mandatory and in other contexts as merely directory. Its meaning is not plain, and construction is required.” 289 Kan. at 914–15. The following factors are considered in determining whether the legislature’s use of “shall” makes a particular provision mandatory or directory:

- (1) legislative context and history;
- (2) substantive effect on a party’s rights versus merely form or procedural effect;
- (3) the existence or nonexistence of consequences for noncompliance; and
- (4) the subject matter of the statutory provision, *e.g.*, elections or notice on charges for driving under the influence.

Id. at 921.

Matters that are “simply a mode of procedure intended to secure order, system, and dispatch of the public business” are more likely directory than mandatory. *Id.* at 922. This Court has previously found that K.S.A. 22-2907 et seq., is primarily a procedural statute. *See Greenlee*, 228 Kan. at 718-719 (“the overall effect is merely to make the process of diversion more formal by setting a few *procedural* standards and establishing some degree

of uniformity in *procedure*.” (emphasis added)).

Further, nowhere in K.S.A. 22-2907 et seq., is there any consequences for failing to provide notice of the diversion policy. *See Ambrosier*, 304 Kan. at 914 (citing *Raschke*, 289 Kan. at 917–18, 219 P.3d 481 (citing and discussing, inter alia, *Hooper v. McNaughton*, 113 Kan. 405, 407, 214 P. 613 (1923) (distinction between directory, mandatory lies in consequence of nonobservance; act done in disobedience of mandatory provision void; directory provision should be obeyed, but act done in disobedience may still be valid))). *See also State v. Fink*, 217 Kan. 671, 676, 538 P.2d 1390 (1975) (this Court held that K.S.A. 22-2902 regarding preliminary hearings being required within 10 days was directory as opposed to mandatory in part because the legislature did not provide for dismissal if not complied with and whether the purpose of the statute, i.e., right to a speedy trial, was being complied with based on the totality of the circumstances).

Legislative context and history can be crucial to the distinction between a mandatory “shall” and a directory “shall.” As it relates to legislative history, the legislature did not intend to require County Attorneys to offer *all* defendants diversion. *See* Kansas House Judiciary Committee Report on H.B. 3130 at 48 (“The Committee recommends that H.B. 3130 be enacted to establish a pretrial diversion **procedure** to be used by county and district attorneys.” (emphasis added)). In fact, this Court has previously recognized that in passing K.S.A. 22-2907 et seq. “the objective sought by the legislature would appear to be to encourage a uniform **procedure** to provide an alternative to formal conviction of first-time offenders,” not to instill a mandatory diversion program. *Greenlee*, 228 Kan. at 718 (emphasis added).

This Court has specifically stated that, “The prosecutor, after following the procedures and considering all the factors may propose a diversion agreement to the defendant. The prosecutor is not required to propose diversion to any defendant.” *Id.* at 717 (emphasis added). This Court went on to state that “[t]here is no statutory right of any defendant to be granted diversion and there was certainly no right at common law.” *Id.* at 718 (finding that the appellant’s constitutional rights of due process were not violated when the Prosecutor did not give the defendant the opportunity for diversion).

Petitioners quoted the Judicial House Committee Report on H.B., but failed to mention the entire quote from the House Committee. Petitioners noted that the “Committee has examined the pretrial diversion approach and believes that such a program should be available in Kansas to reduce the number of persons committed to institutions,” but failed to cite the rest, which states, “in those cases where diversion would be in the interests of justice and of benefit to the defendant and the community.” Judicial House Committee Report on H.B. 3130 at 48-49 (emphasis added). The Committee’s use of “*in those cases*” clearly shows that the Committee did not intend to grant each defendant charged with a crime a right to diversion through this statute. If “all defendants” do not have to be offered diversion, what would be the purpose of providing them all with copies of the diversion program other than to waste County resources?

Petitioners also failed to include the rest of the House Committee’s opinion, which states in part: “The Committee believes that a pretrial diversion mechanism should be available in Kansas to be used, in some cases, as an alternative to the traditional dispositions of incarceration or probation.” *Id.* (emphasis added).

The legislature clearly intended KSA 22-2907 et seq., to just provide a *procedure* or *mechanism* by which County Attorneys *may* provide for diversion. As such, the use of the word “shall” in K.S.A. 22-2907(3) should be interpreted as directory as opposed to mandatory.

Turning to legislative context, to the extent the legislature intended for diversion to be offered to *all* defendants, the legislature has previously drafted a provision that provides for such in K.S.A. 38-2346 in juvenile cases. If the legislature truly wanted diversion to be made available to all offenders, such K.S.A. 22-2907 et seq., could have been amended accordingly.

Further, it is more appropriate, and consistent with the law’s intent, to read K.S.A. 22-2907(3) in conjunction with the rest of the statute.

In order to ascertain the legislative intent, courts are not permitted to consider only a certain isolated part or parts of an act, but are required to consider and construe together all parts thereof *in pari materia*. When the interpretation of some one section of an act according to the exact and literal import of its words would contravene the manifest purpose of the legislature, the entire act should be construed according to its spirit and reason, disregarding so far as may be necessary the strict letter of the law.

Aves By & Through Aves v. Shah, 258 Kan. 506, 513, 906 P.2d 642, 648 (1995).

It is only after a County Attorney has deemed diversion appropriate, may he propose a diversion agreement to the defendant (K.S.A. 22-2907(1)) and then, because diversion has been deemed appropriate, each defendant shall be informed in writing of that diversionary program and policies (K.S.A. 22-2907(3)). It would not make sense to read the statute in a backwards manner that would give every defendant charged with a crime, whether it be a moving violation or murder, a writing of the diversionary program and

policies even though the County Attorney's own guidelines might automatically deny them the ability of receiving diversion.

Therefore, Petitioners' arguments stating that a County must provide the diversion program's guidelines and policies to each defendant charged, even those defendants who will never qualify for a diversionary program, is erroneous. Such a task would be enormously taxing on county money, manpower, and resources and wholly inconsistent with the wording of the statute.

Finally, Petitioners have requested this Court to issue "an order compelling Respondent to provide diversion conference to all eligible defendants in accordance with Respondent's clearly defined legal duty under K.S.A. §22-2907 (2) and (3)."

As it relates to diversion conferences in the Montgomery County Attorney's office, each attorney in the Montgomery County attorney's office has authority to offer diversions, according to the written policy. *See* Exhibit A, ¶ 7. At times the defendants and/or defense attorneys will contact the County Attorney's office to request a diversion or the Court recommends to defendants that they seek a diversion from the County Attorney's office. *See* Exhibit A, ¶ 7. Once the Montgomery County Attorney's office determines that a defendant is eligible, then the attorney will contact the defense attorney to discuss the same. *See* Exhibit A, ¶ 7.

