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MEMORANDUM

To: The Honorable Richard Elías, Chairman, and Members, Pima County Board of Supervisors

From: Barbara LaWall, Pima County Attorney

Date: April 25, 2018

Re: The Prosecution of Drug Cases in Pima County

INTRODUCTION:

There have been several recent memoranda addressing felony drug charges and how they are handled in Pima County. The memos contain mistaken assumptions and serious misconceptions regarding my Office's handling of drug cases. The record must be corrected.

My Office has been and continues to be at the forefront of the criminal justice reform movement in Arizona and nationwide with respect to the manner in which we deal with drug crime. Specifically, we seek every alternative to incarcerating drug addicts, including the creation and implementation of our trendsetting Drug Treatment Alternative to Prison Program. We recognize that there must be a balanced approach between demand reduction and supply reduction, each reinforcing the other, in an integrated approach to addressing the drug problem.

With that in mind, in order to effectively interdict and disrupt the production, importation, and distribution of narcotic and dangerous drugs in our community, we collaborate in multi-jurisdictional partnerships with law enforcement, and we aggressively prosecute drug dealers, their suppliers, and bulk couriers, seeking to remove them from our community, in an effort to cut off the supply of poison they purvey.

We can all agree that prison is not an effective or cost-effective solution for drug addiction. However, a very important distinction must be made between drug addiction and trafficking in deadly narcotics. The impact of the drug problem on every part of our community – not just law enforcement, prosecution, and the criminal justice system, but also on schools, healthcare providers, and businesses – cannot be overstated. Narcotic drugs, such as heroin, fentanyl, cocaine, and prescription opioids, as well as dangerous drugs like methamphetamine, are a significant and pervasive threat to the health and safety of the residents of Pima County. The production, distribution, and use of narcotics and dangerous drugs is such a persistent and substantial problem that combating this insidious threat requires complex and comprehensive solutions. As a result, we work in a highly cooperative fashion with numerous multi-jurisdictional agencies to combat the increasing problem of narcotics trafficking conducted by criminal organizations.

The disproportionate effects narcotic and dangerous drugs have on child welfare, public health, and criminal activity have caused irreparable harm to everyone in our community.

The economic and social impact of heroin, cocaine, fentanyl, and methamphetamine is sizeable and substantial. The impact is costly not only for those suffering from addiction, but for their children and other family members, and for our community at large. Our taxpayers and residents bear the burden of tremendous emergency-medical costs associated with treating overdoses and addiction. We also suffer increased criminal justice costs associated with drug trafficking, as well as many other crimes committed by traffickers, and addicts, including homicides, home invasions, robberies, assaults, burglaries, and other criminal offenses.

In contrast to many other prosecutors, I have continuously dedicated and committed my legal career as the Pima County Attorney to creating and implementing innovative prosecution strategies to address and combat these problems. My goal is to protect public safety by reducing and eliminating the harm that narcotic and dangerous drugs inflict on our communities and our citizens. In addition to prosecution and diversion, we treat those offenders who suffer from substance use disorders and addictions with compassion, and we provide them with alternative to prison programs, offering the treatment and services they need to survive and thrive. We are persistent and creative in our approaches because we cannot afford to lose an entire generation of young people to this destructive and deadly drug problem.

ARREST and CHARGING/ISSUING:

Prosecutors in my Office do not control law enforcement officers' independent arrest decisions. Arrests of individuals for possession of small amounts of drugs occur because possession of narcotic and dangerous drugs has been determined by the legislature to be a felony offense and is against the law. Police officers are sworn to enforce the laws of the State and cannot individually decide on their own initiative to selectively enforce only certain laws. The arrest decision, however, is an executive function within the discretion of a law enforcement agency Chief, and an executive decision to pursue Deflection as an alternative to arrest may be made by the head of the police agency.

Law enforcement agencies that choose to deflect, instead of arrest, individuals suffering from mental illness or drug or alcohol addiction, who have not committed violent or dangerous crimes, taking them to the Crisis Response Center (CRC), Community Bridges, Inc. (CBI), or other treatment centers have been given my support. My office partners with the Sheriff and the Tucson Police Department to provide Crisis Intervention Training (CIT) to law enforcement officers for this purpose. I have supported the Tucson Police Department's efforts to obtain federal and private grant funding to support deflection initiatives.

Fair and effective prosecution is essential to the maintenance of law and order and public safety. After a felony arrest, the determination to file charges and initiate a prosecution is a serious decision. My prosecutors undertake a *legal review* and assessment of all law enforcement arrest charges, including drug arrests. Each case is unique and must be considered on its own facts and merits. Our decision whether to issue formal charges on behalf of the State in the cases presented is based on reviewing

the evidence and applying state law to the facts in order to determine whether sufficient credible, admissible evidence exists to warrant the filing of charges.

Prosecutors in my Office receive cases presented to us by the 30 local, state, and federal law enforcement agencies that make felony arrests. These arrests drive my Office's *charging* decisions. As prosecutor, I represent the State of Arizona, and I have taken an oath to uphold the laws of the State. It is our statutory duty under A.R.S. §11-532, as well as our ethical duty, to review each felony arrest presented by law enforcement to the Office for prosecution to assess whether the evidence is sufficient to prove the charges beyond a reasonable doubt to a jury. This is a significantly higher standard than that required for law enforcement to make an arrest. Roughly 50% of all felony cases presented by law enforcement officers are declined for prosecution based upon our legal judgment.

LEADING THE WAY IN CRIMINAL JUSTICE REFORM:

My general philosophy is twofold. First, aggressively prosecute drug dealers, their suppliers, and bulk couriers, especially those distributing drugs to minors in our schools and parks. Second, facilitate treatment in lieu of prosecution or incarceration for non-violent, non-dangerous addicts. The manner in which we implement this philosophy is nuanced and complicated, because in some areas we have a significant degree of legal discretion, while in other areas we are limited by state laws that we are legally and ethically bound to follow and implement.

As a leader in criminal justice reform, my Office does not seek to jail offenders for possessing marijuana for personal use. Nothing could be further from the truth. In Pima County, under my Office's long-standing and continuous policies, *possession of less than two pounds of marijuana* is treated like a traffic citation when the individual has no outstanding warrants or other concurrent criminal allegations. Our decades-long policy permits police officers to issue a paper citation for marijuana possession under two pounds, rather than make a felony arrest. The person cited can obtain permanent dismissal of the charges simply by attending an education class.

