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# MEMORANDUM

**To:** Wendy Petersen, Assistant County Administrator for Justice and Law Enforcement

**From:** Barbara LaWall, Pima County Attorney 

**Date:** July 3, 2018

**Subject:** Philadelphia DA's February 2018 policy statement

You have asked, in your capacity as Chair of the Justice Coordinating Council, for my comments on the "New Policies Announced February 15, 2018" promulgated by newly-elected Philadelphia District Attorney Larry Krasner and whether Pima County should pursue similar policies.

I have reviewed Mr. Krasner's new policies, which appear to be internal office policies he has adopted that state they are "presumptive, not mandatory requirements" for his assistants. His stated goal for these policies is "an effort to end mass incarceration and bring balance back to sentencing." The policies are prosecutorial policies that involve charging decisions, diversion decisions, participation in re-entry programs, plea offers, and sentencing recommendations.

I am willing to comment on Mr. Krasner's goal and policies, as requested, in the interest of providing public information and education with respect to how our criminal justice system operates in Pima County and the ways in which it may be similar to or different from the criminal justice system in another jurisdiction. My comments should not, however, be construed as indicating that the Justice Coordinating Council, or County Administration, or the Board of Supervisors has any role with respect to determining prosecutorial policies.

As noted in my memorandum of May 24, 2018, charging decisions made by a County Attorney are legal decisions subject to judicial review by the Arizona courts; they are not subject to review by county administration or any other county agency. Moreover, a County Attorney's diversion decisions, plea offers, and sentencing recommendations are to be made on behalf of the State in the exercise of prosecutorial discretion, with input from the victim(s), as well as law enforcement, but without undue influence from any outside individual or entity. County administration may not interfere with a prosecutor's representation of the State of Arizona in this regard.

### **THE GOAL**

Mr. Krasner's stated goal of ending mass incarceration and having balanced sentencing is a laudable one. As I have stated publicly on multiple occasions, I am opposed to private prisons, and I am opposed to the use of incarceration where it is not needed for public safety.

Pima County, Arizona is very different from Philadelphia, Pennsylvania. So, the nature and extent of the problem of over-incarceration, as well as the opportunities for solutions, differ significantly. I have outlined my suggestions for local criminal justice reform on several occasions, including most recently in my memorandum of June 11, 2018 to the Pima County Board of Supervisors, on which you were copied.

### **CHARGING DECISIONS**

Arizona law mandates that the County Attorney *shall* conduct all prosecutions on behalf of the State for all public offenses and institute criminal proceedings when the County Attorney has information that the offenses have been committed. A.R.S. §11-532(A)(1) & (2). When evidence shows that a person has committed a crime in Arizona, the County Attorney's duty is to prosecute on behalf of the State. The County Attorney must diligently enforce State criminal laws, regardless of her opinion with regards to the propriety of those laws. Rule 42, Arizona Rules of the Supreme Court, Ethical Rule (ER) 1.3.

While I am not licensed to practice law in the Commonwealth of Pennsylvania, I have taken a look at Pennsylvania law to see whether that jurisdiction has a similar statutory mandate expressly requiring enforcement of the Commonwealth's criminal laws. I found no such mandate there. Indeed, I found the opposite. Prosecutors in Pennsylvania apparently have discretion whether or not to prosecute a particular crime, and if they choose not to do so, a complainant may file a complaint with a judge for approval or disapproval by the court. Pa. R. Crim. P. 133(B)(3)(ii); *Commonwealth v. Malloy*, 450 A.2d 689, 691-92 (Pa. Super. 1982). In other words, unlike Arizona's County Attorneys, Pennsylvania's District Attorneys have not been commanded to prosecute cases when they have evidence of criminal conduct, and Pennsylvania law has accounted for that wider discretion by creating a mechanism for local complainants to bypass a District Attorney to bring a direct criminal complaint to court. Arizona has no such bypass mechanism, because it has already commanded its prosecutors to prosecute cases.

Mr. Krasner has urged his assistants to decline certain types of criminal charges, as it appears it is within his legal authority as District Attorney under Pennsylvania law. While Arizona prosecutors have legal authority to decline cases based on insufficient admissible evidence to prove the charges beyond a reasonable doubt, such blanket declination of certain types of criminal charges where there is sufficient evidence is inconsistent with an Arizona County Attorney's statutory charge.

