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September 10, 2018

Hank Peck, Chairman  
Hon. Patricia Norris, Board Chair-Elect  
Arizona Town Hall  
2400 W. Dunlap Ave., Suite 200  
Phoenix, AZ 85021

Dear Chairman Peck and Chair-Elect Norris:

I am pleased to see that the Arizona Town Hall is focusing upon the issue of Criminal Justice in Arizona. This is an opportunity for stakeholders throughout the state to evaluate our current criminal justice system and to recommend reforms. It is good that there will be opportunities for those of us who are leaders of criminal justice agencies throughout the state, as well as affected communities, to participate in local Town Hall events on this important issue. I look forward to participating at a Pima County Community Town Hall, and to having other leaders in my office participate in both the community and statewide Town Halls, including those who are subject matter experts on prosecution, victim services, diversion, re-entry, and alternatives to incarceration.

Meanwhile, I write to comment on some matters contained in the Arizona Town Hall Research Committee's 2018 Report on Criminal Justice in Arizona that should be brought to your attention as you and your staff conduct the Town Hall events and prepare a final Report. The stated purpose and mission of the Arizona Town Hall is "to bring diverse people together to solve critical and often divisive policy issues."

In order for people to engage in intelligent discourse on a subject as important as criminal justice in Arizona, the information explaining the criminal justice system provided to them in the initial publication should be as complete, accurate, and devoid of bias as possible. Unfortunately, I feel that your initial Research Report missed the mark in several significant ways.

Overall Mission of the Criminal Justice System:

The Introduction in the Research Report posits a tension between punishment versus rehabilitation as the sole purposes of the criminal justice system. This ignores two additional and important factors: *deterrence* (of the individual criminal from engaging in future criminal

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activity), *and incapacitation* (protecting public safety through the incapacitation of violent and dangerous individuals.)

Size and Scope of Arizona's Criminal Justice System:

This section of the Research Report provides data on crime rates and prison population. It references and provides hyperlinks to statistics and data from numerous resources, including the National Institute of Corrections, the Arizona Office of Economic Opportunity, the Arizona Department of Public Safety, the Arizona Department of Corrections, and the Arizona Supreme Court.

Regretfully, the Report completely omits any data, statistics, or even a footnoted hyperlink reference to the multiple **Prisoners in Arizona** reports published in 2010, 2011, 2014, and 2017 available on the website [www.azsentencing.org](http://www.azsentencing.org). These *Arizona Sentencing Reports* provide a comprehensive compilation of data, analysis, and factual information designed to foster a greater understanding among citizens and policymakers about Arizona's criminal sentencing provisions and their impact on Arizona residents and their quality of life. I feel this is an omission that should be corrected. I urge you to distribute the **Prisoners in Arizona** reports in advance to the participants in the statewide Arizona Town Hall.

Costs of the System:

The Research Report fails to include in the list of costs those associated with defense attorneys and probation officers, while the costs for judges and prosecutors are included.

Crime Victims:

Crime has significant consequences for individual victims, their families and friends, neighborhoods, communities, and businesses. The physical, emotional, psychological, as well as the financial impact of crime is often profound and devastating. The Research Report fails to address or even mention the impact of crime on victims. The report also fails to make the distinction that the criminal justice system of each county, not only the Arizona Attorney General, has a separate individual responsibility to address victims' needs by providing them with participation in the process and with specific services to address the impacts of crime on them, as well as require and ensure that offenders provide restitution. Because Domestic Violence is the most prevalent crime in our

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communities, the needs of domestic violence victims for protection and for services must also be addressed.

### Arizona's Criminal Justice Process

#### Deferred Prosecution/Diversion:

There is no mention whatsoever in the Research Report of deferred prosecution/diversion as an alternative to prosecution. Diversion, in lieu of prosecution, is an increasingly important and growing aspect of our criminal justice system that should be addressed. The Pima County Attorney's Office, as well as city and county prosecutors' offices throughout the state, offer multiple pre-charge and pre-plea diversion programs for both misdemeanors and felonies. These are important programs that need sustainable sources of funding.

#### Filing Charges:

This may appear to be a minor issue, however, the example of how felony charges are initiated and processed from initial appearance through arraignment described in the Research Report is applicable only to the procedures in the Maricopa County Attorney's Office. It is not the process used in Pima County, and likely not utilized in the other prosecutor offices in the state.