My Office also does not seek to send offenders to jail or prison just for personal possession of small quantities of narcotic or dangerous drugs. Those arrested for possessing small quantities of methamphetamines, cocaine, heroin, fentanyl, and other narcotic and dangerous drugs must be arrested and taken into custody per state law. But, they generally are released at their Initial Appearance in less than 12 hours (*with no objection from my Office*).

Those possessing small quantities of these dangerous and narcotic drugs are then offered diversion from prosecution through a program managed by my Office through which they can have the charges against them dismissed upon completion of an appropriate, short-term, therapeutic consequence as determined by a qualified medical clinician. This may be an education class, outpatient treatment, or residential treatment, depending upon the individual's level of addiction, if any.

Those repeatedly arrested by police for drug possession may be prosecuted, but they are not always sent to prison. Instead, if substance addicted, they are released into the

community where they have the opportunity to receive drug treatment under supervision, as well as wraparound recovery support services, through Drug Court, a program initiated by my Office, or the Drug Treatment Alternative to Prison (DTAP) Program, a separate program initiated and also managed by my Office. Offenders arrested for selling small quantities of drugs to support their own addictions are also offered community supervision under the DTAP Program. The DTAP Program saves lives, saves money, and reduces recidivism, according to three independent studies by outside evaluators.

Assuming the evidence is sufficient, non-violent drug involved individuals arrested with personal use amounts of narcotic or dangerous drugs are charged, not just because they have committed a violation of state statute, but also primarily in order to use the court's power to force them into treatment and judicially supervised rehabilitation programs through the use of Drug Court, which has been shown to be a highly effective means to alter an offender's substance abuse behavior with a combination of judicial supervision, escalating sanctions, incentives, mandatory drug testing, treatment, and strong aftercare programs.

Significant and broad prosecutorial discretion occurs with the disposition of these cases. We exercise that discretion to the maximum extent possible to refrain from incarcerating those who are substance addicted and would benefit from treatment and rehabilitation.

We offer multiple diversion programs through which an individual charged with drug possession can avoid prosecution altogether, and plea programs through which an addicted individual charged with drug possession or small quantity sales can receive treatment in lieu of incarceration. We have obtained millions of dollars in grants in order to do so. My Office is at the forefront, statewide and nationally, in this regard, as evidenced by our *Diversion* and *Drug Treatment Alternative to Prison Programs*.

I have done everything within my legal discretion as a prosecutor to ensure that those suffering from addiction who do not pose any public safety threat should have the opportunity to receive treatment through Drug Court, DTAP, and Diversion. This is a highly unique prosecution effort and is not replicated in any other Arizona prosecutor's office.

The remainder of this memorandum responds to (1) the March 2, 2018 memorandum, attached to Mr. Huckelberry's memorandum, received from the Public Defense Services Director and the Public Defender regarding their perspective on the nature and cost of felony drug cases in Pima County (which appears to be a follow-up to the Public Defender's January 14, 2018 memorandum regarding his perspective on cost drivers to the justice system); (2) the March 19, 2018 memorandum from County Administrator Huckelberry; and (3) the March 21, 2018 memorandum from Supervisor Bronson inquiring about my position on HB Bill 2241 – a bill that was introduced in the Arizona State Legislature, and about my DTAP Program.

DATA AND STATISTICS RELATING TO DRUG PROSECUTION IN PIMA COUNTY

The Public Defender, in his January 14 memorandum, stated that “small-scale narcotics offenses” are overwhelmingly disproportionate cost drivers for the Pima County Justice System, citing a statistic that 36% of all felony charges involve dangerous and narcotic drug offenses. This is very misleading. Although 36% of all felony charges involve dangerous and narcotic drug offenses, they are by no means all or mostly “small-scale” offenses. Indeed, as was later acknowledged by the Public Defender in his subsequent memorandum, a significant percentage of those charges involve drug trafficking.

In addition, only a small fraction of those arrested and charged with drug-related felonies are charged *solely* with simple drug possession for personal use. As stated above, all possession-only defendants are eligible for Felony Drug Diversion in lieu of prosecution for the first offense. For several subsequent possession-only offenses, they are offered treatment in lieu of incarceration through Drug Court and DTAP, with increasing treatment interventions and recovery support services.

The fact is that most of those arrested and charged in felony drug cases in Pima County are charged with selling or possessing for sale significant quantities of drugs, or they have other felony charges in addition to the drug charges, such as burglary, trafficking in stolen property, robbery, theft, etc.

In the seven-month timeframe used by the Public Defender Joel Feinman and Public Defense Services Director Dean Brault (July 1, 2017 through January 31, 2018), 3,928 individuals were charged with felony crimes. Of that number, 1,399 (36%) had felony drug charges issued. Many of these defendants were also charged with multiple felonies (burglary, theft, trafficking in stolen property, assault, armed robbery, etc.), not just drug possession or sales. Moreover, significant numbers of them had multiple prior felony convictions as well.

A prosecution does not mean a trial. Ninety-six percent of cases filed have a non-trial disposition. Since last July 1, 2017 through April 20, 2018, there have been a total of 101 trials. Three of those trials were defendants charged with possession of narcotics for sale or sale of narcotics, and one trial was a marijuana possession for sale case. Drug trials are 3.8% of our trials.

Trial 1: A search warrant of defendant’s house turns up multiple packages of marijuana, including a small half-pound bundle, and 21.3 lbs. in the bedroom a few feet from an infant’s crib. Bank records reveal \$107,000 in unaccounted funds. Defendant tells detectives that he repackages the marijuana for his supplier. He is charged with multiple counts, including money laundering to which he pled guilty. Defendant has a prior conviction for burglary.

Trial 2: A search warrant of defendant’s home reveals 7.6 gm methamphetamine, a scale and other drug paraphernalia. Defendant has three prior convictions: possession of a deadly weapon by a prohibited possessor, first degree criminal trespass and

solicitation to possess a dangerous drug. At the time of this arrest, he was on release pending an aggravated robbery charge.