**1. Decline Marijuana Possession and Paraphernalia Charges:**

Mr. Krasner has ordered his assistants to "not charge possession of marijuana regardless of weight" and not charge paraphernalia. That appears to be within his authority and discretion under Pennsylvania law. This is not within my authority under Arizona law.

As the elected Pima County Attorney, I took an oath to uphold the laws of the State of Arizona. It is my sworn duty to enforce Arizona law as determined by the people. Arizona voters and the Arizona legislature have rejected efforts to legalize personal use marijuana, and presently it remains a felony offense.

Nevertheless, Arizona law does afford County Attorneys some discretion in connection with the prosecution of marijuana possession and paraphernalia, and I have exercised that discretion to the fullest extent permissible by law.

For possession of amounts of marijuana of *up to two pounds (32 ounces)*, Arizona law affords prosecutors legal discretion to charge the crime as a misdemeanor, rather than a felony. Utilizing that discretion for more than twenty years in Pima County, I have consistently directed my deputies to charge simple marijuana possession as a misdemeanor, rather than a felony. Additionally, as explained in detail in my April 25, 2018 memorandum on The Prosecution of Drug Cases in Pima County, I have requested that law enforcement agencies not make felony arrests for personal marijuana possession. Instead, I have informed local law enforcement agencies that I will charge marijuana possession only as a misdemeanor, and have urged them to charge marijuana possession of less than two pounds as a misdemeanor. They have agreed and have done so (with extremely rare exceptions).

I also have urged law enforcement agencies not to make a physical arrest for marijuana possession of less than two pounds, but merely to issue a paper citation. They have agreed and have done so (with extremely rare exceptions). In other words, at my urging, local law enforcement agencies in Pima County do

not make a physical arrest nor transport defendants to jail for marijuana possession less than two pounds.

Unlike what had been happening in Philadelphia prior to Mr. Krasner's policies, individuals charged only with marijuana possession are not taken to jail here in Pima County and have not been for decades.

Arizona law allows prosecutors the discretion to offer diversion for some crimes, including marijuana possession and paraphernalia for first- and second-time arrestees. I have exercised that discretion to allow diversion for first- and second-time misdemeanor marijuana possession and paraphernalia for eligible defendants. This permits the diverted participants to have their charges dismissed and avoid prosecution altogether.

It should be noted that my policy of "*possession of less than 2 lb. (32 ounces) marijuana shall be treated as a misdemeanor*" is far more progressive and forgiving of personal use marijuana possession than most other counties in Arizona, and even more than the laws in those states in which small recreational and personal use amounts have been legalized. The possession of 32 ounces (two pounds) of marijuana in any other state would find a person in a world of hurt. In some states, it would be an automatic felony "intent to distribute" charge. The minimum number of ounces for a felony charge in the states in which marijuana has been legalized for recreational use is much lower: in Colorado it is 12 ounces; in Oregon and Alaska it is 4 ounces; in Washington it is 1.4 ounces.

## **2. Decline Prostitution Charges against Sex Workers**

Mr. Krasner has ordered his assistants to not charge prostitution cases against sex workers who have fewer than three convictions, and to charge those with three or more prostitution convictions.

In Arizona, as a matter of law, prostitution is a misdemeanor unless the defendant has three prior convictions for prostitution. My deputies implement this law, which Mr. Krasner's policy parallels.

It should be noted that my office focuses our prosecution efforts primarily on sex traffickers who use coercive means to victimize sex workers, individuals who would not otherwise be engaged in that work. We also focus prosecution efforts on those who manage and facilitate prostitution rings. We pay close attention to whether someone engaged in prostitution is a victim of sex trafficking, because doing so is just and because being the victim of sex trafficking is an affirmative

defense in Arizona to prostitution charges under A.R.S. §13-3214(D). My Victim Services Division, as well as my prosecutors, provide victim services to the victims of sex traffickers (sex workers), treating them with dignity and respect, and offering them support and assistance.