In Respondent's past 18 years of practicing in the Montgomery County Attorney's office, a defense attorney has never requested a diversion conference. *See* Exhibit A, ¶ 8. In fact, defense attorneys have refused to let Respondent or his staff meet with their clients to discuss the case, the possibility of diversion, and/or the terms of a diversion *See* Exhibit

A, ¶ 8. As the defendants are represented by counsel, Respondent would not be permitted to contact them without their attorney's approval and/or presence. *See* Exhibit A, ¶ 8a.

In addition, as a practical matter, any information that would typically be discussed or exchanged during such a conference is exchanged between counsel via email and it would be the defense counsel's responsibility to share such information with their individual clients. *See* Exhibit A, ¶ 9. Therefore, Petitioners' claims related to no conferences being conducted is unfounded, they are just not "conferences" in the traditional sense.

Next, as discussed above in relationship to the notices requested by the ACLU, the cost associated in doing such "conferences" in person would be nearly impossible for Montgomery County to fund. If you assume that the Montgomery County Attorney's office spends one hour of staff attorney time for each case preparing for and having the "diversion conferences" that the ACLU wants it would have to hire 2 full-time attorneys. *See* Exhibit A, ¶ 6d. Assistant County Attorneys earn salaries between \$65,000 to \$80,000, which would mean additional salaries of \$130,000 to \$160,000 plus the benefits package. *See* Exhibit A, ¶ 6d.

Montgomery County also pays for public defenders for 99% of all Misdemeanor cases, which means Montgomery County would have to pay for 111 hours of attorney time at \$75.00/hour for the public defenders to attend the conferences. *See* Exhibit A, ¶ 6e. For traffic cases, the County would have to pay for 3,618 hours of attorney time at \$75.00/hour for the conferences. *See* Exhibit A, ¶ 6f.

Finally, as detailed above, the word "shall" in a statute is only sometimes mandatory

and is often only directory. Similar to the analysis above, the provision of diversion conferences is merely a procedural mechanism and is directory not mandatory. There is nothing in the legislative history or context of K.S.A. 22-2907 et seq., to suggest that the conferences were a necessary requirements as opposed to merely a procedural mechanism to inform a defendant of the terms of the diversion agreement. As a practical matter, this should be done by the defendants *own attorney* and not by the County attorney. Further, there is nothing in K.S.A. 22-2907 et seq., which provides a consequence for failure to conduct a conference.

Therefore, as argued above, the Petitioners have misinterpreted K.S.A. 22-2907 et seq., and their Petition for Writ of Mandamus should be denied.

IV. CONCLUSION

WHEREFORE, based on the above and forgoing, Respondent requests the Court to deny Petitioners' Petition for Writ of Mandamus.

Respectfully submitted,

/s/ Tracy M. Hayes

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY certify that on this 27th day of September, 2018, the foregoing was filed with the Clerk of the Court using the Kansas Courts eFiling system which will send notice of electronic filing to all counsel of record.

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ATTORNEYS FOR PETITIONERS

/s/ Tracy M. Hayes

Attorney

IN THE SUPREME COURT OF THE STATE OF KANSAS

KANSAS CROSSROADS FOUNDATION)
And KARENA WILSON,)

Petitioners,)

Case No. 119493

vs.)

LARRY MARKLE, in his official capacity)
as County Attorney of Montgomery County,)

Respondent.)

AFFIDAVIT OF LARRY MARKLE

I, Larry Markle, Montgomery County Attorney, and Respondent in this action, being duly sworn according to law upon my oath, do hereby depose and state as follows:

1. I was appointed as Montgomery County Attorney on May 8, 2006, and have acted as the duly elected County Attorney since that time.

2. I have personal knowledge of the matters in this affidavit and would testify to these facts.

3. Upon information and belief, the following information is relevant regarding the Kansas Crossroads Foundation (hereinafter "KCF"):

a. KCF's operates similar to an employment agency not as a religious non-profit organization.

b. KCF routinely arranges for people to work for private employers. Based on interviews with individuals who had involvement with KCF, KCF maintains a working relationship with Cobalt Boats, LLC, located in Neodesha, Kansas. See Exhibit 1, bullet point 7.

EXHIBIT A

- c. A number of individuals who have been supervised by probation officers in Montgomery County have paid money to KCF and/or had money paid to KCF on their behalf.
 - d. KCF requires such individuals to sign a written contract. *See Exhibit 2.*
4. KCF alleges that they provide drug and alcohol counseling; however, a check of the records with the Kansas Department of Health and Environment reveals that no licensed counselors have any connections with KCF.

5. **Diversion Policy.** That at all times material hereto, the Montgomery County Attorney's office under my direction has maintained a diversion policy consistent with Kansas Statutes to wit:

- a. The written diversion policy is open to the public and to all attorneys.
- b. The written diversion policy has been accessed by the public and the attorneys on a regular basis.
- c. That I have expended significant amounts of time in developing a diversion program for first time Domestic Violence offenders. This program began in 2007 with Four County Mental Health Services and is now administered by BIP Services in Cherryvale, KS.
- d. That diversions are routinely granted and entered into for first time DUI, first time domestic violence, and other minor offenses.
- e. That diversions are not routinely granted for felonies. If a diversion is granted for a felony it is because of extenuating circumstances, at my discretion.

6. **Diversion Notices/Conferences.** The type of diversion notices and conferences demanded by the ACLU is not required by Kansas Statutes. In addition, it would be cost prohibitive for a small county like Montgomery County.

a. Statistics for 2017 from the Kansas Judicial Branch for Montgomery County show that the following cases were filed:

- i. Felonies—350;
- ii. Misdemeanors—111; and
- iii. Traffic—3,618.

b. If you assume that we spend 1 hour preparing the "notices" that the ACLU wants that would be 4,079 hours of staff time. That equals 102 weeks of work. That means Montgomery County would have to hire 2 full-time staff people just to prep and mail these notices. At \$15.00/hour that would be \$61,185.00 for just salaries. Then you would also have to add the benefits package for KPERS, health insurance, worker's comp, etc.

c. Mailing the "notices" would cost @ \$2.00/notice. @ \$8,158.00 for supplies such as paper, copying, postage, etc.

d. If you assume that we spend 1 hour of staff attorney time for each case prepare for and having the "diversion conferences" that the ACLU wants we would have to hire 2 full-time attorneys. My assistants earn salaries between 65,000 to 80,000. That would mean additional salaries of \$130,000 to \$160,000 plus the benefits package.