#### Bail, Jail Fines and Fees:

Before enacting any bail reforms, it would be beneficial to examine what has worked and what has not worked in jurisdictions across the country that have begun to implement bail reform. While the Research Report mentions that there are such jurisdictions, it does not include any information on what they are doing or results they have achieved.

There is no discussion of the multiple alternatives to bail that could address repetitive failures to appear (as distinct from absconding) by non-violent, non-dangerous defendants charged with low-level misdemeanor cases such as trespassing, shoplifting food for personal consumption, loitering, and urinating in public. There should be some discussion of such alternatives. For example, the use of text and phone reminders, as well as electronic monitoring for pretrial defendants could be expanded as alternatives to incarceration in Jail.

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Charging:

This section of the Research Report presents incorrect information with regards to the prosecutor's duties and responsibilities in the charging process in Arizona. Moreover, the report is written with an apparent significant and highly slanted negative bias against prosecutors. The author of this section erroneously claims that prosecutorial declinations take place "*beyond the boundaries of traditional conceptions of the law,*" and claims they are in "*lawless territory.*"

The prosecutor's role in Arizona regarding charging involves a *legal decision* and *mandate*. The Report incorrectly states that prosecutors in Arizona have *policy discretion* with regards to charging and deciding what crimes to pursue. While prosecutors in other states may have such policy discretion, such is not the case for County Attorneys in Arizona. The author also suggests that "charging and closely connected decisions" could be "closely regulated by the legislatures and courts."

Charging decisions made by prosecutors are Executive branch *legal decisions* subject to review by the court only under certain specific circumstances after indictment. However, the doctrine of Separation of Powers prevents interference and/or regulation by legislatures or administrative bodies in the prosecutorial executive charging function.

In Arizona, the felony charging decision is a *legal* decision, not a *policy* decision. Both Arizona statutes adopted by the legislature and the Ethical Rules adopted by the Supreme Court require prosecutors to diligently represent their client - the State of Arizona. They mandate that county attorneys pursue charges whenever the admissible evidence is sufficient to prove the case beyond a reasonable doubt.

*The Research Report offensively and completely inaccurately refers to this function as "lawless territory."* Juries take an oath to decide guilt based upon evidence as applied to the law upon which they are instructed by the judge. Prosecutors take an oath to decide whether to pursue or decline to pursue charges based on evidence and application of the law. Fulfilling these functions in accordance with the oath is not "lawless."

Some states do provide *policy discretion* to prosecutors in deciding whether to pursue felony charges. Prosecutors in Pennsylvania for example have discretion to decide whether or not to decline to prosecute entire classes of

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crime, such as marijuana possession. Arizona is not one of those states. In Arizona, county attorneys are *legally and ethically mandated* to pursue felony charges after an arrest whenever the evidence presented demonstrates sufficient proof that the suspect is guilty of a crime, as set forth in Arizona's criminal statutes. See Arizona Revised Statutes (A.R.S.) § 11-532(A)(1) & (2); and Rule 42 Arizona Rules of the Supreme Court, Ethical Rule (E.R.) 1.3.

With regards to felony cases, the Research Report also ignores the role of the Grand Jury or Judge in filing formal charges to initiate a case against a suspect. The prosecutor reviews the evidence presented by law enforcement and makes a *legal determination* whether charges should even be presented to the Grand Jury or to a Judge at a Preliminary Hearing. Many felony cases are dismissed after prosecutors find insufficient evidence and decline them. *These decisions are not "lawless."* Additionally, the official felony filing charging decision is one made by a Grand Jury by Indictment or a Preliminary Hearing Judge by Information, not the prosecutor.

#### Misdemeanor Charging:

Law enforcement officers are responsible for filing official misdemeanor charges by citation directly into Justice or City/Town Court. The Report ignores this fact. Prosecutors can later review those charges and may dismiss those where there is insufficient evidence to proceed, or may offer diversion in lieu of prosecution where statutorily authorized. Generally, the misdemeanor charging function does not involve the prosecutor. Misdemeanors constitute the overwhelming majority of cases in the criminal justice system.

#### Plea Agreements:

There is no mention in the Research Report of the fact that plea agreements allow defendants to be convicted on lesser or fewer charges, thus allowing them to be exposed to lower ranges of sentencing. Moreover, it should be noted that it is only with regards to statutorily authorized diversion and plea agreements, not charging or sentencing, where the prosecutor has significant *policy* discretion. However, that discretion remains bounded by the evidence because there must always be a factual basis to support the guilty plea to a particular offense.

