IN (JUSTICE) in ALAMEDA COUNTY

A Case for Reform and Accountability

A REPORT CONDUCTED BY

ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Northern California

URBAN PEACE MOVEMENT
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We extend our heartfelt thanks to The Libra Foundation, a major funder of the Criminal Justice Project of the ACLU Foundation of Northern California. Libra’s generous grant helped make this report possible.
Criminal prosecution in the United States finds its roots in the colonization of Native American people and land, the capture and forced labor of enslaved Africans, and state repression of Black Liberation struggles and other popular social movements.

The ratification of the U.S. Constitution provided the legal justification for the settler colonial project that prosecutors are responsible for upholding. For over 300 years, these systems of social control have evolved and attempted to adapt to movements for liberation, self-determination, and human rights.

Following the ratification of the 13th Amendment to the U.S. Constitution in 1865, which stated that “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted,” the prosecutor’s discretion expanded. Enforcement of Jim Crow laws such as the Black Codes ushered in a new era of prosecution. Formerly enslaved people and their families were targeted by these newly established laws and became subject to forced labor through the Convict Lease System. The process of new law creation, prosecution, incarceration, and convict leasing created a capture-to-prosecution-to-re-enslavement pipeline that helped maintain the labor force that landowners and former-enslavers relied upon to build their wealth. The majority of these laws remained in effect until the mid-1960s, when systems leaders allowed colonization and enslavement to evolve once again. Following the success of Civil Rights, Black Liberation, and Anti-War movements of the mid-20th century, this system further evolved into a capture-to-prosecution-to-re-enslavement-to-deportation pipeline in its current iteration.

Intensified criminalization and incarceration was the reaction to the organized freedom movements of conscious Black, American Indian, Puerto Rican, Chicano, and other historically oppressed communities. Richard Nixon’s War on Drugs became a tool for expanding the reach of the carceral state, while also disrupting the political base of poor and working class communities fighting for self-determination. A new crop of legislation gave way to the proliferation of the current Prison Industrial Complex as we know it. Bill Clinton’s 1994 Crime Bill, in addition to numerous state laws across the country, increased prosecutorial powers and discretion.

Movements for prosecutorial accountability must be situated within these historical realities. Throughout U.S. history, the prosecutor was and continues to play a central role in both protecting the assets of the wealthy, while also attempting to quell movements for self-determination and social justice. Still today, corporations and even presidential candidates continue to exploit and capitalize on prison labor. Our work in Alameda County is part of a long history of struggle to liberate dispossessed communities from economic, political, and social bondage. We’re not the first, we won’t be the last, but we are the many, we are growing, and we are the ones taking action now.
EXECUTIVE SUMMARY

The United States imprisons the most people in the world in both absolute and per capita terms. California is no exception.

California District Attorneys (DAs) have contributed to our state’s history and present trends in over-incarceration and criminalization. Laws and legislation, like the California Penal Code, play a major role but leave room for discretion. In many circumstances, DAs have discretion over how to enforce these laws. Despite the fact that they’re elected officials, DAs are not typically held accountable by the general public for their actions and policies that perpetuate the crisis of mass incarceration, because so much of what they do remains hidden from the public. DAs should seek to limit the incarcerated population and undo the disparate impacts of incarceration on communities of color.

This report outlines the practices and policies of Alameda County District Attorney (ACDA) Nancy O’Malley’s office by presenting quantitative and qualitative findings. Based on these findings, the report makes recommendations for ACDA reform in core practice areas: charging decisions, immigration consequences, police accountability, diversion programs, parole and sentencing, and data tracking. First, we explain the present and historical contexts of the DA’s role in overcriminalization in the United States, California, and Alameda County. Next, we explain our methods for collecting and analyzing data. Finally, we present findings and recommendations. We present this report as part of the ACLU’s larger advocacy efforts for DA reform and accountability in California.

Despite encouraging steps in the right direction, we found evidence indicating that ACDA’s practices that lead to overcriminalization, needlessly cost the county money, and promote mass incarceration. For instance, from 2017–2018:

- Over six in 10 (61 percent) of all charges the ACDA brought against adults were “low-level offenses,” offenses that either should have been directed to diversion programs or not charged at all.
- The ACDA opposed release of incarcerated people in 70 percent of all parole hearings it attended and without documenting any justifications for taking those positions.
- The ACDA had internal guidelines instructing its prosecutors to leverage immigration consequences in order to seek longer probation or jail time during plea negotiations from non-citizens until March 2020.
- While the data relating to diversion was incomplete, it indicated that the ACDA diverted a mere 5 percent of cases in 2017 and 2018 combined.
- The ACDA kept and provided poor-quality data and had no policies regarding data integrity.

We are calling on the ACDA to change its internal policies and practices. We are also calling on Alameda County residents to hold the ACDA accountable for its actions. In doing so, we hope that this report can: 1) better align ACDA practices with public support for justice reform, centering the perspectives of system-impacted people, 2) redirect public spending away from costly over-prosecution and overincarceration, 3) promote public oversight and government accountability, and 4) help curb the historical trend of mass incarceration in California and nationally. These objectives are especially important because of the DA’s role in maintaining mass incarceration, racial disparities in the criminal legal system, and a lack of accountability for law enforcement.
In this report, we ask DA O’Malley to reform the policies and practices of the ACDA to reduce incarceration, criminalization, and racial disparities in Alameda County, including:

- **With respect to charging decisions,** create consistent internal policies to guide prosecutors in the use of discretion. Do not charge offenses we’ve listed as “decline to charge,” automatically refer cases to pre-plea diversion programs with offenses we’ve listed as “diversion,” because these are offenses that are a waste of limited resources or where health-based interventions are best suited solutions for all parties involved.