- e. Montgomery County also pays for public defenders for 99% of all Misdemeanor cases. That means Montgomery County would have to pay for 111 hours of attorney time @ \$75.00/hour.
- f. Montgomery County also pays for public defenders for traffic cases. Now that they have to have a "diversion conference" the County would have to pay for 3,618 hours of attorney time at \$75.00/hour.
- g. The State of Kansas pays for public defenders for 99% of all felony cases. That means the State of Kansas would have to pay for 350 hours of attorney time at the State rate. The current rate is now \$75.00/hour.
- h. Montgomery County would also have to hire at least two people to monitor the diversions to see if the defendants are compliant. If that is a staff person, then use the same numbers as number 2 above. Montgomery staffers are not trained as probation officers, law enforcement officers or otherwise.

7. **Diversion Application Procedure:** Each attorney in the Montgomery County attorney's office has authority to offer diversions, according to the written policy. At times the defendants and/or defense attorneys will contact the County Attorney's office to request a diversion. At times the Court also recommends to defendants— that they seek a diversion from the County Attorney's office. Once the Montgomery County Attorney's office determines that a defendant is eligible, then the attorney will contact the defense attorney to discuss the same.

8. In the past 18 years of practicing in this office, a defense attorney has never requested a diversion conference. In fact, defense attorneys have refused to let myself or any of the assistants meet with their clients to discuss the case, the possibility of diversion, and/or the terms of a diversion.

- a. As the defendants are represented by counsel, I am not permitted to contact them without their attorney's approval and/or presence.

9. Further, any information that would typically be discussed or exchanged during such a conference is exchanged between counsel via e-mail and it would be the defense counsel's responsibility to share such information with their individual clients.

10. Any individual that would be eligible for a diversion programs would also:

- a. Be eligible for probation instead of incarceration.

11. There is no change in the number of individuals that are incarcerated as opposed to available for employment if offered the diversion program; incarceration only results based on a probation violation.

- a. Any violation of probation would also likely lead to someone being removed from the diversion program.

12. Similar to the requirements of probation, K.S.A. 22-2909(c) requires an individual that accepts a diversion agreement to pay fines and to participate in an alcohol and drug evaluation by a licensed provider.

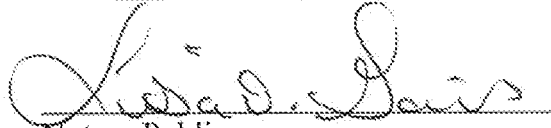
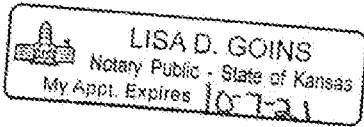
- a. Similar to the requirements of probation, K.S.A. 22-2909(c), KCF's alleged "injuries" of having to transport and spend resources on those who are on probation would still be in place if more individuals were granted diversion.

FURTHER AFFIANT SAYETH NAUGHT.



LARRY MARKLE-SC#12345
Montgomery County Attorney
300 E. Main
Independence, KS 67301
(620) 330-1020
lmarklelawyer@gmail.com

Subscribed and sworn to before me this 26th day of September, 2018.


Notary Public

Kansas Crossroads Foundation
Working to strengthen Southeast Kansas
1103 Illinois
Neodesha, KS 66757
620-325-4061

Jack Kyle: 620-313-0420
Jennifer Davis: 620-205-6602

To work for our non-profit organization for two months at a supporting host company – here is the following things you must agree to:

- Build a work record for submission to the host company (we can help you with this through volunteer work).
- Attending support group twice a week mandatory on Wednesday at 7PM at Christ Church 1001 Elm Neodesha (other local options are Celebrate Recovery Sunday 9:15 AM or Montgomery County locations call Sue Caldwell 620-779-3267 other option are in Fredonia and Cherryvale)
- Attending weekly goal setting and stress management with the director once a week.
- Attend one approved outside healthy social group each week (local option Bible Study outside Thayer every Friday at 6:30 PM van leaves Christ Church at 6 PM or call Hasstedt's for a ride 620-325-3865 or 620-920-0440, AA, NA, Alanon, other bible studies, sorority, book clubs, etc as long as they are pre-approved).
- Submit and pass random urinalysis and breathalyzer tests.
- Must follow all work requirements given by the host company for employment.
- If you are unable to make it to work you must call into Cobalt 620-325-3662 to report before work begins and call or text Jack or Jennifer. *JMS, SUK*
- If you have a prior commitment (court, doctor, etc) let your supervisor and us know ahead of time so that plans can be made.
- If you need any medical treatment for illnesses (mental or physical) we will do what we can to help, we have local options for people in need and can help you get the medications or other treatments you need. We are here to help you, and we can only help you if you are open and honest.
- If you have any problems at work with the job or any of the employees please let us know, again we are here to help if we don't know anything we can't help.
- Your time with us is 60 days at that point Cobalt has the option to extend this contract or hire you.
- If you are unable to attend a meeting please let us know, these are mandatory meetings and are part of all of our recovery process.
- Skipping meetings is just like missing work, it will count against your record with the program, if you are missing meetings you can be dismissed from the program (lose your job).

I _____ understand and agree to the fact that there are no guarantees that we will be able to place you into a job, but we will do our best to get you a job.

Sign

Date

EXHIBIT 1



Kansas Crossroads Foundation
Working to strengthen Southeast Kansas
1103 Illinois
Neodesha, KS 66757
620-325-4061
Jack Kyle: 620-313-0420
Jennifer Davis: 620-205-6602
Sue Caldwell 620-779-3267

To work for our non-profit organization for two months at a supporting host company – here are the following things you must agree to:

- You are building a work record for submission to the host company so attendance, quality, and hard work are important as well as following all the rules given by host company which may include mandatory overtime as needed.
- Attend a support group twice a week: mandatory Celebrate Recovery meetings on Wednesday at 7PM KCF/NLC and Sunday 9:15 AM at Christ Church 1001 Elm (for Montgomery County locations contact Sue Caldwell).
- Attend weekly goal setting and stress management with a director once a week.
- Attend one approved outside healthy social group each week .
- Submit and pass random drug & alcohol tests.
- If you are unable to make it to work you **must** call into Cobalt at **620-325-3662** to report before work begins **and** call or text Jack, Jennifer, &/or Sue. If you have a prior commitment (doctor, court, etc) let your supervisor and us know ahead of time. They generally fire people for missing 2 days - don't miss.
- If you need any medical treatment for illnesses (mental or physical) we will do what we can to help, there are local options for people in need and we can try to help you get the medications or other treatments you need. We are here to help you, and we can only help you if you are open and honest.
- If you have any problems at work with the job, coworkers, boss, etc. please let us know so we can handle it for you, do not attempt to fix it yourself.
- Your time with us is 60 days at that point Cobalt has the option to extend this contract or hire you on full time.
- If you are unable to attend a meeting you must let us know, these are mandatory meetings and are part of all of our recovery process. Skipping meetings is just like missing work, it will count against your record with the program, if you are missing meetings you can be dismissed from the program (lose your job).

