YES, RAY RICE'S DIVERSION ADJUDICATION WAS APPROPRIATE



The popular meme has been that Ray Rice got some kind of miraculous plea deal to diversion (pre-trial intervention, or "PTI", in New Jersey parlance) and that NOBODY in his situation ever gets the deal he did.

Is that true? No. Not at all. Kevin Drum wrote a few days ago at Mother Jones on this subject:

> First, although Ray Rice's assault of Janay Palmer was horrible, any sense of justice—no matter the crime—has to take into account both context and the relative severity of the offense. And Ray Rice is not, by miles, the worst kind of domestic offender. He did not use a weapon. He is not a serial abuser. He did not terrorize his fiancée (now wife). He did not threaten her if she reported what happened. He has no past record of violence of any kind. He has no past police record. He is, by all accounts, a genuinely caring person who works tirelessly on behalf of his community. He's a guy who made one momentary mistake in a fit of anger, and he's demonstrated honest remorse about what he did.
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> In other words, his case is far from being a failure of the criminal justice system. Press reports to the contrary,

> when Rice was admitted to a diversionary program instead of being tossed in jail, he wasn't getting special treatment. He was, in fact, almost a poster child for the kind of person these programs were designed for. The only special treatment he got was having a good lawyer who could press his cause competently, and that's treatment that every upper-income person in this country gets. The American criminal justice system is plainly light years from perfect (see Brown, Michael, and many other incidents in Ferguson and beyond), but it actually worked tolerably well in this case.

Mr. Drum is absolutely correct, Ray Rice was quite appropriate for the diversion program he was ultimately offered and accepted into by Atlantic County Superior Court. Let me be honest, Kevin talked to me about this and I told him the truth.

In fact, that is exactly the deal I would hope, and expect, to get for any similarly situated client in Rice's position. It is also notable the matter was originally charged as a misdemeanor assault in a municipal court, which is how this would normally be charged as there was no serious physical injury. Rice would have gotten diversion there too and, indeed, that was the deal his lawyer, Michael Diamondstein, had negotiated with the municipal prosecutors before the county attorney snatched jurisdiction away and obtained a felony indictment. Despite the brutality depicted by the video, this is precisely the type of conduct that underlies most every domestic violence physical assault (seriously, what do people *think* it looks like in real life?) and it is almost always charged as a simple misdemeanor assault.

Janay Palmer Rice clearly did not receive a "serious physical injury" level of injury under the applicable New Jersey definition in NJ Rev Stat § 2C:11-1(b) and a small period of grogginess/unconsciousness is not considered, by

itself, as meeting the threshold. Now, to be fair, New Jersey has two levels of injury that can lead to a felony charge, the aforementioned “serious physical injury”, and the lower “significant physical injury”, pursuant to NJ Rev Stat § 2C:11-1(d) that Rice was charged under, and which is a far less serious charge, even though still nominally a felony under New Jersey classification.

The injury to Janay Palmer (Rice) did fall within the lower “significant physical injury” threshold under New Jersey’s criminal statutes because of the momentary apparent lapse of consciousness. So, under the New Jersey statute, while the felony, as opposed to simple misdemeanor, charge may have not been the norm for such a fact set, it was certainly minimally factually supportable. That said, most all similar cases would still be charged as simple assault, as indeed, as stated above, Rice initially was. The New Jersey assault statute, with its different iterations of offenses, and offense levels, is here.

With that description of the nature and structure of assault in New Jersey out of the way, there is something else that must be addressed: I am absolutely convinced that the much ballyhooed “percentages” reported by ESPN’s Don Van Natta from an September 12, 2014 ESPN report showing how “extremely rare” it is for a person like Ray Rice to be given diversion, a claim constantly bandied about across all media and throughout the public, are entirely bogus and based upon gross misunderstanding of what exists in the criminal justice system.

Van Natta clearly does not understand the criminal law system, much less diversion/PTI programs and their underpinnings, whether in New Jersey or anywhere else, and clearly no one broke it down appropriately for him. Yet Van Natta, ESPN, and nearly all the media and public have parroted this false information relentlessly like it is the gospel. It is not, and the public understanding is false.

I will assume Van Natta's baseline numbers of a total of "15,130 domestic violence cases" and "3,508 involv[ing] some level of assault" are correct, and to give Van Natta the benefit of the doubt, I will work off his reported numbers in that regard. Van Natta (and I urge you to read his report while considering the deeper discussion here) takes his figures off of all Domestic Violence (DV) incidents that involve assault, which he states as being 3,508 in year 2013. He then magically says the 30 PTI diversions reported [Note: the professionals in New Jersey I talked to say the persons accepted into PTI figure is 70, not 30, but I will continue to use Van Natta's numbers], which is the program Rice was adjudicated into, were "less than 1%", so Rice is "rare"!!