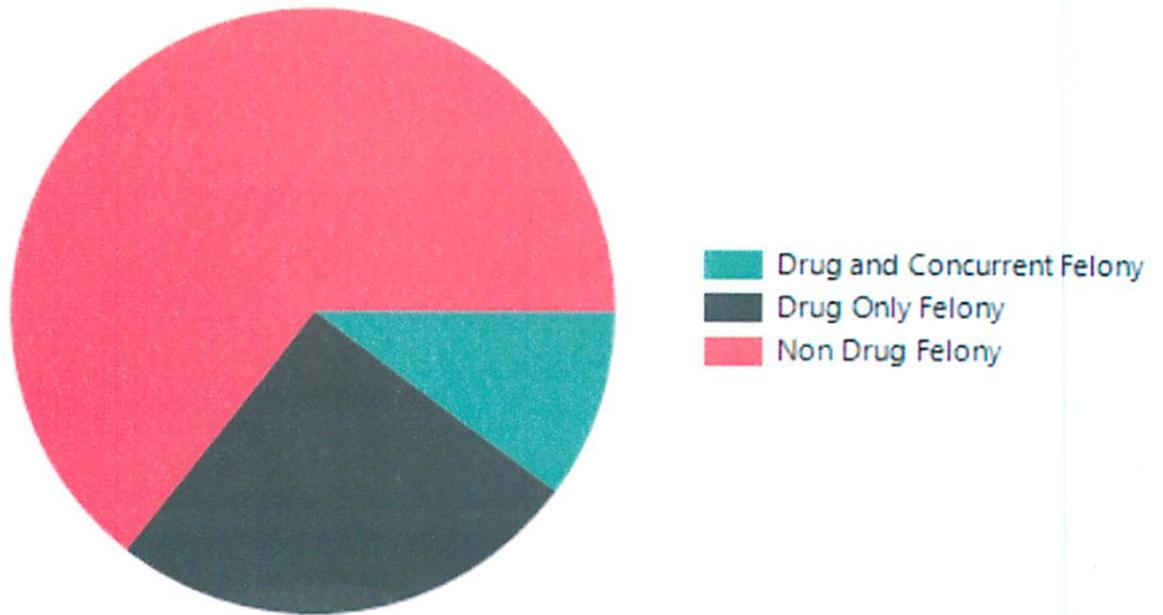
Trial 3: This trial involved multiple defendants charged with seven separate hand-to-hand sales of methamphetamine to an undercover detective, culminating in the sale of a half-pound of methamphetamine. One defendant is a prohibited possessor, another was on parole for first degree murder.

Trial 4: This trial involved a sale of 9 gm. heroin to an undercover officer. The defendant had four prior convictions for first degree criminal trespass, and three separate convictions for aggravated assault with a deadly weapon.

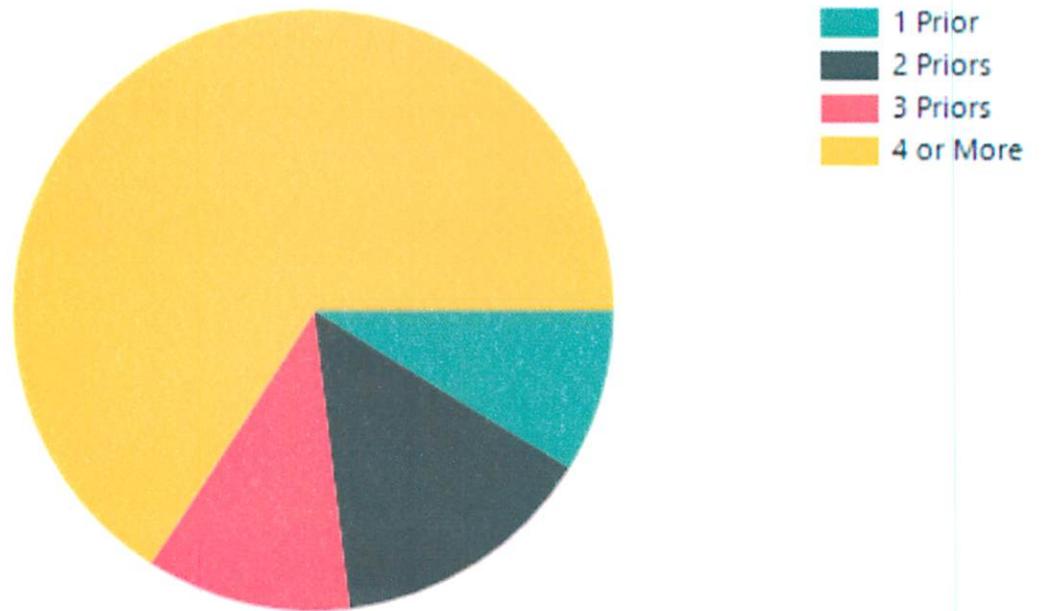
A recent example of a felony drug defendant pending trial this month: Defendant, RM, was stopped by police for expired auto license tags. He was also driving on an expired license and had 3 outstanding felony warrants, one for non-appearance on a current pending felony for which he had been released ROR. A search of his car reveals a syringe with residue under the driver's seat, on the passenger floorboard is a backpack with a 9mm loaded handgun with a bullet in the chamber. Also in the backpack is a baggie that tests positive for 27.8 gm methamphetamine, and another baggie that tests positive for 14.4 gm heroin. On the passenger floorboard are empty baggies, a scale, 4 cell phones, and a handwritten note with names and dollar amounts. The defendant, a prohibited possessor, has 7 prior convictions, one of them for a violent DV assault.

Here are the data revealing the types of cases prosecuted by my Office:

All Felony Defendants Charge Type Breakdown



Felony Drug Defendants Priors Breakdown



Pima County Attorney' Office

Drug Cases

Date Range 7/1/17 - 1/31/18

Overall Summary

Description	Defendants Felony Priors				Defendants Concurrent Felony Charges					
	Defns	Any Priors	Drug Priors	No Priors	Drugs	DUI	DV	Prop	Vio	Other
Defendants with NO Drug Charges	2529	312	233	2217	0	256	89	1157	1025	464
Defendants WITH Drug Charges *	1399	788	600	611	1395	20	1	120	59	4
Drug Only Charges	999	533	405	466	999					
Drug + Concurrent Felony Charges	396	251	191	145	396	20	1	120	59	0
Paraphernalia and Other only	4	4	4	0						4
Totals for July thru January	3928	1100	833	2828	1395	276	90	1277	1084	468

Source: PCAO CAPS; CAMMS

* Defendants with Marijuana, Narcotic or Dangerous drug charges generally also include Paraphernalia charges

This chart reflects that only 466 of the total 3,928 defendants – just 12% – were charged only with some type of drug charge(s) without additional, concurrent felony charges and had no prior felony convictions.