I **REDACTED** understand and agree to the fact that there are no guarantees that we will be able to place you into a job, but we will do our best to get you a job.

REDACTED

Sign

REDACTED

ate

REDACTED

EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF KANSAS

KANSAS CROSSROADS FOUNDATION)	
And KARENA WILSON,)	
)	
Petitioners,)	
)	Case No. 119493
vs.)	
)	
LARRY MARKLE, in his official capacity)	
as County Attorney of Montgomery County,)	
)	
Respondent.)	

AFFIDAVIT OF LISA MONTGOMERY

I, Lisa Montgomery, an Assistant Montgomery County Attorney, being duly sworn according to law upon my oath, do hereby depose and state as follows:

1. I have been an Assistant Montgomery County Attorney since January 2017.
2. I have personal knowledge of the matters in this affidavit and would testify to these facts.
3. I have been personally involved in the prosecution of multiple cases involving Karena Wilson (hereinafter “Wilson”) prior to her accepting a plea deal related to her charges in June 2016 she has raised in the Petition for Writ of Mandamus, to wit:
 - a. Karena Wilson was involved in some capacity in cases 16 CR 107 I and 16 CR 110 I (IPD#15-2644 and IPD# 15-2636);
 - b. In case 17 CR 179 I Wilson was a suspect in Possession with Intent to Distribute Methamphetamine, a copy of the Probable Cause Affidavit is attached hereto as Exhibit 1;

EXHIBIT B

- i. Wilson was not charged in regard to this case because she agreed to testify against the co-defendant, Austin Harris. Wilson later revoked her agreement to testify against Harris while being prosecuted in 17 CR 269 I;
- ii. In addition, she came to the Montgomery County Attorney's office and, without her attorney present, made statements that the methamphetamine was hers and not Harris'. Such information was promptly reported to her attorney.

4. In case 17 CR 269 I, the case referenced in the Petition for Writ, Wilson was a suspect in a series of thefts, a copy of the Probable Cause Affidavit is attached hereto as Exhibit 2.

- a. Wilson was originally charged with Felony Theft in violation of K.S.A. 21-5801(a)(1), two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct.
 - i. The evidence in this case was that Wilson:
 1. served as a lookout for Austin Harris and/or Bradley Davis;
 2. attempted to gain access to other businesses and coin machines for the purpose of continuing this course of thefts;
 3. at least three business with coin machines were broken into and stolen from in the course of one evening; and

4. the businesses not only lost the profits from the vending machines, but the vending machines themselves were damaged.

5. Wilson first appeared on June 19, 2017, without counsel but was appointed counsel from the Public Defender Office, Bryan Rickman, prior to her next appearance on June 27, 2019.

a. Bryan Rickman has been a public defender in Montgomery County for at least seven years and is familiar with the diversion policies of the Montgomery County Attorney.

b. I have personally worked in the Montgomery County Public Defender's office with Rickman and have heard Rickman state to clients that he knows the Montgomery County Attorney's diversion policy and that they do not qualify for diversions and that he won't ask for one.

6. Wilson had a preliminary hearing on September 19, 2017.

a. Testimony during the preliminary hearing raised additional charges of criminal damage to property for the three vending machines that were damaged.

7. I intended to add three misdemeanor charges of criminal damage to property for less than \$1,000.00 for each vending machine damaged that night to each co-defendant's case.

8. I received the attached email from Rickman dated November 6, 2017, with a plea offer and a proffer of Wilson's testimony. *See Exhibit 3.* There is no mention in

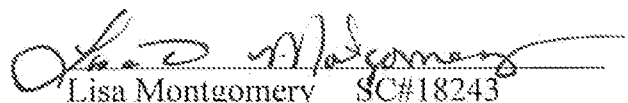
the offer of a request for a diversion on client's behalf and at no time previously did Rickman request a diversion in writing or verbally of me. I agreed to this plea offer in exchange for testimony against Harris and Bradley Davis. On December 6, 2016, Wilson appeared at our office and made statements in regards to Harris' other case.

9. On December 12, 2017, Wilson pled no-contest to three counts of misdemeanor theft, one count for each vending machine that was broken into on June 14, 2017, and was sentenced on that date. Even though Wilson was no longer willing to testify against Harris, I took into consideration her testimony against Davis and did not withdraw the plea offer.

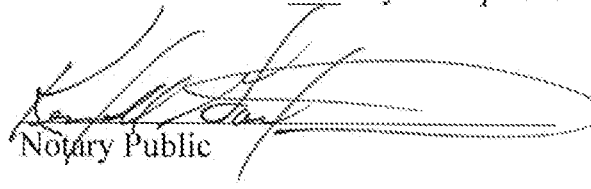
10. Even if Mr. Rickman had requested a diversion, I would not have offered Wilson a diversion agreement for the following reasons under the Montgomery County Attorney's Diversion Policy:

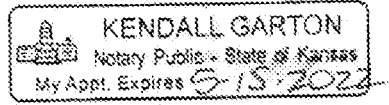
- a. She was charged with a felony.
- b. The Kansas Bureau of Investigation Criminal Records Section Report showed a previous arrest by Independence Police Department for two misdemeanor counts involving drugs and drug paraphernalia in 2014.
- c. She made un-solicited statements in this office about committing a felony by possessing Methamphetamine in the case against Harris.

FURTHER AFFIANT SAYETH NAUGHT.

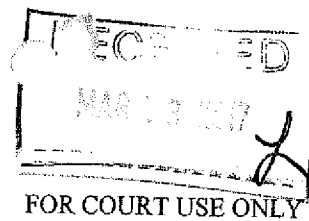

Lisa Montgomery SC#18243
Assistant Montgomery County Attorney

Subscribed and sworn to before me this 27th day of September, 2018.