- **With respect to youth justice,** create a policy to never charge youth as adults.

- **With respect to sentencing,** reduce and eliminate excessive penalties by no longer seeking any enhancements, and no longer charging under the Three Strikes law, Life without the Possibility of Parole and death sentences.

- **With respect to immigration consequences,** continue to work with community partners to implement and enforce new policies that mitigate and eliminate the immigration consequences of criminal convictions.

- **With respect to police accountability,** create an internal policy around police-relevant practices, including: investigating and charging police use-of-force incidents, records access under SB 1421, making the “Brady list” (list of non-credible officers who the DA’s office will NOT use as witnesses), and pledging to never receive campaign donations from law enforcement unions.

- **With respect to diversion programs,** increase access to diversion programs and collaborative courts by: reducing exclusion criteria, expanding eligibility criteria, and removing the requirement that individuals must plead before they can enroll. Ensure that all programs are pre-plea. This should not have a net-widening effect and should only apply to cases that would otherwise be prosecuted.

- **With respect to parole,** institute a policy where the ACDA only involves itself in the process to support the release of individuals much like the Los Angeles DA’s new policy.

- **With respect to data transparency,** improve data tracking and integrity by recording more variables, including demographic data for individuals, and create an end-to-end case tracking system for charging and diversion.

A more extensive and detailed list of recommendations can be found on page 30.
“People deserve transparency from the DA’s office — who is she prosecuting? Who gets a pass? The data should be public.”

— Justice Reinvestment Coalition member

**The Failure of Mass Incarceration**

The United States incarcerates more people per capita than any other nation, accounting for 25 percent of the world’s incarcerated people. If California were a country, it would have the fourth highest incarceration rate in the world. As the most populous state in the nation, it also ranks high in absolute terms, convicting over 500,000 people annually. While some may consider California a model for reform, as a state it continues to perpetuate longstanding racial disparities, including in arrests, prosecutions, and sentencing. The most recent statistics from the California Department of Corrections and Rehabilitation (CDCR) show that Black people make up over 28 percent of the state’s prison population but only 6 percent of the state’s total population. Similar disparities exist in arrest rates. According to the Drug Policy Alliance, in 2012 only 6.6 percent of California’s population were Black, while Black people accounted for almost 15 percent of felony drug arrests in California, despite drug use being the same across populations.

California’s history of prison overcrowding, discriminatory criminal justice practices, and high recidivism make the state a critical target for criminal legal reform. In 2011, the U.S. Supreme Court ruled that California must reduce its prison population to 137.5 percent of planned capacity. As of July 2019, 13 of the state’s 35 prisons still operated above this cutoff. As of October 2020, due to COVID-related releases, California’s prison population is now 108.9 percent of planned capacity. However, California experienced a sharp spike in COVID cases throughout the state in the last two months of 2020. The state prison population must continue to dramatically reduce, if we are serious about saving lives. Between 2007 and 2016, California issued over $2.5 billion in lease-revenue bonds for the expansion of its jail system. This reliance on incarceration has jeopardized the health, safety, and constitutional rights of incarcerated people in this state, an issue that has come into sharp focus since the outbreak of COVID-19.

Over-incarceration is not equally distributed across demographics. People of color are represented disproportionately in the state’s criminal legal system. In particular, Black men are incarcerated in state prisons at 10 times the rate of white men and represent 28.5 percent of incarcerated men, despite making up only about 5 percent of California’s male residents. The state also has one of the country’s highest recidivism rates. Fifty percent of incarcerated people recidivate and end up incarcerated again within three years of their release. California’s criminal legal system exists at great human and financial cost with demonstrably failing rehabilitative outcomes.

The state spends over $13 billion a year on prison operations, or over $80,000 per incarcerated person, an investment for which many argue the negative consequences far outweigh the positive. Increasing evidence points to the inefficacy of the carceral system to meet many of its specified goals, including justice and public safety. For instance, peer-reviewed research has shown that incarceration does not reduce an individual’s likelihood of committing violence, one of its purported objectives. Despite the half-century-long War on Drugs — one of the main drivers of mass incarceration — drug use levels remain largely the same, if not worse. In addition, analysis of the release of tens of
thousands of incarcerated people in the wake of California’s prison realignment, showed a decrease in recidivism and no impact on violent crime rates. Meanwhile, Proposition 47, one of the main vehicles for reducing the prison population, is expected to lead to hundreds of millions in savings for the state. While the benefits of incarceration appear elusive, its psychological and material costs are devastating for incarcerated individuals and their families. Families and the larger community also feel the effects as formerly incarcerated individuals struggle to assimilate back into society without access to rehabilitative services, in addition to the housing, educational, and employment discrimination they face after they’ve served their time.

**District Attorneys’ Impact on Mass Incarceration**

As is the case in most states, California DAs are elected officials. Still, a lack of transparency and historical deference to “law and order” politics has meant that they have been able to evade accountability by the public for their practices and policies. As the ACLU’s website aptly puts it: “District attorneys decide who will be detained in jail before their court date, and who will be sent to state prison. They decide what crimes to charge, and they control the plea deals offered. With 95 percent of those incarcerated having taken plea deals — including people who have pled guilty to a crime they didn’t commit to avoid the risk of a longer sentence or because they were under duress — prosecutors largely control who ends up behind bars.” After sentencing, prosecutors continue to influence outcomes by attending parole hearings and opposing individuals’ releases, often without any justification.