Defendants with Felony Drug Charges and Concurrent Felony Charges

All Defendants with Felony Drug Charges and Concurrent Felony Charges					Concurrent Felony Charges				
Description	Defns	Defns No Priors	Defns w/Priors	w/Drug Priors	DUI	DV	Prop	Vio	Other
Marijuana only	41	13	28	19	5	0	9	13	18
Narcotics only	112	40	72	51	7	0	34	13	64
Dangerous only	130	48	82	64	6	1	53	20	59
Marijuana + Narcotics	14	6	8	7	0	0	4	3	8
Marijuana + Dangerous	13	6	7	5	1	0	1	3	8
Narcotics + Dangerous	66	21	45	37	0	0	18	6	43
Dangerous + Marijuana + Narcotics	20	11	9	8	1	0	1	1	17
Total	396	145	251	191	20	1	120	59	217

Source: PCAO CAPS; CAMMS

* The total for All Defendants includes combinations not broken out above.

** Defendants with No Priors and No Concurrent

Looking at the defendants charged with felony drug charges and additional types of felony charges, reveals that many also have prior felony convictions. The chart above reflects concurrent felony charges with which many defendants were charged in addition to felony drug charges. Some of these concurrent felony charges include violent crimes, domestic violence, DUI, and property crimes (some of which are dangerous, such as armed robbery, aggravated assault, armed residential burglary).

Defendants with Felony Drug Charges Only

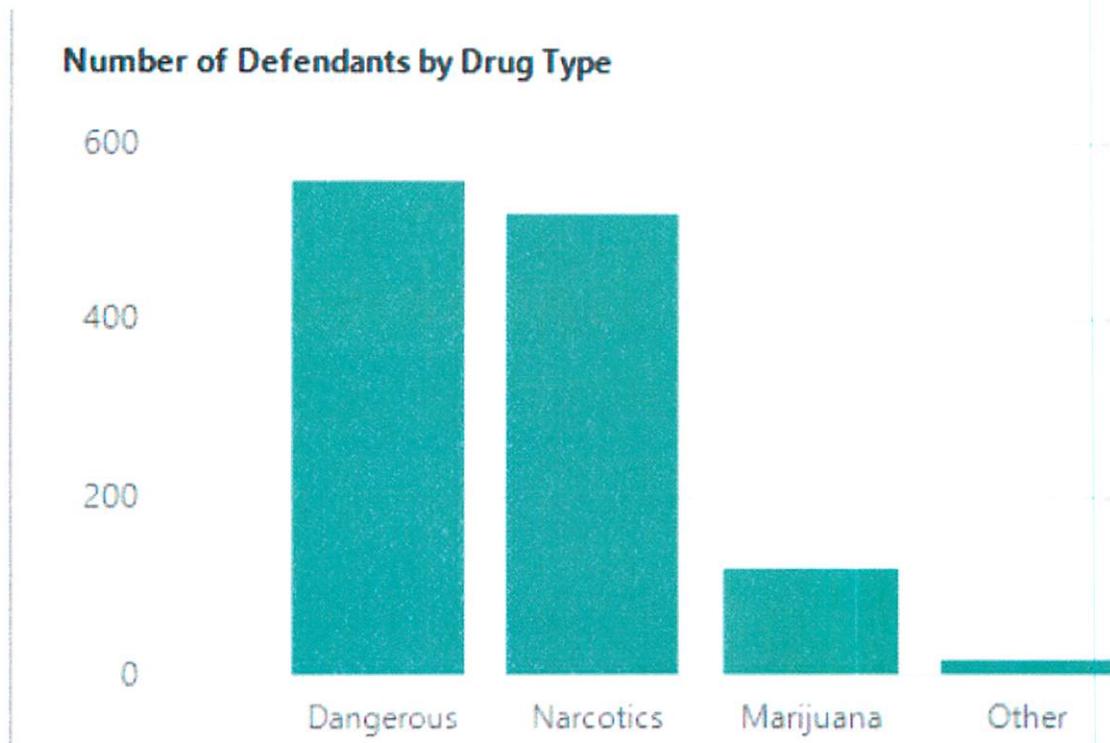
Sale or Transport Only Defendants				
Description	Defns	Defns No Priors	Defns w/Priors	w/Drug Priors
Marijuana only	50	4	4	46
Narcotics only	44	13	10	31
Dangerous only	34	14	11	20
Marijuana + Narcotics	3	1	0	2
Marijuana + Dangerous	1	1	1	0
Narcotics + Dangerous	16	12	10	4
Dangerous + Marijuana + Narcotics	0	0	0	0
Total	148	45	36	103

Possession Only Defendants				
Description	Defns	Defns No Priors	Defns w/Priors	w/Drug Priors
Marijuana only	1	0	1	1
Narcotics only	306	148	158	122
Dangerous only	347	138	209	153
Marijuana + Narcotics	12	9	3	3
Marijuana + Dangerous	18	4	14	12
Narcotics + Dangerous	115	43	72	54
Dangerous + Marijuana + Narcotics	13	4	9	7
Total	812	346	466	352

Source: PCAO CAPS; CAMMS

These charts show that just 346 of the total 3,928 defendants – less than 9% of those charged with felonies during this seven-month period – were charged solely with drug possession (not sale or transport) and had no prior felony convictions and no concurrent felony charges. Beginning on September 26, 2017, all of these defendants were eligible for Felony Drug Diversion and were able to have the charges against them dismissed.

This percentage is consistent with the Pima County Sheriff's Department Drug Offense Booking Summary that is shared weekly with the members of the Justice Coordinating Council. The report issued by the Sheriff on Friday, April 6, 2018 for the previous seven days reflects the highest charge holding an inmate was identified as "felony drug possession for use" in only 26 out of the 264 felony bookings that week – 9.8%. (Dismissals by prosecutors at the felony charging stage account for the very slight differential in the percentage rate between bookings and charges prosecuted.)



Felony drug cases primarily involve narcotic or dangerous drugs, though a small percentage of trafficking, DUI, and multiple-drug possession cases involve marijuana.

STATUTORY DRUG THRESHOLD AMOUNTS:

Arizona Revised Statutes outlining and detailing drug crimes do not establish any category known as “small-scale” narcotics offenses. That term, used by the Public Defender and Public Defense Services Director in their memorandum is not defined anywhere in the law. In their memorandum, the Public Defender and Public Defense Services Director discussed drug cases involving less than one gram or more than one gram in weight, as if that were some magic number.

However, depending upon the drug, one gram may be a little or it may be a lot. For this reason, state law establishes threshold amounts that result in a prison sentence, which vary depending on which drug is involved. These thresholds amounts are indicators that the possessor may be involved in trafficking or selling the drugs. For marijuana, the amount is 2 pounds; for methamphetamine it is 9 grams; for cocaine it is 9 grams; for LSD it is ½ milliliter; for PCP it is 4 grams or 5 milliliters; and for heroin it is 1 gram. A.R.S. § 13-3401(36).