Notary Public


KENDALL GARTON
Notary Public - State of Kansas
My Appt. Expires 5-15-2022

DISTRICT COURT OF MONTGOMERY COUNTY,
KS



ARREST/DETENTION PROBABLE CAUSE AFFIDAVIT

OCA No 17-417

MG
County in Kansas

I, Dustin Taylor, of the Independence Police Department being first duly Sworn on oath, says:

The following offense(s) has been committed:

21-5705(a1)(d1)(B) Distribute opiate, opium, narcotic, certain stimulant; 3.5 - <100 grams: STAT
21-5709(b)(2)(e3) Use/possess w/intent to use drug paraphernalia into human body: STAT

The following person or persons are alleged to have committed said offense(s):

Adult - Name Harris, Austin James

Race- White

Sex- Male

DOB- REDACTED

SSN- REDACTED

Address-

REDACTED

This affidavit is based on the following facts:

On Tuesday, March 21, 2017 at approximately 5:00 AM, Officers were dispatched to 801 E. Birch St. Independence, Montgomery County, KS 67301 in regards to a possible overdose involving an 18 year old white female who may have ingested sleeping pills.

Upon arrival, Sergeant TAYLOR observed a white male assisting a white female out of the residence and onto the porch. Sergeant TAYLOR recognized both individuals from prior dealings, as AUSTIN HARRIS and KARINA WILSON. K. WILSON was pale in color and coming in and out of consciousness. While speaking with A. HARRIS, Sergeant TAYLOR learned that A. HARRIS located a note that K. WILSON had written prior to ingesting the unknown substance. Sergeant TAYLOR requested to see the note which K. WILSON had written and began to follow A. HARRIS to the front door of the residence.

A. HARRIS opened the front door walked through the living room. As Sergeant TAYLOR approached the door to step inside the residence, a white, transparent container, which was wrapped in black electrical tape, with a round stem emitting from the container could be seen in plain view. The device was resting on a coffee table in the living room, approximately 5 to 7 feet from the front door and appeared to have burn marks. Also the white plastic body of the device appeared to have been slightly melted. Based on Sergeant TAYLOR's training and experience, Sergeant TAYLOR believed the device to be a homemade smoking pipe, which is used to assist in ingesting methamphetamine into the human body by means of smoking.

Once A. Harris returned with the letter from K. WILSON, Sergeant TAYLOR and A. HARRIS

returned to the porch. A. HARRIS was advised of his rights per Miranda and agreed to speak without an attorney. Sergeant TAYLOR advised A. HARRIS that he saw the "meth pipe" on the table and A. HARRIS became very nervous and began shaking. I was able to visually observe the color fade from A. Harris's face as he began to turn white. A. HARRIS advised that he did not know who the pipe belonged to. Sergeant TAYLOR asked A. HARRIS if there were any other illegal items inside the residence and A. HARRIS advised that he did not know. A. HARRIS advised that the smoking pipe may belong to his girlfriend K. WILSON, or her friend "June" who I know to be CRYSTAL SMITH from prior dealings. A. HARRIS advised that he allowed C. SMITH to come into his residence and take a shower and have a place to stay. A HARRIS advised that after C. SMITH got out of the shower he went into the bathroom and located a "meth pipe" and A. HARRIS told C. SMITH to leave and get her belongings. A. HARRIS advised that he sent his girlfriend K. WILSON to take C. SMITH somewhere and get her off of his property. A. HARRIS advised that K. WILSON and C. SMITH left in his truck and he did not know where they went. A. HARRIS advised that when K. WILSON left, C. SMITH took several bags and laundry baskets with her. A. HARRIS advised that he and K. WILSON were arguing and he left the residence in his vehicle. A. HARRIS advised that he drove around for approximately two hours and ran out of fuel, so he had to walk home. A. HARRIS advised that upon arrival, K. WILSON and C. SMITH were back at the residence and C. SMITH was putting bags back inside the home. A. HARRIS stated that he asked her what she was doing and she stated that she was getting more things of hers. A. HARRIS advised that he did not understand and asked C. SMITH where her K. WILSON was. C. SMITH told A. Harris that K. WILSON was inside the residence. A. HARRIS stated that he went inside and observed that K. WILSON was acting oddly and he could tell that she was under the influence of something. A. Harris advised that K. WILSON stated that she had consumed "sleeping pills" but could not tell A. HARRIS what kind, how many, or who provided them. A. HARRIS advised that K. WILSON slowly began losing functionality and speech, and also losing her skin color, so A. HARRIS contacted emergency services. A. HARRIS advised that he was only back at the residence for approximately 30 minutes prior to our arrival.

A. Harris was detained and placed into handcuffs. Officers D. BOWERS and D. TAYLOR conducted a clearance of the residence to make sure no other persons were inside the residence for officer safety, or to destroy any evidence. After a quick clearance of the residence Officers D. BOWERS and T. LUPARDUS remained at the scene and secured the residence. Sergeant TAYLOR applied for, then was granted a search warrant of the residence at 6:34 AM by Montgomery County District Court Judge Jeffery Gettler. The search warrant was executed at approximately 6:50 AM and the following items were located:

- white transparent homemade smoking pipe with residue black electrical tape
- clear tube with glass light bulb and white crystalline residue
- Homemade smoking pipe with clear container which contained red liquid and metal piping
- clear glass mason jar containing large quantity of white crystal substance

(this is not a complete list of items)

Sergeant Jason REDDY conducted methamphetamines field test kit on the white crystal substance located in the mason jar and received a positive result. The mason jar was located in a bedroom which belonged to A. HARRIS and K. WILSON, based on clothing articles photographs and personal items visual inside the room. Based on Sergeant TAYLOR'S training and experience Sergeant TAYLOR believed the homemade smoking pipes to be used to assist in ingesting methamphetamines into the human body by means of smoking. The white crystal substance was weighed using a digital scale and showed an approximate weight of 3.5 ounces or (99.05 grams). Based on Sergeant TAYLOR'S training and experience, it is common for individuals who distribute illegal narcotics to be in possession of large amounts of illegal narcotics, which can be accessed and divided up into smaller quantities for individual buyers.