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Sentencing and Incarceration:

There is a suggestion in the Report that prosecutors have policy discretion with regards to sentencing. However, *sentencing ranges are set by statutes in Arizona, and sentencing is a judicial function.* The vast majority of sentences (70-75%) involve probation, not prison.

The Report addresses changes in the mandatory minimum drug sentencing schemes of Michigan and New York, stating the changes in the “draconian Rockefeller Drug Laws” and other “attacks on mandatory minimums . . . suggest there appears to be a growing consensus that reform is needed.” However, it is a very serious omission that the Report in the Sentencing and Incarceration section completely fails to discuss any aspect of Arizona’s unique drug sentencing laws which *mandate probation and treatment.*

By law in Arizona, a person convicted of drug possession cannot be incarcerated until a *third conviction.* Arizona’s criminal drug sentencing law requires providing defendants arrested for drug possession with probation and treatment, the successful completion of which will result in the dismissal of the offense or a misdemeanor conviction.

There is no discussion in the Report of possible sentencing *alternatives to incarceration.* Legislation is needed to provide judges with such alternatives. Electronic monitoring, for instance could be utilized for DUI offenders and others who can be safely released into the community while experiencing the consequences of their crimes. The Research Report does not explore the significant technological advances that render electronic monitoring a viable option that can protect public safety at a lower cost to taxpayers, and that - when combined with treatment - can reduce recidivism.

Consequences holding defendants accountable should be both therapeutic, when possible, as well as designed to deter and prevent future criminal activity. Drug Courts have been established in Arizona for more than two decades, yet the Research Report fails to include any data and research from the National Association of Drug Court Professionals and the National Drug Court Institute regarding evidence-based best practices and the types of interventions that save lives, reduce recidivism, and reduce costs. Focusing on mental health issues alone, without

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addressing issues involving substance use disorders/addiction, is a glaring omission.

Drug Diversion, Drug Court, and the Drug Treatment Alternative to Prison programs are proven solutions. Pima County is implementing these options, using federal grants and one-time bridge appropriations from the state legislature. However, sustainable state funding is needed to maintain and expand these programs.

The Research Report does not address the singularly unique Drug Treatment Alternative to Prison Program in Arizona, nor does it mention the cost-benefit studies that have demonstrated it costs less than half the cost of prison and is far better at reducing recidivism. Here is a link to information on this unique and successful program, including three cost-benefit studies performed by independent evaluation teams:

<http://www.pcao.pima.gov/dtap.aspx>.

#### Vulnerable Populations:

It is important that expanded services be made available to suspects, defendants, and convicted criminals in jails, through pretrial services, probation, and in prisons. These services should be offered in a culturally competent fashion to address the specific needs of each individual. There is no discussion in the Report of *crime victims* who are members of vulnerable populations and whether or how their needs are being met. Expanded services *also* should be made available in hospitals and in communities for victims, particularly victims of domestic violence, sexual assault, and sex trafficking.

#### Prison Population:

Once again, there is no reference in the Research Report to the independent report commissioned by the Arizona Prosecuting Attorneys Advisory Council (APAAC) analyzing the crimes committed by those incarcerated in Arizona's prisons, including their prior offenses. As *previously noted, this is a glaring omission.*

#### Re-Entry and Recidivism:

The vast majority of Arizona's prisoners are released back into society. More re-entry programs with better services are sorely needed in Arizona. There should be a continuum of services, provided in a culturally competent manner, from arrest through re-entry. The Research Report

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fails to address, in any significant way, how an overhaul of the prison environment and the addition of services for inmates is necessary to reduce recidivism.

Prisons in Arizona are expensive warehouses in which violence is endemic, and they are ineffective in reducing crime. Prisons should incorporate a therapeutic environment for the overwhelming majority of inmates who could benefit from that, and services for re-entry should commence on day one of incarceration and be offered throughout the period of incarceration with a continuum of services to follow release from incarceration. This would benefit the entire community when inmates ultimately are released from custody.

Collateral Consequences of Criminal Convictions:

The Research Report fails to address in any substantial way the many collateral consequences of criminal convictions. There are numerous legal and regulatory sanctions and restrictions that limit or prohibit people with criminal records from accessing employment, occupational licensing, housing, voting, education, and other opportunities. These are significant and should be discussed and explored by the Arizona Town Hall.

Thank you for your consideration of these matters pertaining to the Town Hall's Research Report on Criminal Justice in Arizona.

Sincerely,



Barbara LaWall  
Pima County Attorney

BL/cjw