One gram of marijuana may make only one marijuana joint, a single dosage unit. By contrast, however, one gram of heroin will make as many as 10-12 dosage units and may be fatal. The first is clearly just enough for one person’s use, but the latter is a quantity indicating possible involvement in sales or distribution activity.

THE OPIOID EPIDEMIC: HEROIN, FENTANYL, AND CARFENTANIL:

The opioid crisis keeps getting worse, in part because new types of drugs keep finding their way onto the streets. Fentanyl, heroin's synthetic cousin, is among the worst offenders. Carfentanil, the most dangerous, potent synthetic opioid, is beyond horrifying.

These synthetic opioids are deadly because they're so much more potent than heroin, as shown by the photograph below. On the left is a potentially lethal dose of heroin. In the middle is a 3-milligram dose of fentanyl, enough to kill an average-sized adult male. On the right, a deadly amount of carfentanil.

According to the Center for Disease Control and Prevention, heroin is 4-5 times more potent than morphine; fentanyl is up to 100 times more potent than morphine; and carfentanil is 10,000-100,000 times more potent than morphine. Just touching the skin with minuscule amounts of fentanyl or carfentanil can be deadly.



Quantities of potential overdose: heroin (small fraction of a gram), fentanyl, and carfentanil

Different drugs differ substantially not only in their statutory threshold quantities, but also in the way they cause addiction, overdoses, and death. For example, carfentanil, fentanyl, and heroin are not "recreational" drugs. They are tremendously addictive, often from the first use. Moreover, any overdose of these drugs is extremely deadly, and may occur from a single hit.

Pima County has seen a steady increase in overdose drug deaths since 2010, when there were 273. Just five years later, in 2015, 379 drug overdose deaths were recorded. And in 2016, Pima County saw 356 drug overdose deaths. Heroin, fentanyl, oxycodone, morphine, hydrocodone, and other opioids and methamphetamine accounted for most of the 356 fatal overdose deaths. Pima County fatal overdose deaths from fentanyl have increased from 7 in 2014 to 23 last year, and 7 have been reported in the first quarter of this year. We currently have two pending cases where defendant drug dealers are charged with manslaughter for the fentanyl overdose deaths of their buyers.

It is for this reason that I supported legislation introduced as HB 2241 to make the manufacture, sale, and trafficking in these three drugs subject to heightened penalties. These particular drugs pose a very grave and deadly threat to public safety.

It should be noted that HB 2241, which did not pass, would have increased the mandatory minimum sentence for selling and trafficking in these drugs, not for possession. It would not have prevented us from continuing to offer the DTAP Program to those drug-addicted defendants arrested for possession for sale or involved in hand-to-hand sales to support their addiction. There was nothing in HB 2241 that would have eliminated prosecutorial discretion in this regard.

COSTS OF POST-INDICTMENT DRUG CASES:

The summary information presented by the Public Defender and Public Defense Services Director regarding costs of post-indictment drug cases is highly inaccurate in many key respects. Their misconception is that this office spends a significant percentage of its budget prosecuting minor drug offenses. This is simply false. The data being used in their report fails to distinguish between serious, violent felons who are facing drug charges and addicts who merit treatment in lieu of prison. They fail to take into consideration that many defendants are charged not just with drug possession, but have concurrent felony charges and/or numerous prior felony convictions.

The data they present makes no distinction among the types of drugs involved, or whether the charges relate to trafficking or simple possession. Most notably, they assess the cost of prosecuting "low-level" drug crimes by tallying counts within indictments rather than cases against individual defendants, which is a serious flaw. We endeavored to obtain the underlying Public Defense data in an attempt to validate, assess, and compare it to our own data; however, we were informed by Public Defense Services that the vast majority their data could not be released to us.

In a broader sense, the Public Defense Services and Public Defender report also misses another key point. It includes the prosecution costs of DTAP and Drug Diversion the same as the costs of other drug prosecutions, thus suggesting my Office should be criticized for the very programs that combat addictions, save lives, and avoid sending addicts to prison. It should also be noted that the summary chart they present reflecting a \$26 million cost for the Tucson Police Department Patrol Division and the Pima County

Sheriff's Operations Division is comprised almost exclusively of personnel costs for patrol officers and deputies.

The Tucson Police Department's published budget reflects that 99.16% of its Patrol budget consists of salaries and employee-related benefits to officers. Thus, the only way to reduce those costs would be to eliminate current commissioned peace officers. Doing so would present a threat to public safety.

DTAP COST ANALYSIS STUDIES AND PARTICIPANT DEMOGRAPHICS:

The DTAP Program has been proven to reduce recidivism, save lives, and save taxpayers millions of dollars. Three cost-benefit analyses performed by independent, outside evaluators in 2012, 2013, and 2017 demonstrate that participants in the DTAP Program have a recidivism rate less than half that of those sent to prison. These studies are publicly available on my Office website at: <http://www.pcao.pima.gov/dtap.aspx>.

Our most recent study shows the DTAP cost of treatment under court and probation supervision with wraparound recovery support services for three years is roughly \$17,000; whereas the cost of prison (for a shorter time period) is roughly \$48,000.

Each year, at my request, independent evaluators assess the DTAP program data quantitatively. They also qualitatively review the DTAP Program's operations and adherence to evidence-based best practices as developed by the National Drug Court Institute, and make recommendations for improvements to the program.

Based on their evaluations and reports, operational improvements to the DTAP Program are made each year. Our agency partners – including the Court, the Probation Department, treatment providers, and other social service agencies involved with wraparound recovery support services – make operational improvements, as well.

In 2015, we learned that individuals of Hispanic or Latino ethnicity were an underserved population in the DTAP Program, comprising only 16% of the program census – a percentage disproportionate to the demographics of Pima County and the overall criminal justice population. At my request, an investigation into the causes found that many rejections of Hispanic or Latino individuals could be attributed to immigration issues. These defendants could not provide proof of legal residence in the U.S., and under federal law, they were ineligible for services. Other causal factors included potential implicit bias in the evaluation process. Individuals being evaluated for the program had been administered clinical assessments in English only. Additionally, the recommendations made to my Office by clinicians and outside agency representatives for those who were likely to succeed and should be offered the program left room for subjective opinion.