On Tuesday, March 21st, 2017 at approximately 8:23 PM, Sergeant TAYLOR conducted a traffic stop on a vehicle in the area of N. 13th St. and Pine St. Independence, Montgomery County, KS 67301. During the traffic stop, a female passenger in the vehicle was recognized by Sergeant TAYLOR as CRYSTAL SMITH. Sergeant TAYLOR checked C. SMITH for wants or warrants and was advised by dispatch that C. SMITH had an active warrant for her arrest, warrant number 16-0364, through the City of Independence, KS. Crystal was placed under arrest for the warrant and brought to the Independence Police Department for questioning. Sergeant TAYLOR advised C. SMITH of her rights per Miranda and she agreed to speak with him. C. SMITH advised that she was at A. HARRIS'S residence the night before as A. HARRIS had originally told Sergeant TAYLOR. C. SMITH stated that she uses syringes to ingest methamphetamine into her body and had done so at A. HARRIS'S the previous night, while A. HARRIS and K. WILSON were both present. C. SMITH stated that A. HARRIS and K. WILSON were smoking the methamphetamine using the white transparent homemade smoking pipe which was located on the coffee table during the search warrant at 801 E. Birch St., and also seen in plain view by Sergeant TAYLOR upon his arrival to the original call for service. C. SMITH stated that she left the residence with K. WILSON and went to JOHNNY BEST'S residence (it should be noted that while on patrol Sergeant TAYLOR did observe C. SMITH and K. WILSON at J. BEST'S residence, using A. HARRIS'S vehicle for transportation which validated C. SMITH'S timeline.) C. SMITH stated that she returned to A. HARRIS'S residence to gather the rest of her belongings and A. HARRIS made her leave. C. SMITH stated that she had never seen the clear glass mason jar of crystalline substance. C. SMITH stated asked "If I had that much dope, why the fuck would I go over to Austin's house and get bunk ass dope from him?!" C. SMITH stated that she had purchased methamphetamine from A. HARRIS one gram at a time. C. SMITH stated that A. HARRIS is always talking about manufacturing methamphetamines the times she has been around him. C. SMITH stated that she had no reason to lie, because she just found out that she is pregnant today and decided to stop using methamphetamine. C. SMITH stated that the last time she used methamphetamine was the previous night, while at A. HARRIS and K. WILSON'S residence.

Based on the above facts, A. HARRIS is currently at the Montgomery County Department of Corrections where he is waiting to see a judge on the above charges.

This affidavit is not intended to be a comprehensive report on the investigation of the allegations, but is limited to showing Probable Cause that one or more violations of the Kansas Criminal Code occurred, Probable Cause that the defendants above

named committed the acts that were in such violation, that the same occurred in Montgomery County, Kansas within the time prescribed by the applicable Statute of Limitations.

[Signature]
Affiant

ARREST/DETENTION PROBABLE CAUSE DETERMINATION

The court determines from the above affidavit under oath that there is probable cause to believe that the offense(s) of:

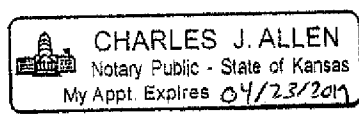
Has been committed by the persons named in the above affidavit and probable cause for the arrest and detention of said person(s)

Signed on _____ at _____ m

Judge

Subscribed and sworn to before me on 03 / 22 / 2017
at 02:35, Am.

Charles J Allen
Notary



1. Set forth various charges possible under the facts as presently known.
2. Name of person or persons who are alleged to have committed the offense(s).
3. State facts and circumstances specifically, in detail, and when and how the information was acquired - by observation, informant, etc., and if by informant or other hearsay, describe how reliability verified - (previous proved reliability, corroboration by other physical observation, etc). Additional facts brought out orally before the judge should inserted before signature.

COURT ORIGINAL DETENTION FACILITY PROSECUTING ATTORNEY AFFIANT OR LAW ENFORCEMENT AGENCY OR EXTRA

DISTRICT COURT OF MONTGOMERY COUNTY,
KS

FOR COURT USE ONLY

ARREST/DETENTION PROBABLE CAUSE AFFIDAVIT

OCA No 17-887

MG
County in Kansas

I, Dustin Taylor, of the Independence Police Department being first duly
Sworn on oath, says:

The following offense(s) has been committed:

**21-5801(a)(1)(b5) Conspiracy to commit Theft of property/services; \$1500 or less from 3 businesses in 72 hrs:
STAT**

The following person or persons are alleged to have committed said offense(s):

Adult - Name Wilson, Karena Violet

Race- White

Sex- Female

DOB- [REDACTED]

SSN- [REDACTED]

Address-

[REDACTED]

This affidavit is based on the following facts:

On June 14th, 2017 at approximately 4:48 PM, Sergeant CHRISTINA JOHNSON was dispatched to 407 W. Railroad St. Independence, Montgomery County, KS 67301, for a theft report. Sergeant C. JOHNSON arrived and spoke to JEREMY HALLETT, who is the owner of the establishment. J. HALLETT advised that someone had illegally entered the vending machines in front of his store. J. HALLETT advised that whomever entered the vending machines had taken the bill collection unit and the coin collection unit from inside the machines. Sergeant C. JOHNSON observed that there were 3 vending machines next to each other on the east side of the store, which possessed a metal gate around them to prevent anyone from entering them. The first was a Pepsi vending machine, which was unlocked from the front. The coin collection unit, which possessed approximately \$60.00 in quarters, had been removed from the inside of the machine. The second was a Red Bull vending machine, which was missing the bill and coin collection units, along with approximately \$60.00 in quarters as well. The middle vending machine was not disturbed or damaged.

J. HALLETT advised Sergeant C. JOHNSON that he was able to obtain video surveillance of the incident. J. HALLETT valued the coin changers that were missing from both machines at \$100.00 each at replacement cost. As Sergeant C. JOHNSON was talking to J. HALLETT, JASON WATSON, who is the owner of Watson Vending, arrived on scene. J. WATSON advised Sergeant C. JOHNSON that he had other vending machines that were illegally entered around Independence, KS.

J. WATSON advised that he needed to check his vending machines at Jayhawk

Cleaners, Borovetz liquor, Community Clothes Closet, Super 8, and Wal-mart to see if those machines had been tampered with or illegally entered. Sergeant C. JOHNSON advised Officer DAMON ATHEY to come to her location and speak to her about more incidents which she believed to be related to the theft at Hallett's Liquor. On arrival Officer D. ATHEY spoke with Sergeant C. JOHNSON, who stated that Hallett's liquor store vending machines were illegally entered and money was taken from inside of the machines. Sergeant C. JOHNSON explained that JASON WATSON from Watson Vending, had reported similar thefts. Sergeant C. JOHNSON advised Officer D. ATHEY to go speak to J. WATSON, who was at Jayhawk's cleaner located at 729 N. 10th St. which is 1/2 block south of Hallett's Liquor. J. WATSON was present, because he was checking his vending machines at that business. Officer D. ATHEY made contact with J. WATSON, who stated that the vending machine at Jayhawk's Cleaners was not illegally entered.

J. WATSON and Officer D. ATHEY went to 120 N. 24th St. Independence, Montgomery County, KS 67301, (Borovetz's Liquor store) where J. WATSON has other vending machines placed for business. It was determined by J. WATSON, that someone did break into the vending machines located a Borovetz Liquor; however left the change inside the vending machine.