Prosecutors’ decisions significantly impact the resources that are spent on jails, prisons, probation, and parole services. Over time, and with a succession of DAs that exercise discretion similarly, DAs have fueled a criminal legal system that over-criminalizes, overcharges, and over-incarcerates communities of color with little to show for it except billions of dollars continually wasted. This is reflected in the fact that the 2019–2020 budget for California’s criminal legal system is over $15 billion, and continues to rise. Furthermore, while the ACDA’s office is allocated $84 million and the Sheriff’s office $431.2 million, Public Defense is allocated only $50.8 million.

District attorneys have a critical role to play in criminal justice reform. DAs’ significant discretion and autonomy has also led to distinct criminal justice policies across counties that breed inequities. However, this autonomy also represents an opportunity for DAs to drive criminal justice reform efforts without requiring leadership at the state level. Voters can also hold their DAs accountable as elected officials.

DA Kim Foxx raised the bar for felony retail theft charges from $700 to $1,000 or greater, decreasing the number of felony retail theft charges by almost 75 percent in the first two years of her administration. She also expanded alternative prosecution practices, such as diversion, and encouraged her deputies to drop charges on low-level offenses, including shoplifting, drug possession, and failure to pay traffic fines. Despite fears that decreased prosecution would result in higher rates of crime, the county experienced a decrease in violent crime of 8 percent, and the murder count decreased every year she has been in office.

In Philadelphia, Larry Krasner won his 2017 election with a campaign platform focused on shifting the DA’s office “from a culture of seeking victory for prosecutors to a culture of seeking justice for victims,” with goals to end mass incarceration, illegal use of stop-and-frisk, cash bail imprisonment, pursuit of the death penalty, and abuse of civil asset forfeiture. His policies have instructed attorneys to offer plea deals below the bottom range of Pennsylvania sentencing guidelines for nonviolent offenses, halt prosecution of marijuana cases where...
there was no intent to sell, decline to charge sex workers before a third prosecution conviction, and handle any small retail theft with a citation. The city’s jail population has decreased 33 percent during his tenure, without any increase in crime.²⁸

Rachael Rollins won the 2018 DA election in Boston’s Suffolk County with promises to end cash bail and pretrial detention and halt prosecution of petty, poverty-related crimes.²⁹ Chesa Boudin won San Francisco County’s 2019 election on a similarly progressive campaign platform. In his short time in office he has eliminated the use of status enhancements,³⁰ ended the use of cash bail and reduced pretrial detention,³¹ and offered diversion programs for primary caregivers as an alternative to incarceration.³²

**Alameda County**

Alameda County data from 2015 emphatically shows that Black and Latinx individuals have higher jail and prison incarceration rates than whites.³³ According to that data, Black individuals were almost nine times as likely as whites to be incarcerated in jail, and over four times the county average. Rates for Latinx people were about twice the rate of whites, and slightly higher than the county average.³⁴ These disparities provide evidence of discriminatory policing and prosecution by police departments and the DA’s office.

In Alameda County, Nancy O’Malley has served as the District Attorney since 2009. During the three election cycles O’Malley has served, she’s only run opposed once. That was most recently, in 2018, when civil rights attorney Pamela Price challenged her for the seat. In that election, DA O’Malley received campaign contributions from numerous police unions and associations.³⁵

Although O’Malley spends time in the community at events and participating in backpack or bike giveaways, especially in South and East Alameda County, the general public is largely uninformed about the role of the District Attorney. Many Alameda County residents are unaware that a DA is an elected position, whose salary is paid for with their tax dollars. DAs’ power to hold law enforcement accountable for misconduct such as police brutality and false police reports is also unbeknownst to many community members.

Following community demands for a platform to discuss community recommendations, O’Malley has been regularly meeting with the Justice Reinvestment Coalition (JRC) of Alameda County. The JRC is comprised of 17 organizations that include formerly incarcerated youth and adults, criminal legal reform professionals, and community advocates. These in-person meetings have the potential for tremendous innovation with regard to criminal legal reform and correcting the practices in Alameda County that helped fuel the mass incarceration boom of the past four decades.

The relationship between prosecutorial discretion and racial disparities in the criminal legal system has been historically difficult to assess due to lack of data. The public needs better access to prosecutors’ training records, records of prosecutors’ choice points, data that tells us who those choices are impacting, and data that tells us what those impacts are. Access to high quality data can help explain the connection between prosecutorial discretion, mass incarceration, and racial disparities in the criminal legal system. At the same time, such data would also be crucial to measure the effects of targeted interventions aimed at undoing these injustices.
METHODS

To collect data for this report, we worked alongside the Justice Reinvestment Coalition to understand the practices of the ACDA and discuss how we can promote change that will positively affect the most impacted communities in Alameda County.

Our research and analysis are based on a mixed-methods approach to information gathering. We gathered information through public records requests and analysis, community engagement, and court-watching.

Records Requests & Analysis

On Aug. 30, 2019, the ACLU of Northern California received responses to a public records request from the ACDA pursuant to California Public Records Act. We worked with our coalition partners to define core function areas we wanted to target. These areas were: charging decisions, immigration consequences, police accountability, diversion programs, parole and sentencing, and data transparency. We hoped that with this information, we could better understand current ACDA practices and policies. We received records that included quantitative data, (spreadsheets that tracked charging practices) and qualitative data, (pdfs of internal policies and public-facing documents).