As a result of this information, I requested a special outside evaluation (complete with focus groups of participants), recommendations for modifications to our intake process, and training on diversity and inclusion and implicit bias. As a result, we implemented

the following three changes to the DTAP Program to remove subjective elements from the DTAP intake process:

- (1) The determination of medical necessity for the program was transferred from the Probation Department to an outside clinical agency;
- (2) The American Society of Addiction Medicine (ASAM) assessment tool, a clinical, statistically-validated tool for substance use disorder, replaced the Offender Screening Tool (OST), a probation tool, as the mechanism for determining whether a defendant meets medical necessity to enter the DTAP Program; and,
- (3) The ASAM assessment tool is now administered by a bilingual licensed clinician who is able to conduct the interview in either Spanish or English.

Moreover, we urged our treatment provider partner agencies to ensure that each employs bilingual staff. These modifications were implemented in 2015-2016, and as a result, by 2017, the proportion of Hispanic/Latino individuals in the DTAP Program increased from 16% to more than 30%. Currently, Hispanic/Latino individuals make up 36% of the DTAP participant population.

SUGGESTIONS FOR THE FUTURE TO IMPROVE THE CRIMINAL JUSTICE SYSTEM AND REDUCE COSTS:

I appreciate the implementation to date of several of my suggestions to improve the Criminal Justice System and to reduce its costs. The recommendations included in my April 26, 2017 memorandum that have been implemented to date include: continuation of the Safety + Justice Challenge; coordination of databases containing medical and mental health information for jail detainees; encouraging judges to utilize alternatives to bail for misdemeanors and to focus more on public safety when making release decisions at Initial Appearances; implementation of a Felony Drug Diversion Program; exploration of possible consolidation of the misdemeanor courts; and expansion of non-crisis services for those suffering chronic mental health, behavioral health, and substance use disorders.

As I previously wrote, there are a couple of additional means, not yet implemented, that may be explored as part of an effort to improve the way the criminal justice system handles those suffering from substance use disorders.

We need a means to identify and provide treatment and wraparound recovery support services to those who, though not caught in possession of drugs, are arrested for misdemeanor crimes, such as shoplifting, trespassing, and misdemeanor assault, committed as a result of their drug addiction. These individuals should be given the same opportunities for treatment as those arrested for misdemeanor or minor felony crimes who are found to possess illegal drugs at the time of their arrest.

The first step is to develop a misdemeanor drug court. I have taken the lead in preparing a grant application to the federal Substance Abuse and Mental Health Services Administration to support and expand the existing DTAP and Drug Court

programs for felons and to establish in 2019 a new, **Consolidated Misdemeanor Problem-Solving Court** that would help those suffering from substance use disorders, as well as mental illness, who repeatedly commit misdemeanor crimes as a result of their illness and addiction.

My Office has partnered with the Superior Court, the Consolidated Justice Courts, the Tucson City Court, the other municipal courts, the Tucson City Prosecutor, the Tucson Public Defender, and Pima County Public Defense Services, as well as numerous community-based agencies, including the regional behavioral health authority, several treatment agencies, and other service providers, on this project. Further expanding resources to, and reducing silos between, existing misdemeanor specialty courts will result in additional individuals being referred to these therapeutic accountability programs.

The second step is to expand use of arrest deflection programs, otherwise known as diversion by law enforcement, as has been discussed over the past couple of years at the Justice Coordinating Council and in various meetings relating to the Safety + Justice Challenge funded by the MacArthur Foundation. Indeed, I sent a representative, along with representatives from the Tucson Police Department and the Pima County Sheriff's Department, to explore the LEAD law enforcement Deflection Program in Seattle, Washington.

While I have some concerns regarding the specific manner in which the LEAD program has been implemented in Seattle, I am generally open to law enforcement agencies piloting a similar deflection program here in Pima County that would further the health and safety of those deflected by ensuring that they are connected to appropriate services. I recently allocated significant time of two of my staff to assist Pima County Administration, the Office of Criminal Justice Reform, and Grants Management in preparing a grant application for funding to expand the use of deflection by the Tucson Police Department.

Finally, I support preventive measures that may be undertaken by our local governments, medical providers, and community-based service agencies to get addicts treatment and other services before they are arrested, are transported by EMTs to an emergency room, or die from an overdose, so that the criminal justice and emergent medical systems need not become involved unless truly necessary. I am pleased and impressed with the efforts recently initiated by Assistant County Administrator Wendy Petersen and by Safety + Justice Challenge Program Director Terrance Cheung to bring together all of these agencies to work on this type of solution. And I am pleased to have my Office participate actively with this project, as well as the other projects associated with the Safety + Justice Challenge.

ADDENDUM:

STATE DRUG LAWS:

Arizona Revised Statutes criminalize the possession, possession for sale, sale, transportation for sale, and importation of certain drugs, including, but not limited to marijuana, dangerous drugs, and narcotic drugs. State law classifies methamphetamines and certain other drugs as “dangerous drugs,” and “narcotic drugs” including cocaine, heroin, fentanyl, and opioids, among other drugs.

Under Arizona law, possession of marijuana for personal use is a Class 6 felony – the lowest-level felony – and this crime may be treated as either a felony or a misdemeanor. In contrast, possession for personal use of dangerous drugs and narcotic drugs are more serious Class 4 felony crimes, and the Arizona Legislature has *not* afforded prosecutors or the courts discretion to treat these crimes as a misdemeanor. The sale or possession for sale of any amount of a narcotic or dangerous drug is a more serious crime – a class two felony, and the law likewise gives no discretion regarding charging these cases as anything other than a felony.

These separate classes of felonies are treated differently under state law in terms of sentencing upon conviction. Those convicted of certain felonies are eligible for probation, while those convicted of other felonies are ineligible for probation and will be sent to prison upon conviction. The sentence is determined by the Court through a judge’s exercise of his or her discretion within the sentencing range established by state law for the particular crime of which the defendant is convicted, whether by jury verdict at a trial or by a guilty plea in a plea agreement.

THRESHOLD DRUG AMOUNTS:

A.R.S. §13-3401 (36) defines “threshold amounts” for illegal substances by way of either weight or market value. Sales or possessions for sale (including transportation for sale) exceeding the threshold amount require a mandatory prison sentence. Convictions for sale or possession for sale less than the threshold amount are probation-available offenses at sentencing at the discretion of the Judge. However, methamphetamine is an exception to the above, statutorily requiring a mandatory prison term for the sale, manufacture, or possession for sale of methamphetamine in any amount, including amounts under the previously codified meth threshold amount.

PROSECUTION OF DRUG CASES:

The overwhelming majority of all felony cases charged by my Office are resolved by way of plea bargains or diversion, and approximately 99% of all personal use drug possession cases are resolved through diversion or plea agreements. I have consistently pursued a policy of offering treatment alternatives to prosecution and treatment alternatives to incarceration. And, I have been pro-active in seeking to obtain the necessary resources to do so.