Dispatch then notified officers, that DANA WATSON, who is a co-owner of Watson Vending, and who had previously observed J. HALLETT'S security footage, had observed a vehicle that Jeremy Hallett had on the security video surveillance from his business heading west on Laurel St. It should be noted that J. HALLETT had not been able to show officers the video at this time. The vehicle was described as a 2004 yellow Chevrolet Cavalier displaying Kansas registration 518 JXR. Officer D. ATHEY observed the vehicle traveling westbound on Laurel St and 24th St. Officer D. ATHEY attempted to catch up to the vehicle but the driver turned south on 27th St. and Officer D. ATHEY lost sight of the vehicle. Sergeant C. JOHNSON advised a short time later, that the same vehicle was at the intersection of 27th and Myrtle St. unoccupied. Officer D. ATHEY approached the vehicle and a white female came out of the residence of 2101 W. Myrtle St identifying herself as Karena Wilson. Officer D. ATHEY asked K. WILSON if the vehicle belonged to her. K. WILSON stated the vehicle belonged to her boyfriend AUSTIN HARRIS. Officer D. ATHEY asked K. WILSON where A. HARRIS was and K. WILSON stated that he was across the street with his daughter pushing her on the swing. Officer D. ATHEY went over and met with a white male that he knew from previous encounters to be A. HARRIS. Officer D. ATHEY asked A. HARRIS if the yellow Chevrolet Cavalier belonged to him, and A. HARRIS stated that he and K. WILSON had just purchased the vehicle. Officer D. ATHEY advised A. HARRIS of his rights per Miranda and A. HARRIS invoked.

J. HALLETT subsequently came to the location to see if he could identify A. HARRIS from his video footage. J. HALLETT showed Officer D. ATHEY the video of the incident involving the vending machines from previous night. The video showed a white male approach the vending machines. The male begins tampering with the vending machines for several seconds. After several seconds, a white male wearing a

baseball hat approaches the machines on foot from the south and begins looking around. The male who approaches from the south, was identified by officers from prior dealings, and by J. HALLETT as he and A. HARRIS attended school together in the past. A. HARRIS can be seen looking around and appears to be surveying the area while the other male is tampering with the machines. A. HARRIS then exits the view, walking back to the south and then returns a few moments later, driving a yellow Chevrolet Cavalier with a black hood. A. HARRIS exits the vehicle and continues to stand near the vending machines and the other male. After A. HARRIS begins looking around the area again, a white female can be seen stepping out of the passenger side of the vehicle. Officer D. ATHEY and J. HALLETT both recognized the female to be K. WILSON from prior dealings. After several more moments, the male removes a what appears to be a coin collection unit from one of the vending machines, and places it on the ground by the driver side door of A. HARRIS'S vehicle. The male then places the coin collection unit in the vehicle, and returns to the second vending machine and opens it. The male grabs the coin collection unit from the second machine and jogs around the front of the vehicle entering the passenger side. As the male begins jogging, A. HARRIS looks around and also takes a few rapid steps and enters the driver side of the vehicle. A. HARRIS shuts the door, and remains idle for a brief moment. A. HARRIS is then seen exiting the the vehicle again and walks back to the vending machines. A. HARRIS reaches down and picks an item up off of the ground and places it into one of the machines and secures the vending machine doors. A. HARRIS, K. WILSON, and the male are then seen exiting the parking lot in the yellow Chevrolet Cavalier with both coin collection units.

After viewing the video with J. HALLETT, A. HARRIS walked up to Officer D. ATHEY and stated he would now like to talk about what had happened. Officer D. ATHEY re read A. HARRIS his rights per Miranda at 5:36 PM and A. HARRIS agreed to speak to Officer D. ATHEY without an attorney present. A. HARRIS stated that he thought the other male seen in the video was just going to get a drink from the vending machine. A. HARRIS advised that the male started breaking into the vending machine. A. HARRIS stated he was trying to get the subject to stop and just leave the liquor store, but the subject continued breaking into the vending machines to get the money out of them. A. HARRIS stated that the same individual whom he was with at Hallett's Liquor, has been breaking into pop machines all around town and in other towns as well. A. HARRIS stated he only knows the male by the name "BRAD" and that he lives in Neodesha, KS. Sergeant C. JOHNSON asked A. HARRIS why he did not just leave or contact the police, if A. HARRIS knew that "BRAD" was breaking into the vending machines. A. HARRIS stated that he was going to call the police after he dropped his daughter off at her mothers house. A. HARRIS stated this was the first time that he had been with "BRAD" while the he was breaking into the vending machines. A. HARRIS stated "BRAD" told him that he had been going to other towns and doing the same thing with other vending machines.

Officer D. ATHEY issued A. HARRIS and K. WILSON both a notice to appear for the charge of theft; however after review of the incidents by the Detectives Division, the cases were subsequently dismissed from Municipal court at the request of the

Independence Police Department. After review of the incidents, Officer D. ATHEY was advised that both A. HARRIS and K. WILSON needed to be placed under arrest for the above recommended charge. Officer D. ATHEY was unable to locate A. HARRIS and K. WILSON prior to shift change.

Sergeant D. TAYLOR arrived for shift duties on 06/16/2017 and was briefed on the above situation. Sergeant D. TAYLOR contacted Detective DEREK BRYANT and was notified that both A. HARRIS and K. WILSON needed to be placed under arrest in reference to this case if contact was made. Detective D. BRYANT also advised that through the investigation, the male who was with A. HARRIS and K. WILSON, whom A. HARRIS knew as "BRAD" had been identified as BRADLEY DAVIS. Detective D. BRYANT advised that B. DAVIS possessed some type of universal key mechanism which allows him entry into the vending machines. Detective D. BRYANT advised that A. HARRIS and K. WILSON were believed to have facilitated the criminal acts committed by B. DAVIS by providing transportation and serving as "lookouts." It should be noted that the vending machines from IPD cases 17-887, 17-887A, and 17-887B all appeared to have been committed on the same night and all machines appeared to have been illegally entered in the same manner.

Sergeant D. TAYLOR was able to locate A. HARRIS and K. WILSON on 06/16/2017 at the address of 317 N. 10th St. Independence, KS 67301. A. HARRIS and K. WILSON were placed under arrest and escorted to the Montgomery County Department of Corrections where they are waiting to see a judge. Based on Sergeant D. TAYLOR'S training and experience, he knows it to be common for individuals who commit burglaries and thefts, to use transportation such as vehicles. Sergeant D. TAYLOR also knows it to be common for the same individuals to bring another person or persons to assist in surveying the area so they are not seen committing illegal acts by passerby's or police. It should be noted that common behavior of a lookout is consistent with the mannerisms displayed by A. HARRIS and K. WILSON while present on the video provided by J. HALLETT, in which A. HARRIS can be seen looking around and standing near B. DAVIS during the thefts. It should also be noted that A. HARRIS can be seen trying to get back in the vehicle quickly as B. DAVIS begins to jog away from the machines, and K. WILSON rapidly re-enters the vehicle at the same time, which would suggest that A. HARRIS and K. WILSON had full knowledge of the thefts which had occurred.