To analyze the quantitative data we received, we sorted and summed charging data using a statistical analysis tool. To analyze internal policies, we read through many pages of documents provided. In both cases, we were limited by the poor quality and availability of data we received. There was no end-to-end tracking system that represented a case from arrest to post-sentencing. Within a given database, the ACDA did not track important data. For instance, the data we received for juveniles charged in juvenile court did not contain disaggregated data. Instead, it contained combinations of charges and seemed to represent those combinations as they may have been input into the ACDA database. Additionally, adult charging data did not contain: 1) demographic data, such as age or race, for individuals charged, 2) disposition data, such as date or final charges at sentencing, or a variable specifying which code the charged offense came from, such as the Penal Code or Vehicle Code. In addition to recommendations for specific practices, at the end of this report we recommend that the ACDA track and maintain higher quality data.

Community Engagement

Community engagement is an essential part of prosecutor accountability efforts, and also a source of information we used to gather data. The ACDA is an elected position with a salary of $358,137.78, excluding benefits. Total pay and benefits amounts to $509,240.70, which is paid by taxpayers. It makes sense that the DA should be held accountable to the public and especially to the communities most harmed by their practices. Community engagement ensures that community members exercise their democratic power, and communicate the standard to which the ACDA should be held. Additionally, community engagement empowers those directly impacted by the legal system to organize. In many ways, these are the people most equipped to lead a movement that seeks to correct policies and practices that cause harm both in their personal and family lives, and also in their communities.

Since the ACDA election in June 2018, Urban Peace Movement, in partnership with the ACLU of Northern California and the Justice Reinvestment Coalition of Alameda County, organized formerly incarcerated and systems-impacted youth, adults, allies, legal advocates, and local residents in a
variety of community engagement efforts across Alameda County. While Oakland has long received the majority of attention in terms of criminal justice reform, activism, and organizing, other parts of Southern and Eastern Alameda County are given less consideration. During the summer of 2019, Urban Peace Movement’s formerly incarcerated youth staff members led a team of youth and young adults that gathered 500 community surveys to understand their position on important prosecutorial issues. Survey questions addressed various issues described throughout this report. More in-depth description of our survey samples can be found in Appendix E.

Of the people we surveyed, 46.7 percent responded that either they or a family member had been impacted by the criminal legal system. In terms of being directly impacted by crime, 44.8 percent of respondents were survivors.

Additionally, over 1,000 signatures were gathered for a petition calling on the ACDA’s office to hold Alameda County Sheriff’s Sgt. James Russell accountable for illegally recording privileged conversations between children and their attorneys. Community surveys and petition signatures were gathered throughout the county at community events, businesses, and public spaces. Community presentations about the power of District Attorneys were held for high school and college students, immigrant community organizations and parent organizations, and for broad public events. Through these efforts, Urban Peace Movement and the Justice Reinvestment Coalition reached over 2,000 people.
Finally, the network coordinated in-person stakeholder meetings with the ACDA Nancy O’Malley and her staff, both in community settings and at the ACDA’s office in Oakland. All materials and agendas for the community surveys, petitions, educational presentations, and stakeholder meetings with the ACDA’s office were prepared by formerly incarcerated and directly impacted youth, community members, and advocates.

**Court-Watching**

Since August 2018, over 60 community members have participated in court-watching by observing jury trials, pre-trial hearings, arraignments, and other court proceedings. The Justice Reinvestment Coalition led over three weeks of in-person observations, with a sustained week and a half of daily court-watching occurring in the fall of 2019. The qualitative observations expose a great deal about the relationship between the daily courtroom prosecutors and their supervisors who are approving plea offers, as well as their relationship to the judge, sheriff’s deputies, defense attorneys, defendants, and loved ones in the audience. For many court watchers, the broad discretion and lack of consistency in decision-making amongst courtroom prosecutors became very clear after comparing multiple felony and misdemeanor courtrooms throughout Alameda County.

Court-watchers took note of how frequently a person appearing in court was in or out of custody, their in-custody status at Santa Rita Jail, how often people are released on their own recognizance, the frequency and amount at which bail is set, frequency and length of time a county jail sentence is imposed, the perceived race or ethnicity of the defendant, the perceived level of empathy shown by people holding county level positions of power, how often defendants had family or community support present, and comparisons of the overall culture and energy of various courtrooms.

Teams of court watchers observed morning and afternoon court sessions, jury trials, and other special hearings for anywhere between one to three hours, at three different courthouses: Rene C. Davidson, Wiley W. Manuel, and the East County Hall of Justice. Laptops and paper notetaking materials were used in courtrooms, which garnered different responses depending on who was working in a particular court room on any given day. While some judges, prosecutors, and deputies were unbothered by court watchers using laptops to make their observations, Judge Barbara Dickinson asked ACSO deputies to remove court watchers if they didn’t put their laptops away. This limited court watchers ability to record the breadth of observations made on that particular day.

Conversations during breaks with a prosecutor and a judge in one courtroom gave a group of court-watchers a deeper understanding of the court process, perspectives being considered in decision-making, and personal motivations for seeking particular outcomes. Informal conversations with out-of-custody individuals, as well as community members attending court in support of their in-custody loved one, shed new light on various aspects of the plea negotiation process from the perspective of those who are fighting cases.

It is important for the public, especially directly impacted community members and advocates, to periodically observe real-time court proceedings to contextualize data. Court watchers are given a glimpse into the day-to-day decision making of line prosecutors and their superiors, as well as the relationship between prosecutors, judges, defense attorneys, court staff, and community members.
Charging Decisions

The most essential prosecutorial function is determining whether and how to charge cases brought forth by law enforcement, due to the impact on both the lives, families, and communities of individuals charged, and on resources spent and incarceration rates.