I am very proud of the fact that my efforts in this regard have put Pima County at the forefront of the criminal-justice-reform movements statewide and nationally to provide treatment to those suffering from drug addiction.

I view justice system involvement as an opportunity to get individuals suffering from addiction the treatment needed to save their lives, reduce recidivism, and save money by reducing the costs that their addiction imposes on our community. The National Drug Court Institute has published data demonstrating scientifically that drug court programs work better than jail or prison, better than probation, and indeed better than voluntary treatment alone. <http://www.nadcp.org/wp-content/uploads/2018/03/NADCP-Brief.pdf>.

Obviously, some individuals suffering from addiction pose a public safety threat. Many individuals charged with simple drug possession for personal use are also charged with homicide, sexual assault, drive-by shooting, aggravated assault, home invasion, armed robbery, armed burglary, domestic violence resulting in serious physical injury, or other serious crimes. These individuals are prosecuted for the dangerous and violent crimes they have committed, as well as drug possession, because the evidence shows they committed that crime as well. We often reduce or waive the drug charges in connection with a plea agreement when the defendant accepts responsibility and appropriate consequences for the more serious crimes charged.

POSSESSION OF MARIJUANA OR MARIJUANA PARAPHERNALIA:

As previously stated, state law allows the prosecutor discretion to prosecute marijuana possession less than two pounds as a felony or as a misdemeanor. Decades ago, state and local law enforcement agencies were informed that my Office would not prosecute possession of marijuana less than two pounds as a felony. In addition, law enforcement agencies were urged not to arrest an individual for possession of marijuana for personal use and not to transport the individual to the jail, but instead issue a misdemeanor citation. Law enforcement agencies, which have their own discretion in this regard, have agreed with this request and issue paper misdemeanor citations for marijuana possession for personal use and release the suspect, rather than making a custodial arrest in which the suspect is transported and booked into jail.

Additionally, prosecutorial discretion is exercised in connection with the disposition of these misdemeanor possession cases by offering individuals diversion, allowing them to avoid even a misdemeanor conviction if they attend an education class. Individuals who successfully complete the misdemeanor diversion program (93%) have their cases dismissed. Those few who fail diversion (after receiving multiple attempts to assist them to succeed) may be prosecuted in Justice Court, with a misdemeanor conviction resulting in unsupervised probation.

It is also my office policy to treat possession of drug paraphernalia alone, such as a bong, pipe, empty syringe, or syringe with just trace amounts of drugs, the same way we treat marijuana possession – that is, to offer misdemeanor diversion. Individuals possessing just paraphernalia relating to dangerous or narcotic drugs are screened by a

clinician to determine whether they suffer from a substance-use disorder, and the clinician assigns the conditions of misdemeanor diversion. For individuals who do not suffer from addiction, an education class is the consequence. For those who are addicted, the clinically indicated level of treatment (outpatient, intensive outpatient, or residential) is the consequence.

POSSESSION OF DANGEROUS OR NARCOTIC DRUGS:

Unlike marijuana possession, Arizona state law makes it a Class 4 felony to possess any dangerous or narcotic drugs for personal use, such as heroin, methamphetamines, fentanyl, cocaine, and other similar drugs. Prosecutors lack the legal discretion to treat such possession as a misdemeanor, and possession of narcotic drugs may only be charged as a felony. However, prosecutorial discretion permits offering diversion or a plea. I have exercised that discretion to the fullest extent I can to implement my philosophy and achieve my policy goal of offering treatment in lieu of prosecution or incarceration.

DISCRETIONARY PROSECUTORIAL INTERVENTIONS:

Within the bounds of prosecutorial discretion and to the maximum extent that available resources allow, I have established a continuum of innovative prosecutorial interventions, with a focus on evidence-based treatment and wraparound recovery support services for those arrested for simple possession of dangerous or narcotic drugs. As a result, in Pima County, it is not until an individual is arrested for the fourth or fifth time on felony drug possession charges, and subsequently fails treatment after multiple attempts to assist him or her with compliance, that imprisonment becomes the consequence. Here are the steps along the continuum that have been implemented:

- 1. First Felony Drug Possession Arrest – *felony diversion* alternative to prosecution:**

In late 2017, funds became available for the first time to institute a diversion opportunity for those charged with felony drug possession for personal amounts of dangerous or narcotic drugs (such as heroin, methamphetamines, fentanyl, and cocaine). I had lobbied for and received a grant for treatment funding to my Office from the State of Arizona. Those state funds – combined with federal funds for drug treatment made available to Arizona beginning in 2014 through our state's expanded Medicaid program (AHCCCS) under implementation of the Affordable Care Act – along with the opening of the Community Bridges, Inc. facility in 2017, made it possible for the first time to institute a pre-prosecution Felony Drug Diversion Program.

Under this program, we agree not to prosecute first time felony arrestees charged with possession of dangerous or narcotic drugs for personal use, conditioned upon the arrestee agreeing to complete drug treatment, counseling, education, or community service.

Charges are suspended upon enrollment and dismissed upon successful completion. To successfully complete Felony Drug Diversion, a clean drug test is

required. However, a positive drug test may result in additional therapeutic interventions and extension of the time to complete diversion. For those who successfully complete the diversion program, there is no felony conviction and no sentence. Those who fail are prosecuted and, if convicted, typically receive probation (with treatment and recovery support services). They are not incarcerated.

This program is extremely valuable. It saves lives, and saves significant financial resources for Pima County in terms of criminal justice costs, emergency room costs, and more. In addition, it saves those who successfully complete the program from suffering the negative collateral consequences associated with a felony conviction. (I have successfully lobbied for changes in state law to reduce some of the collateral consequences for those convicted of felony drug possession so that they now are eligible for public benefits, including aid to needy families and the Supplemental Nutrition Assistance Program (SNAP), which facilitates successful re-entry for these individuals. Nevertheless, additional collateral consequences remain.)

2. Second and Third Felony Drug Possession Arrests – *probation* alternative to prison:

Those arrested a second time for personal possession of dangerous or narcotic drugs are offered a plea to probation. The Adult Probation Department determines the terms and conditions of probation, whether it will be standard, unsupervised, or intensive probation, or whether the probationer will be placed on the supervised Drug Court probation caseload where they will receive treatment and recovery support services. Generally, the Adult Probation Department imposes greater supervision and offers more robust services to those convicted for a third time after having previously participated in probation.