Here is Van Natta's problem. Off the bat, he admits 496 of his baseline 3,508 cases were never adjudicated, so they have to be excised from the relevant set being discussed. We are now down to 3,012 for the set of criminal DV defendants Ray Rice could be in.

Then comes Van Natta's real whopper. You see, nearly all DV assaults are filed as simple misdemeanor assaults (again, as Rice originally was in this case). I think 85% is probably *way* too conservative as the percentage that are treated as misdemeanors as opposed to felonies (the percentage is likely well higher than that, leaving even fewer defendants similarly situated as Rice), but let's use that figure, which means only 15% of the 3,012, or 452, of DV assault cases actually made it to a felony level indictment and prosecution as Ray Rice did.

The above is absolutely critical because the "PTI" diversion program Rice was given is *only* available for felony level offenses, it statutorily *does not* apply to misdemeanors (misdemeanors have other diversion options available, but that is a different jurisdiction and classification than Rice ultimately faced). So, now, as to Ray Rice's situation, we are down to 30 out of 452. Already looking less "rare"

than Van Natta let on.

But it doesn't stop there. Not by a long shot. The common way DV assaults get elevated to felony level is that a dangerous weapon (gun, knife, etc) is used, or a dangerous instrument (bat, blunt object, whatever) is used, usually in conjunction with the higher level "serious physical injuries" described above. Ray Rice's fact scenario had none of that, and Janay Palmer Rice's injuries, while technically nominally meeting the threshold for "significant physical injury" under the New Jersey's statutory construct, certainly did not meet that for "serious physical injury". Let's again be conservative and say that half of those remaining 452 cases left in Van Natta's numbers involved dangerous weapon/instrument and/or serious physical injury (again, this is likely very conservative), all of which would almost certainly have precluded PTI diversion. Now the set of cases similar to Rice is down to 226.

But, these kind of cases that get filed as felonies quite often have defendants with prior convictions. Let's say a third of the cases had defendants with one or more priors, which is normally a putative disqualifier for PTI diversion. Now the relevant set similar to Ray Rice, who had no priors of any kind, much less for assault, is down to 150 cases. Again, I think this is very conservative and giving Van Natta the benefit of the doubt. There are still other factors critical to professional diversion screening, and the Atlantic County justice system has just such a professional screening system, and coordinator, that affects this calculation.

For one, New Jersey has a comprehensive Victim's Rights provision giving the victim strong input into charging and disposition, including, specifically, placement of the defendant within pre-trial programs such as diversion. While the wishes of the victim are certainly not carte blanche, their input is a very substantial element. Like Janay Palmer Rice, the victim does

not always desire, much less demand, prosecution of their attacker, and has the ability to request diversion instead of prosecution. This is common in DV situations, even ones where the victim is the incident reporter, which was *not* the case with Janay Rice, as she was never the instigator of police involvement, reporting and/or initial charging.

So, let's say that the victim is hostile to the defendant and wants full prosecution half of the time. That was not the case with Janay Rice, who was crystal clear in not wanting prosecution, and unequivocal in her unwillingness to cooperate in any formal prosecution, much less trial. If in only half of these 150 remaining cases does the victim want prosecution, and Janay Rice did not, then Ray Rice's relevant identifiable set is down to 75 or so cases like his.

The remaining 75 are cases where the victim *does indeed* want diversion for the accused defendant instead of prosecution. We are now down to 30 out of 75 per Van Natta's own baseline numbers [and remember, professionals in New Jersey say the figure is 70 that were diverted, not 30 as Van Natta alleged]. Hey, those odds look a LOT different than Van Natta's numbers and percentages that Van Natta, ESPN, and most of the public and press, have been falsely demagoguing relentlessly. Maybe, that is why Ray Rice was appropriately accepted into New Jersey's PTI diversion program and not, as Don Van Natta has falsely demagogued, a rare 1% freak outlier.

Now, anybody who has done a lot of this type of criminal defendant, and/or criminal victim, Domestic Violence representation, or the actual DV intake screening underlying diversion programs, will tell you financially stable defendants with strong family and social structure, strong community ties etc … all factors easily attributable to Ray Rice … are *by far* the most likely to benefit from diversion, successfully complete it, and not reoffend.