**ADULT CASES**

In response to the ACLU’s Public Records Act request for prosecution data from 2017 and 2018, the ACDA provided a dataset that includes every charge prosecuted by their office for those two entire calendar years. However, our analysis was restricted by the limitations in the data provided. The ACDA provided no demographic data, no disposition data, no information on where arrests occurred, and no information on charges the DA declined to prosecute. Because no disposition data is available, it’s possible that some of these charges were dropped. Overcharging to later gain leverage in plea deals is a common practice from DAs.

For our analysis, we were interested in charges of felonies and misdemeanors brought by the ACDA. Of those, we identified 85,972 charges (35 percent were felonies and 65 percent were misdemeanors) and 36,572 cases.

**Adult Charges, 2017–2018**

Between 2017 and 2018, the ACDA brought 55,557 misdemeanor charges (64 percent) and 30,415 felony charges (36 percent), totaling 85,972 charges. Serious and violent felonies, which receive the most public attention from DAs, constitute merely 7 percent of total charges. Within misdemeanor and felony charges, we identified two categories of low-level offenses. The first, “Decline to Charge” (or DTC) charges, are those offenses the DA’s office prosecuted but that we believe should not be charged at all, such as simple possession, possession of drug paraphernalia, or driving with a suspended license because they are such low-level offenses and criminally prosecuting them is not in the interest of justice, safety, and rehabilitation. Additionally, charging these offenses is an inefficient use of county funds. The second, “Diversion” charges, are those such as petty theft, DUls, and variations of burglaries or robberies where the ACDA should recommend for pre-plea diversion programs because other social services and restorative justice interventions are more appropriate to resolve the underlying issues and harm than the carceral system. Incarcerating and fining people for DUls
have traditionally not reduced recidivism nor prevented further instances. There is a growing consensus that substance abuse disorders are better treated outside of the criminal legal system, where adequate resources can be provided, such as in diversion programs.\textsuperscript{39} We developed these categories with input from community stakeholders, and they can be found in Appendix D. Contra Costa County DA Diana Becton and Los Angeles DA George Gascon both have DTC lists, which include many of the offenses listed here. The Contra Costa County DA’s office has said they expected this list to significantly reduce filings.\textsuperscript{40} We are assuming here, as well as in our analysis of serious violent crimes, that the overlap is negligible.

The following tables describe the most common charges filed by the ACDA’s office in 2017–2018, overall and broken down by felonies and misdemeanors.

### Top 5 Most Common Adult Charges in Alameda County, 2017–2018

<table>
<thead>
<tr>
<th>Offense</th>
<th>Number of charges</th>
<th>Cases with at least one of these charges( ^* )</th>
<th>Cases with exclusively this charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>DUI (VC 23152)( ^* ) (W)</td>
<td>16,854</td>
<td>8,625</td>
<td>5,112</td>
</tr>
<tr>
<td>Petty Theft (PC 484 and subsections)( ^* )</td>
<td>3,999</td>
<td>3,294</td>
<td>1,903</td>
</tr>
<tr>
<td>Suspended Driving Privileges-Related (VC 14601.1-.5)( ^* )</td>
<td>3,567</td>
<td>3,292</td>
<td>564</td>
</tr>
<tr>
<td>Possession of Paraphernalia (HS 11364)( ^* )</td>
<td>3,336</td>
<td>3,147</td>
<td>504</td>
</tr>
<tr>
<td>Possession of Controlled Substance (HS11377 and subsections)( ^* )</td>
<td>2,852</td>
<td>2,738</td>
<td>567</td>
</tr>
<tr>
<td><strong>Sum of top 5 charges</strong></td>
<td><strong>30,608</strong></td>
<td><strong>21,096</strong></td>
<td><strong>8,650</strong></td>
</tr>
<tr>
<td><strong>Total of all charges or total cases</strong></td>
<td><strong>85,972</strong></td>
<td><strong>36,572</strong></td>
<td><strong>36,572</strong></td>
</tr>
</tbody>
</table>

\( ^* \) denotes a charge on our Diversion list while \(^\text{\*} \) denotes a charge on our DTC list.
**FEONIES**

**Top 10 Most Common Felonies Charged to Adults in Alameda County, 2017–2018**

<table>
<thead>
<tr>
<th>Offense</th>
<th>Number of charges</th>
<th>Cases with at least one of these felony charges</th>
<th>Cases exclusively made up of this felony charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Robbery (PC 211)*</td>
<td>1,879</td>
<td>970</td>
<td>507</td>
</tr>
<tr>
<td>Drug-related (including DUI of controlled substance) (VC 11550^, HS 11350^, HS 11351*, HS 11363*, HS 11364*, HS 11377*)</td>
<td>1,740</td>
<td>1,110</td>
<td>116</td>
</tr>
<tr>
<td>Burglary (PC 459)*</td>
<td>1,733</td>
<td>997</td>
<td>468</td>
</tr>
<tr>
<td>Auto theft (VC 10851 and subsections)*</td>
<td>1,636</td>
<td>1,481</td>
<td>115</td>
</tr>
<tr>
<td>Felony firearm possession (PC 29800 and subsections)*</td>
<td>1,218</td>
<td>958</td>
<td>72</td>
</tr>
<tr>
<td>Assault &amp; Battery (PC 245(a) and subsections)</td>
<td>1,190</td>
<td>811</td>
<td>159</td>
</tr>
<tr>
<td>Carrying Concealed Firearm (PC 25400 and subsections)*</td>
<td>1,112</td>
<td>912</td>
<td>13</td>
</tr>
<tr>
<td>Carrying Loaded Firearm (PC 25850)*</td>
<td>1,043</td>
<td>882</td>
<td>8</td>
</tr>
<tr>
<td>Grand Theft (PC 487 and subsections)</td>
<td>845</td>
<td>555</td>
<td>199</td>
</tr>
<tr>
<td>Possession of Ammunition (Felon) (PC 30305)*</td>
<td>607</td>
<td>543</td>
<td>31</td>
</tr>
<tr>
<td><strong>Sum of top 10 charges</strong></td>
<td><strong>13,003</strong></td>
<td><strong>9,219</strong></td>
<td><strong>1,688</strong></td>
</tr>
<tr>
<td><strong>Total of all charges or total cases</strong></td>
<td><strong>85,972</strong></td>
<td><strong>36,572</strong></td>
<td><strong>36,572</strong></td>
</tr>
</tbody>
</table>