### **3. Reduce Shoplifting Charges**

Mr. Krasner has directed that his assistants charge all shoplifting under \$500 as a "summary offense." There is no such thing as a "summary offense" in Arizona. (Apparently a "summary offense" in Pennsylvania carries a penalty of up to 90 days in jail and a \$250 fine.) Arizona law permits shoplifting up to \$2,000 to be treated either as a felony or a misdemeanor. My Office policy is for my deputies to charge shoplifting with a value of under \$2,000 as a misdemeanor, and law enforcement agencies have been requested to cite defendants directly into the appropriate jurisdiction's misdemeanor courts for such offenses. They have agreed to do so. As with marijuana possession, I then exercise my discretion to offer diversion for first- and second-time shoplifting offenses.

There is a distinct exception to this progressive charging policy when it comes to "professional" shoplifting committed as part of an orchestrated criminal enterprise. Organized retail theft is clearly distinct from ordinary shoplifting committed by individuals seeking goods or food for personal use. Organized retail theft refers to the professional shoplifting that occurs when individuals purposefully set out to steal retail merchandise for resale and financial gain. Organized retail theft typically involves a criminal enterprise employing a group of individuals who steal large quantities of merchandise from a number of targeted stores, and a fencing operation that converts the stolen merchandise into cash.

In Pima County, organized retail theft costs retailers and honest residents more than \$5.91 million a year. Organized retail thieves make money by stealing merchandise and reselling it, victimizing all of us. The annual losses from organized retail theft are staggering. We pay for this crime in higher prices and enormous loss of tax revenue. Local businesses have been greatly impacted by organized thieves and have asked for my help.

I am committed to dealing with such organized retail theft more severely than mere shoplifting. Pima County law enforcement, prosecutors, and merchants came together last year to combat this insidious threat to our community. To fight back, we formed the Coalition Against Retail Theft (CART), and created the "We Watch, We Prosecute" campaign to educate retailers, consumers, and perpetrators about our community's intolerance for organized retail theft.

Organized retail theft cases have been treated and charged as felonies by my Office, and we will continue to do so.

#### **4. Divert More**

Mr. Krasner has directed his assistants in Philadelphia to offer diversion for several crimes in which diversion cannot be offered in Pima County, either because the crime does not exist in Arizona or because prosecutor-led diversion is not authorized in Arizona for that type of crime. Failure to carry a concealed carry permit for a firearm is not a crime in Arizona, which has no such permit requirement. DUI is not an offense for which prosecutor-led diversion is authorized in Arizona. Possession with the Intent to Deliver is not a crime under Arizona law. As noted above, I already offer diversion for marijuana possession and paraphernalia and have done for decades.

The philosophy of expanding the use of diversion is a laudable one, and one that I employ here in Pima County. I am proud of my Community Justice Boards, which offer a restorative justice diversion alternative for juveniles, my Bad Check Program, and my other Adult Diversion Programs, especially my new Felony Drug Diversion Program, made possible with resources obtained just last year from the State of Arizona shortly after the opening of my partner agency, Community Bridges, Inc., which provides screening and assessment as well as treatment services. The Public Defender has been another partner in the new Felony Drug Diversion Program. Thus far, the Program appears to be working well, and we recently accepted our 100<sup>th</sup> participant.

#### **5. Increase Participation in Re-Entry Programs**

Mr. Krasner has directed his assistants to consider ways in which to help increase participation in re-entry programs. It is good to see another prosecutor getting involved in re-entry, as I have done.

I have been a co-sponsor of re-entry job fairs; I participated on local re-entry committees including the Pima County Re-Entry Coalition; and I am pleased to participate on the County's new task force to address the re-entry needs of super-users of our jail. My Office has also participated in the U.S. Attorney's Office Adult Re-Entry Coalition (ARC), a state-wide effort to create meaningful, long-term solutions and assistance for individuals released from prisons, since its inception roughly two years ago.

My Office also participates in the Arizona-wide "Stepping Up Initiative," a program established by the National Association of Counties with the goal of reducing the number of people with mental illness in jails and developing re-entry solutions. My staff has participated in the planning committee of Step Up Arizona's annual summit for the last three years (and is currently preparing for the fourth summit, to occur this August in Phoenix). Each year, I have funded a delegation of a minimum of 20 individuals to attend this summit, paid for via federal grant funding I have procured. In addition to the large, multi-disciplinary delegation I fund to attend this re-entry summit, I have consistently funded multiple individuals to attend a variety of national trainings each year relating to re-entry, also paid for with grant funding I have obtained.