THOSE are the people best suited for diversion, indeed that diversion was designed for, and Ray Rice, by all known appearances, facts and reports, was exactly such a person.

That is why, after thorough screening and consideration, by professionals, Ray Rice was allowed by the Atlantic County PTI Diversion Coordinator, Atlantic County Prosecutor and the Atlantic County Judge assigned to the PTI program, to participate in PTI diversion, and, frankly, why he is an excellent candidate to succeed. It appears it was absolutely the right prosecutorial exercise of discretion and I find it not out of the ordinary, whatsoever, that diversion was offered to him by Atlantic County Prosecutor James McClain. McClain has publicly addressed precisely why he decided to allow Rice to participate in diversion, and, frankly, it comports with everything that is appropriate in consideration and screening of these type of DV cases. This is precisely the situation DV diversion is intended to address, and by all intended parameters, McClain's decision in the Ray Rice case looks absolutely appropriate.

This is also the view of many of the most knowledgeable professionals in New Jersey, including the former Atlantic County probation official and former assistant director of the Pre-Trial Intervention program in Atlantic County, David Gruber, who has said:

> Since PTI was started in Atlantic County in 1976, thousands of applications have been processed. From all appearances, the Ray Rice case was handled "by the book" and all relevant factors were duly considered. I am aware that some in the media have combed New Jersey Superior Court records and discovered that only 70 of more than 15,000 domestic-violence assault cases were admitted to PTI. But it is impossible to determine suitability for PTI by merely collecting raw data. Every case is different. And, though it might sound trite, it is also

> very true that only a trained, experienced professional is in a position to make an appropriate ruling.
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> All in all, I believe the Ray Rice case proves that New Jersey has a pretrial intervention program that is second to none and beyond reproach. On top of that, with anger and misinformation swirling all around, Atlantic County showed the country what a cool-headed, objective, open-minded criminal justice system looks like. We all can be proud of that.

Even in New Jersey, with their strict criminal assault statutes, Rice was in the subset of DV assault cases, and attenuated level of court involvement, that were appropriate for, and often do indeed get diverted (despite Van Natta and ESPN's recklessly demagogued and misrepresented numbers). And, yes, it helps to have an experienced (read probably expensive) attorney like Mike Diamondstein helping work all this out and present it the right way to the screening authorities. But indigent defendants appear to get considered right alongside of well to do ones in Atlantic County. The quality of presentation may help, but it appears it is certainly far from dispositive, under the New Jersey system.

And the New Jersey system is actually quite admirable and inclusive. I say that as a practitioner in Arizona, and I am envious of the detailed program specified in the New Jersey State Code. The PTI diversion program in New Jersey is promulgated in New Jersey Revised Statutes Section 2C:43-12 and it delineates 17 separate factors that, on the whole, militate and direct, especially considering the victim's demands, exactly that Ray Rice was an exemplar for the PTI division program.

This analysis is based upon contact with multiple people at the Atlantic County Prosecutors Office, Atlantic County Office of

Public Defenders, private criminal defense attorneys in New Jersey and New York, former heads of the New Jersey PTI Diversion Program, Yearly Uniform Crime Reports from The State of New Jersey, Yearly Domestic Violence Reports from The State of New Jersey and, significantly, from many decades of personal practice in criminal defense, defending both the accused, and victims, of domestic violence.

Pre-trial diversion programs, whether for assault, drugs, theft, or other crime, are one of the key efforts in the battle to reduce the ridiculously high incarceration rate in the United States. If you believe in that goal, you must accept that appropriately screened defendants will get diverted. And that, by all appearances, is exactly what happened in the Ray Rice case. Recognizing this fact is not tantamount to condoning Rice's DV abuse, it is simply recognizing that there are alternative adjudicative resolutions available, and utilized, when and where appropriate. I would argue this is a very good thing in our society.

The ultimate verdict on Ray Rice having been granted diversion will be up to Mr. Rice. By all known facts to date, Rice has been a model participant in the assigned diversion program. Rice entered the program on May 20, 2014 and is now slightly over halfway through it. He seems to be an ideal candidate to benefit from the program, but only his own conduct, and time, will tell.

The only point here is that, contrary to the media demagoguery, led by ESPN, and parroted by nearly all, it was indeed appropriate, and not at all that unusual, for a person of Ray Rice's particular facts and circumstances to be permitted participation in New Jersey's PTI diversion program. In short, Kevin Drum was right. And so was Atlantic County Prosecutor James McClain and supervising judge Michael Donio, for placing Rice in the program.