* denotes a charge on our Diversion list while ^ denotes a charge on our DTC list.

Of the 30,415 felonies charged by the ACDA between 2017 and 2018, about 65 percent fall within the category of low-level offenses mentioned above that could be safely diverted to various programs. 10,721 (about 35 percent) of the felony charges could have, depending on circumstances^2, been referred for diversion or restorative justice programs, without requiring the individual to plead guilty (“pre-plea diversion”). 3,259 (about 11 percent) of the felony charges could not have been charged at all.

Of the 36,572 unique cases, 9,939 (27 percent) comprise at least one felony charge, and 9,909 (also about 27 percent) cases were made up of exclusively felony charges. This means that in all but 30 felony cases, people who were charged with felonies were exclusively charged with felony charges.

**Adult Felonies, 2017–2018**

- **56.1%** Non low-level offense
- **33.2%** Diversion
- **10.7%** Decline to Charge
MISDEMEANORS

Top 10 Most Common Misdemeanors Charged to Adults in Alameda County, 2017–2018

<table>
<thead>
<tr>
<th>Offense</th>
<th>Number of charges</th>
<th>Cases with at least one of these misdemeanor charges</th>
<th>Cases exclusively made up of this misdemeanor charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>DUI (VC 23152 and subsections)*</td>
<td>16,295</td>
<td>4,939</td>
<td>5,075</td>
</tr>
<tr>
<td>Drug-related (including DUI of controlled substance) (VC 11550*, HS 11350*, HS 11351*, HS 11363*, HS 11364*, HS 11377*)</td>
<td>7,396</td>
<td>4,939</td>
<td>2,643</td>
</tr>
<tr>
<td>Petty theft (PC 484 and subsections)*</td>
<td>3,494</td>
<td>3,057</td>
<td>1,889</td>
</tr>
<tr>
<td>Driving with Suspended License (VC 14601 and subsections)^</td>
<td>3,272</td>
<td>3,007</td>
<td>563</td>
</tr>
<tr>
<td>Disorderly Conduct (PC 647 and subsections)*</td>
<td>1,639</td>
<td>1,414</td>
<td>680</td>
</tr>
<tr>
<td>Resisting Arrest (PC 148(a)(1))^</td>
<td>1,486</td>
<td>1,232</td>
<td>207</td>
</tr>
<tr>
<td>Driving without License (VC 12500)^</td>
<td>1,443</td>
<td>1,430</td>
<td>45</td>
</tr>
<tr>
<td>Assault and Battery (PC 242)</td>
<td>1,333</td>
<td>1,203</td>
<td>430</td>
</tr>
<tr>
<td>Vandalism (PC 594 and subsections)*</td>
<td>1,333</td>
<td>1,042</td>
<td>376</td>
</tr>
<tr>
<td>Domestic Violence (PC 273.5)</td>
<td>1,053</td>
<td>1,004</td>
<td>521</td>
</tr>
<tr>
<td><strong>Sum of top 10 charges</strong></td>
<td><strong>38,585</strong></td>
<td><strong>23,267</strong></td>
<td><strong>12,429</strong></td>
</tr>
<tr>
<td><strong>Total of all charges or total cases:</strong></td>
<td><strong>85,972</strong></td>
<td><strong>36,572</strong></td>
<td><strong>36,572</strong></td>
</tr>
</tbody>
</table>

* denotes a charge on our Diversion list while ^ denotes a charge on our DTC list.

Of the 55,557 misdemeanors charged by the ACDA between 2017 and 2018, 39,676 (about 71 percent) qualify as low-level offenses. 22,561 (about 41 percent) of these are Diversion offenses. 17,115 (about 31 percent) of these are DTC offenses. Furthermore, of the 36,572 unique cases, 26,649 cases (72.9 percent) included at least one misdemeanor charge. 26,634 (72.8 percent of all unique cases) cases were made up exclusively of misdemeanor charges.

![Adult Misdemeanors, 2017–2018](image)
**LOW-LEVEL OFFENSES**

Of all 85,972 non-infraction charges, 53,036 (62 percent) can be classified as low-level charges. Of the 36,572 unique cases, 27,611 (75 percent) cases had at least one low-level charge. Furthermore, 17,741 cases (48 percent of total cases) were made up of exclusively low-level offenses.

A list of low-level offenses can be found in Appendix D. Topping the list is DUI (or VC 23152). Almost Twenty percent of all charges were DUIs. 8,625 cases had at least one DUI charge and 5,112 cases (14 percent of all cases) consisted exclusively of DUI charges.