The Second Chance program, which aims to assist in obtaining employment for formerly incarcerated individuals, is another re-entry program that I have supported, and my Office has been involved in the planning of the annual Second Chance Job Fair.

## **6. Plea Offers**

Mr. Krasner directs his prosecutors to make "bottom end of the mitigated range" plea offers in a wide variety of cases. It is unclear from his guidelines what the net effect of this directive is.

In Pima County approximately 96% of all felony cases are resolved by a non-trial disposition, whether diversion, dismissal, or a plea. The percentage is even greater, 99%, for misdemeanors. Trials are unnecessary and unduly burdensome in the vast majority of cases. We offer plea agreements in most cases, and defendants accept them on advice of counsel, because they offer a means by which to accomplish justice for the defendant, the victim, and the community.

Negotiated guilty pleas are intended to save time and money and create an opportunity for the system to handle more cases and concentrate resources on high priority cases. However, guilty pleas are not intended to create an atmosphere in which expediency displaces the purpose of the criminal justice system.

The purpose of the criminal justice system is to protect the community by holding criminals accountable for their conduct while protecting the rights of victims and safeguarding the legal rights of the defendant.

My prosecutors are directed to consider a wide variety of factors in fashioning their plea offers and to take into account numerous particular considerations, such as: the severity of the crime; the participation of the defendant; the defendant's background; the expectation of rehabilitation; the type of offense involved; the necessity of a trial versus a plea; the attitude of the defendant; the input of the victim; and the strength of the evidence, etc. There are often many other factors that must be considered under any given circumstance, such as: a substantial legal weakness where the admissibility of evidence is questionable; a substantial factual weakness that places in question our ability to prove a case; and unusual, extraordinary, or extenuating circumstances where the interest of justice requires a plea.

My Office has a Case Evaluation System (CES) within the Charging Unit which makes reasonable plea offers on a wide variety of routine felony cases. The purpose of CES is to quickly, immediately after charging, identify those cases which should plead and expeditiously dispose of them, without delay, reducing jail bed days, and reducing more costly litigation with transfer to a trial prosecutor's caseload.

A significant majority of cases (approximately 60-65%) are disposed of by CES plea negotiations. However, too many cases languish for far too long, and are eventually sent to a trial team, where they often end up pleading – many months later, and at a much greater cost to Pima County. (As an aside, many of these cases could be quickly resolved if I had three additional prosecutors to assign to this unit, thus allowing each prosecutor to devote more time to the negotiation of these plea agreements. Currently, prosecutors assigned to the Charging Unit every day handle a full day's issuing/charging appointments with law enforcement, leaving very little or no time to negotiate CES pleas on hundreds of cases with defense attorneys.)

A blanket directive to routinely "low-ball" plea offers would be unwise. To direct prosecutors in every case to stipulate to the mitigated sentence in a plea would be malfeasance in terms of our representation of the State of Arizona. Each case must be considered on its own individual merit, and judges should be free, after considering pre-sentence reports and conferring with probation officers, to determine the sentence appropriate for any particular defendant that comes before them within the sentencing range set forth in Arizona law.

When extraordinary, compelling reasons on an identified individual case exist for a mitigated sentence, prosecutors are expected to articulate and advocate those reasons in open court at the time of sentencing. Unlike Philadelphia's Assistant

District Attorneys, my prosecutors do not have to seek approval from their supervisors to advocate for a statutorily presumptive or an aggravated sentence if they believe the defendant deserves a higher sentence.

## 7. Sentencing

Mr. Krasner has directed his prosecutors to state on the record, in every case, how much a recommended sentence would cost the taxpayers, and to justify the benefits and the costs of the sentence they are recommending.