I was an active member of the team that developed and implemented the Superior Court Drug Court two decades ago. And, within the past eight years, I have applied for and received multiple federal grants from the U.S. Department of Justice, Bureau of Justice Assistance, and the Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, to provide enhanced funding to the Adult Probation Department specifically for our Drug Court. This funding makes it possible for the Probation Department to offer Drug Court participants expanded treatment and recovery support services to help those probationers succeed.

3. Fourth Felony Drug Possession Arrest – *Drug Treatment Alternative to Prison (DTAP)*:

Attached are brochures summarizing the prosecutor-led Felony Drug Diversion program and the prosecutor led DTAP Program.

As a leader in criminal justice reform in Arizona, I initiated and created the Drug Treatment Alternative to Prison (DTAP) Program in Pima County in 2011. Establishing this highly innovative program required successfully obtaining two federal grants – one from the U.S. Department of Justice, Bureau of Justice Assistance, and another from the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration. Sustaining and expanding this program has required my Office successfully obtaining multiple additional federal and state grants in the amount of millions of dollars. DTAP is a post-conviction sentencing alternative available to those who plead guilty to drug possession who otherwise would be sent to prison upon conviction based upon multiple prior felony convictions.

Instead of prison, participants receive three years of community supervision beginning with 30 to 90 days of residential treatment followed by intensive outpatient treatment and transitional housing. DTAP participants are supervised under probation by a specialized team of both probation and surveillance officers. They must attend regular court review hearings and undergo drug testing several times each week. They receive extensive special recovery support services, including transportation, food, trauma-informed treatment, life skills training, education, and job training and job placement, among other services. Those who struggle in DTAP are afforded multiple opportunities to re-engage successfully with the program. Those who succeed in DTAP successfully complete probation and avoid prison altogether. Only those who fail DTAP, after being afforded multiple opportunities to succeed, are sent to prison.

We do not seek to fail participants in DTAP for relapses in their addiction, only for non-compliance with probation conditions (missing drug tests, appointments, and the like). Relapses are viewed as a part of recovery and are treated with therapeutic adjustments and additional supportive interventions.

I have continued to apply for and receive federal and state grants to maintain and expand the DTAP Program and to expand the types of treatment and wraparound recovery support services that are offered to DTAP participants. Such grant funding has paid for, among other things, a peer mentor for all DTAP participants, and a jobs developer who has a 100% success rate at finding jobs for DTAP participants despite their felony records.

The DTAP Program that I initiated and have managed and supported in Pima County since 2011 is the only one of its kind in the State of Arizona, and has been acknowledged with awards and recognition statewide and nationally.

4. Expansion of the DTAP Program:

In January 2014 and again in January 2018, the DTAP Program was expanded to include not only those repeatedly convicted of drug possession for personal use but also those convicted of sales of small quantities of drugs and other low-level felony property offenses to support their personal addiction, who otherwise would be sent to prison upon conviction. Instead of prison sentences, these eligible participants receive three years of community supervision with residential treatment followed by intensive outpatient treatment and transitional housing and other supportive services, as described above.

POLICIES AND PRACTICES REGARDING MAJOR DRUG TRAFFICKING AND SALES:

Those who engage in multiple sales of drugs over the threshold amount on different occasions, those who sell significant quantities of drugs, and those who possess significant amounts of drugs for purposes of sale are prosecuted to protect the public health and safety of the community. I concur with state law that imposes prison time on those who plague our community by flooding it with a deadly supply of poison.

The recent opioid epidemic and the ongoing methamphetamine epidemic are major crime drivers in Pima County. Because we are a border county, with large quantities of narcotic and dangerous drugs being trafficked internationally from the border through our community, there is significant criminal activity involving international narcotics trafficking, as well as local distribution and sales, contributing to crime in Pima County. This drug trafficking activity spins off armed home invasions, armed robberies of drug dealers, and other violent and dangerous crimes. The glut of supply coming through our County is siphoned off to local users, contributing to the intensity of the epidemic of addiction suffered by many of our residents. That addiction, in turn, fuels additional robberies, burglaries, and other property crimes committed by addicts desperate for a way to pay for the drugs they are compelled by addiction to consume.

Additionally, drug-related home invasions remain at high levels in Tucson and Pima County. Drug overdose deaths attributable to opioids and methamphetamine are at historical high water marks in Pima County. Overdose deaths attributable to fentanyl may cause even more such deaths in calendar year 2018. In 2017, several parks in Tucson became open-air drug markets for the sale of heroin and methamphetamine.

I believe that the criminal justice system's response to the opioid and methamphetamine epidemics must be twofold: first, interdict and interrupt the illegal supply and distribution of narcotic and dangerous drugs; second, reduce the demand for these harmful and addictive drugs. As previously noted, I have a balanced approach between aggressive prosecutions and working hard to reduce demand by providing multiple treatment alternatives to those suffering from substance use disorders and addiction.

On the supply side, federal, state, and local law enforcement officers do the best they can with their limited resources to interdict the supply of these drugs. In response to the arrests made by law enforcement agencies, my Office vigorously prosecutes serious

drug dealers, their suppliers and bulk couriers, as well as those who commit robberies, home invasions, burglaries, kidnappings, and thefts that victimize families and individuals in our community.

In order to protect the public, it is necessary to take the suppliers off the streets. Allowing these individuals to remain in the community, and co-mingling them with individuals struggling with addiction in a therapeutic environment, would place in jeopardy the recovery of those suffering from addiction and further traumatize them. It is my goal to protect those suffering from addiction from these predators.

A review of several months of data (for the same seven-month period referenced in the Public Defense Services report) indicates that the Felony Drug Diversion Program will be offered in 2018 to somewhere between 550-625 felony defendants charged for the first time with felony drug possession for personal use and drug paraphernalia (with no additional felony crime).

Drug Court generally has approximately 120 new participants each year, and DTAP now has approximately 65 new participants each year, including both those charged with drug possession for personal use and with small quantity drug sales or low-level felony property offenses.

All told, at least 735 defendants annually, which represents about ***25% of all defendants with felony drug charges, are offered treatment in lieu of prosecution or treatment in lieu of incarceration.***

The remaining 75% of defendants charged with drug cases fall into one of three categories: (1) they are serious drug dealers, suppliers, or bulk couriers; (2) they are charged with other felonies in addition to drug possession; and/or (3) they have prior convictions for violent or dangerous felony crimes that render them ineligible for Diversion, Drug Court, or DTAP.

cc: Chuck Huckelberry, County Administrator
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