Out of all low-level charges, 32,663 (62 percent) were “diversion” charges, which we believe would be addressed more effectively if they were recommended to pre-plea diversion programs. Furthermore, out of all low-level charges, 20,375 (38 percent) qualify as DTC charges, which we recommend to not be charged at all. Out of the total 85,972 charges, 23.6 percent qualify as DTC charges while 38 percent qualify as “diversion” charges.

The following table highlights the most common low-level offenses charged, encompassing both felonies and misdemeanors.

### Top 10 Most Common Low-Level Offenses Charged to Adults in Alameda County, 2017–2018

<table>
<thead>
<tr>
<th>Offense</th>
<th>Number of charges</th>
<th>Cases with at least one of these low-level charges</th>
<th>Cases exclusively made up of this low-level charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>DUI — VC 23152 and subsections*</td>
<td>16,854</td>
<td>8,625</td>
<td>5,112</td>
</tr>
<tr>
<td>Drug-related (including DUI of controlled substance) (VC 11550*, HS 11350*, HS 11351*, HS 11363*, HS 11364*, HS 11377*)</td>
<td>8,548</td>
<td>6,049</td>
<td>2,759</td>
</tr>
<tr>
<td>Petty theft (PC 484 and subsections)*</td>
<td>3,999</td>
<td>3,294</td>
<td>1,903</td>
</tr>
<tr>
<td>Driving with Suspended License (VC 14601 and subsections)*</td>
<td>3,583</td>
<td>3,292</td>
<td>564</td>
</tr>
<tr>
<td>Robbery (PC 211)*</td>
<td>1,909</td>
<td>996</td>
<td>525</td>
</tr>
<tr>
<td>Resisting Arrest (PC 148(a)(1))^</td>
<td>1,802</td>
<td>1,491</td>
<td>208</td>
</tr>
<tr>
<td>Auto theft (VC 10851 and subsections)*</td>
<td>1,796</td>
<td>1,631</td>
<td>130</td>
</tr>
<tr>
<td>Vandalism (PC 594 and subsections)*</td>
<td>1,606</td>
<td>1,372</td>
<td>474</td>
</tr>
<tr>
<td>Driving without License (VC 12500)^</td>
<td>1,520</td>
<td>1,506</td>
<td>45</td>
</tr>
<tr>
<td>Felony firearm possession (PC 29800 and subsections)*</td>
<td>1,234</td>
<td>973</td>
<td>72</td>
</tr>
<tr>
<td><strong>Sum of top 10 charges</strong></td>
<td><strong>42,851</strong></td>
<td><strong>29,229</strong></td>
<td><strong>11,792</strong></td>
</tr>
<tr>
<td><strong>Total of all charges or total cases:</strong></td>
<td><strong>85,972</strong></td>
<td><strong>36,572</strong></td>
<td><strong>36,572</strong></td>
</tr>
</tbody>
</table>

* denotes a charge on our Diversion list while ^ denotes a charge on our DTC list.
WOBBLERS

Wobblers are a set of offenses that a prosecutor may charge as either a felony or a misdemeanor. Because of the difference in impact that a felony conviction can have on an individual versus a misdemeanor conviction, such as longer sentences and long-term consequences for housing and employment during reentry, this is an area where prosecutorial discretion can have major consequences. We compared the ACDA charging data we received to a list of wobblers we developed with partners.43

We found that, of the 85,972 charges the ACDA brought between 2017 and 2018, 57 percent were wobblers. 31,429 (64 percent) of those wobblers were charged as misdemeanors and 17,545 (36 percent) were charged as felonies. The most common wobbler offenses were DUI, larceny, drug possession and burglary.

From a case-level perspective, of the 36,572 total cases in 2017 and 2018, 14,824 (40.5 percent) were made up exclusively of wobbler charges. In comparison, according to the ACDA’s budget presentation from the 2017–2018 fiscal year, the ACDA reviewed 40,932 police reports and charged 8,948 people with felonies and 21,493 people with misdemeanors.44

The following table illustrates the most common wobbler charges that appear in the data, and at what severity they were charged by Alameda county prosecutors.