This affidavit is not intended to be a comprehensive report on the investigation of the allegations, but is limited to showing Probable Cause that one or more violations of the Kansas Criminal Code occurred, Probable Cause that the defendants above named committed the acts that were in such violation, that the same occurred in Montgomery County, Kansas within the time prescribed by the applicable Statute of Limitations.

[Signature]
Affiant 209

ARREST/DETENTION PROBABLE CAUSE DETERMINATION
The court determines from the above affidavit under oath that there is probable cause to believe that the offense(s) of:

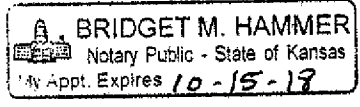
Has been committed by the persons named in the above affidavit and probable cause for the arrest and detention of said person(s)

Signed on _____ at _____ m

Judge

Subscribed and sworn to before me on 6/17/17
at 5:03 a.m.

[Signature]
Notary



1. Set forth various charges possible under the facts as presently known.
2. Name of person or persons who are alleged to have committed the offense(s).
3. State facts and circumstances specifically, in detail, and when and how the information was acquired -- by observation, informant, etc., and if by informant or other hearsay, describe how reliability verified -- (previous proved reliability, corroboration by other physical observation, etc). Additional facts brought out orally before the judge should inserted before signature.

COURT ORIGINAL DETENTION FACILITY PROSECUTING ATTORNEY AFFIANT OR LAW ENFORCEMENT AGENCY OR EXTRA



Lisa Montgomery <lisamontgomery052013@gmail.com>

Karena Wilson 17 CR 269-I

1 message

Bryan Rickman <brickman@sbids.org>

Thu, Nov 16, 2017 at 9:26 AM

To: "Lisa D. Montgomery" <lisamontgomery052013@gmail.com>

Lisa,

Ms. Karena Wilson will agree to resolve her case by pleading no contest to three separate counts of misdemeanor theft. In exchange for her plea, she will agree to testify at Bradley Davis and Austin Harris jury trials.

Ms. Wilson's proffered testimony would be as follows:

Ms. Wilson and Austin Harris were girlfriend/boyfriend at time these thefts occurred.

Ms. Wilson and Mr. Harris would sometimes give rides in their car to other people in exchange for money or gas purchased by the riding people.

On the date of the theft at Hallett's Liquor store an unknown male with an unknown female ask Mr. Harris to give them a ride across town. Mr. Harris has possibly seen the guy a time or two before but Karena doesn't think Austin really knows the guy very well. Karena has never met the guy or the unknown female before. Austin agrees to give the unknown male (now know to be Bradley Davis) and unknown female a ride in his car. The unknown girl is on the heavy side, white and in her 20's. I don't recall if Karena told me what seats they were sitting in the car. It is not in my notes.

As the four are traveling across town, Mr. Davis sees the vending machines at Hallett's Liquor store. Mr. Davis tells Mr. Harris to stop at the vending machine so he can get a drink and he will also get a drink for Austin and Karena. Austin and Bradley go up to the vending machine. Ms. Wilson gets out the car to stretch her legs and wait for her can of Red Bull that she told Mr. Davis that she wanted. Next thing she knows is that Mr. Davis is doing something with the vending machine and he and Austin return to the car with David having a coin box. Harris and Wilson go back to there home and tell Davis and the unknown girl to get out and leave. The next day, Austin and Karena find a coin bucket in the back seat of Austin's car and she and Austin take the coin bucket to the police department.

Ms. Wilson does not know anything more than this. She does not know anything about the other two vending machine thefts.

If Ms. Wilson's plea offer and proffer is acceptable to the State of Kansas, I would propose that we continue the arraignment hearing and have Ms. Wilson waive her speedy trial and to make a full and complete statement in accordance with her proffered testimony and upon completion of Mr. Davis and Mr. Harris' vending machine theft cases, that she enter no contest pleas to the three misdemeanor theft charges as proposed.

Please advise.

Bryan

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EXHIBIT 3



**OFFICE OF THE DISTRICT ATTORNEY
EIGHTEENTH JUDICIAL DISTRICT**

MARC BENNETT
District Attorney

ANN SWEGLE
Deputy District Attorney, Administration

JUSTIN EDWARDS
Deputy District Attorney, Trial Division

RON PASCHAL
*Deputy District Attorney, Juvenile
Division and Ethics Coordinator*

December 15, 2017

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 restitution², 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 conviction³, state law⁴ 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

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 prison⁶ 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 probation⁸, 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 make⁹, given a third

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 heroin¹¹ after already having one or more prior convictions for a person felony¹².

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 offenses¹³ 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 (excluding misdemeanor traffic) diversion constituted 4.7 percent of the 3,221 felonies filed in 2016.

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 probation charges and run them consecutive to reach 36 months, 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.

After review of the applications, we rejected 21% of the criminal and drug applicants¹⁴, while 13% of the applications remained pending at the end of the year.¹⁵ 7% of the applicants¹⁶ 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 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?

14. 28 criminal applications and 5 drug applications.

15. 14 criminal applications and 7 drug 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 cases¹⁷ 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 Commission¹⁸ 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 total cases 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 two people on diversion. With all due respect, diverting 2 out of 6 felonies filed—or even 3 of 10 or 7 out of 20—annually, is not a diversion program, it’s an anecdote.

As to 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 would not constitute a failure, the county attorney would simply be following state law. Conversely, if 2 of felonies were for 3rd time DUI (not diversion eligible under state law) and the

16. 9 criminal applications and 3 drug applications.

17. 310 felonies and 855 misdemeanors.

rest were 3rd time shoplift 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 request for information from prosecutors did not request that kind of information. 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 offenses¹⁹. Sedgwick County also sentenced 40 murders, 23 Rapes, 126 Aggravated Assaults and 120 Robberies²⁰. 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 and Colby, most western 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 felonies²¹ is commendable, but to suggest that larger offices can simply follow suit ignores the reality of the

18. Chapter 1, pages 6-10.

19. Page 95 – appendix 1 – 117/124 pp.

20. Chapter 1, page 6; 28/124 pp.

21. Are we talking about criminal damage to property and auto burglary or robbery and aggravated sexual battery?

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 charging²².

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 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

22. In Shawnee County where grand juries are utilized, the threshold decision is whether to present the case to the grand jury.

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 he had a career .300 batting average on his college baseball team but conveniently withholds the fact that he 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. 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’s simply a false narrative. We expected 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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