I firmly believe that it is important to be cost-conscious and judicious of taxpayers' dollars. I have spent more than two decades of my career in the prosecutor's office working to protect the public safety of this community while also creating innovative and creative programs to make the criminal justice system more efficient and effective. However, I find Mr. Krasner's directive in this regard to be completely inappropriate and offensive. Mr. Krasner's simplistic directive fails to take into consideration the many other impacts to public safety and the costs to the victim and to the community that occur as a result of the commission of a crime. Other costs might not be as easily tallied as the cost of a jail or prison bed, but they are no less relevant.

Most important, it is our judges who decide the appropriate punishment to impose. Asking judges in Arizona to consider financial impact and monetary considerations of imprisonment is in conflict with their statutory obligations to weigh the aggravating and mitigating circumstances of each defendant's case.

A.R.S. § 13-701 (F) specifically mandates judges to weigh the aggravators and mitigators, and if the court finds there are aggravators and no mitigating circumstances, the court *shall impose* the aggravated sentence. If any aggravators are proven at sentencing, the costs of imprisonment (which are not a legally permissible mitigating factor) cannot be used to reduce the sentence. The cost of incarceration is wholly irrelevant at a sentencing hearing. The purposes of our criminal law include proscribing harmful conduct, ensuring public safety, imposing just punishment, protecting victims' rights, and, in the cases of repeat violent offenders, removing them from society. A.R.S. §§13-101, 13-101.01. Arizona's declared public policy does not mention cost of imprisonment.

More specifically, our sentencing statutes in Arizona enumerate which specific aggravating factors and mitigating factors should be considered at sentencing. Aggravators include factors such as infliction of serious physical injury; use of a deadly weapon; the value of property taken or damaged; heinousness and

depravity of the offense; physical, emotional, and financial harm to victims; prior felony convictions; the disability of the victim; and many others. A.R.S. § 13-701(D). The cost of the sentence is not included.

Mitigators under Arizona law include the defendant's age, diminished capacity to understand the wrongfulness of his conduct or to conform to the law, minimal involvement in the crime, and "[a]ny other factor that is relevant to the defendant's character or background or to the nature or circumstances of the crime and that the court finds to be mitigating." A.R.S. § 13-701(E). The "cost" of a particular sentence is not a legally proper mitigating factor in Arizona. It is simply not legally relevant to determining an appropriate sentence.

Moreover, asking prosecutors to inform judges of the cost of incarcerating a defendant is completely offensive to our victims, who seek justice in their individual cases. Pennsylvania law does not afford victims the same rights as are afforded under our Arizona Constitution and statutes. Pennsylvania does not have constitutional rights for crime victims. And its statutes are less protective of victims' rights than Arizona statutes. For example, victims in Pennsylvania do not have the right to refuse to be interviewed by the defense, and they have no right to a speedy trial and prompt resolution of their case. Most notably, there is no provision like Arizona's that guarantees a victim the right to be treated with dignity and fairness throughout the process. See Ariz. Const. art. 2, § 2.1(A)(1). Nevertheless, one would hope that prosecutors in the Commonwealth of Pennsylvania would have due concern for their victims in connection with making sentencing recommendations and discussing factors appropriate and relevant to sentencing.

My Office has litigated cases against the best defense attorneys in Pima County and Arizona for decades and such arguments about the cost of incarceration have never been made. And that is not because those lawyers are unimaginative; it is because those lawyers are aware of the law and their ethical duties.

It should be noted that Mr. Krasner's radical approach has been the subject of much discussion and significant controversy in Philadelphia. One columnist referred to it as a "Krasnerian experiment of justifying, minimizing, and forgiving bad behavior." As you can imagine, many of his "reforms" are already unpopular with the law enforcement community and victim advocacy groups. Moreover, many experienced prosecutors who have left or have been forced out of his office have expressed dismay at many of Mr. Krasner's policies.

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Richard Sax, who spent 30 years as a homicide prosecutor in the Philadelphia D.A.'s office before retiring last year called Mr. Krasner's policy "absurd, irrelevant, ridiculous, nonsense and horrific."

A recent NPR article about Philadelphia's new approaches made this very point.  
[https://www.npr.org/2018/03/31/598318897/philadelphias-new-da-wants-prosecutors-to-talk-cost-of-incarceration-while-in-court.](https://www.npr.org/2018/03/31/598318897/philadelphias-new-da-wants-prosecutors-to-talk-cost-of-incarceration-while-in-court)