<table>
<thead>
<tr>
<th>Charge</th>
<th>Charge Type</th>
<th>Misdemeanor</th>
<th>Felony</th>
<th>Total number of charges</th>
</tr>
</thead>
<tbody>
<tr>
<td>DUI — VC 23152(a)</td>
<td></td>
<td>7,732</td>
<td>261</td>
<td>7,993</td>
</tr>
<tr>
<td>DUI — VC 23152(b)</td>
<td></td>
<td>7,648</td>
<td>238</td>
<td>7,886</td>
</tr>
<tr>
<td>Larceny — PC 484(a)</td>
<td></td>
<td>3,277</td>
<td>139</td>
<td>3,416</td>
</tr>
<tr>
<td>Drug Possession — HS 11377(a)</td>
<td></td>
<td>2,518</td>
<td>333</td>
<td>2,851</td>
</tr>
<tr>
<td>Burglary — PC 459</td>
<td></td>
<td>159</td>
<td>1,714</td>
<td>1,866</td>
</tr>
<tr>
<td>Driving Stolen Vehicle — VC 10851(a)</td>
<td></td>
<td>160</td>
<td>1,636</td>
<td>1,796</td>
</tr>
<tr>
<td>Vandalism — PC 594(a)</td>
<td></td>
<td>1,174</td>
<td>432</td>
<td>1,606</td>
</tr>
<tr>
<td>Larceny — PC 496d(a)</td>
<td></td>
<td>148</td>
<td>1,416</td>
<td>1,564</td>
</tr>
<tr>
<td>Simple Possession of Drugs — HS 11350(a)</td>
<td></td>
<td>1,272</td>
<td>175</td>
<td>1,447</td>
</tr>
<tr>
<td>Domestic Violence — PC 273.5(a)</td>
<td></td>
<td>1,053</td>
<td>389</td>
<td>1,442</td>
</tr>
<tr>
<td>Battery — PC 242</td>
<td></td>
<td>94</td>
<td>1,333</td>
<td>1,427</td>
</tr>
<tr>
<td>Carrying Loaded Firearm — PC 25850</td>
<td></td>
<td>130</td>
<td>1,043</td>
<td>1,173</td>
</tr>
<tr>
<td>Larceny — PC 496(a)</td>
<td></td>
<td>554</td>
<td>524</td>
<td>1,078</td>
</tr>
<tr>
<td>Criminal Threats — PC 422</td>
<td></td>
<td>655</td>
<td>376</td>
<td>1,031</td>
</tr>
<tr>
<td>Assault with Deadly Weapon — PC 245(a)(1)</td>
<td></td>
<td>405</td>
<td>554</td>
<td>959</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td><strong>26,979</strong></td>
<td><strong>10,563</strong></td>
<td><strong>37,535</strong></td>
</tr>
</tbody>
</table>
Burglary, driving a stolen vehicle, larceny, battery, carrying a loaded firearm and assault with a deadly weapon, highlighted in light blue in the table above, were charged more often as felonies than as misdemeanors. All of these charges, except assault with a deadly weapon, are about 10 times more often charged as a felony. Additionally, the ACDA has a blanket, officewide practice of seeking a mandatory minimum of 120 days jail time for firearm possession. By overwhelmingly charging these as felonies, the ACDA is missing a significant opportunity for positive intervention in lieu of seeking the harshest charging and sentencing choices. Charging more wobblers as misdemeanors can prevent a large population of those charged with offenses from the harmful long-term effects of a felony conviction, such as prolonged incarceration, discrimination in licensing, housing, employment, and education. The top 15 wobbler charges listed above constitute 76.64 percent of all wobbler charges.

COURT WATCH OBSERVATIONS

One group of court watchers had the opportunity to speak with a judge and Deputy DA during a break inside one of the court departments. Discussion topics ranged from motivations to become a judge or prosecutor, their background, and alternatives to incarceration for the most common offenses. This impromptu conversation reinforced the popular belief that “those closest to the problem are closest to the solution.” The judge discussed personal struggles earlier in their life, which put them in a position to make sound and compassionate judgments about the thousands of individuals who appear in court for similar health issues and related behavior. This judge was especially compassionate on DUI cases, as demonstrated in their conversations with individuals, recommendations for substance abuse classes, and check-ins about their progress in substance abuse support classes. As seen in the data above, DUI charges are overwhelmingly the most common ones charged by the ACDA, making up almost 20 percent of all charges. Judges and prosecutors must make decisions that are informed by the latest research, data, and the root causes of certain behaviors. They must work in partnership with directly impacted community members, service providers, and advocates to develop concrete alternatives to incarceration.

Findings from our community survey highlight overwhelming public support for charging all wobblers as misdemeanors and for ending the mandatory minimum 120 days in jail for firearm possession.

Would you support the District Attorney if they decided to charge all “wobblers” as misdemeanors?

- Yes: 14%
- No: 86%

Do you support an end to the District Attorney’s policy of a mandatory minimum 120 days in prison for firearm possession, and instead have youth be evaluated on a case-by-case basis?

- Yes: 17.9%
- No: 82.1%

While the ACDA’s internal policy of a mandatory minimum 120 days in prison for firearm possession can be applied to people of all ages, our community research and court support has indicated that young men of color under the age of 25 are most vulnerable to this policy of mandatory incarceration by the DA’s office.
SERIOUS, VIOLENT FELONIES

In addition to understanding how the ACDA charges low-level offenses, we wanted to understand how much of the ACDA’s caseload was dedicated to crimes that were serious or involved the threat of or actual physical harm to another person, defined in the Penal Code as “serious” and “violent” offenses. To do this, we compared the charging data we received to a list of 362 serious, violent offenses as defined by Penal Code statutes. We found that between 2017 and 2018, the ACDA charged 5,990 serious, violent offenses as felonies. This represents only 6.9 percent of the total charges brought during that time, and 20 percent of the total felony charges brought during that time. The table below shows the five most common serious violent felonies charged:

<table>
<thead>
<tr>
<th>Offense</th>
<th>Number of charges</th>
</tr>
</thead>
<tbody>
<tr>
<td>Robbery — PC 211</td>
<td>1,843</td>
</tr>
<tr>
<td>Burglary — PC 459</td>
<td>1,714</td>
</tr>
<tr>
<td>Criminal Threats — PC 422</td>
<td>376</td>
</tr>
<tr>
<td>Assault with Semiautomatic — PC 245(b)</td>
<td>187</td>
</tr>
<tr>
<td>Carjacking — PC 215(b)</td>
<td>176</td>
</tr>
</tbody>
</table>
YOUTH JUSTICE

We identified 459 cases brought against juveniles between 2017 and 2018. The ACDA did not provide case disposition or individual demographic data. Because of the poor quality of the data provided, it was impossible to distinguish charges by case or count numbers. This means that, in total, it is likely that the following findings may not accurately reflect distinct cases.

The five most common charges filed against juveniles in 2017 and 2018 were, in order of frequency:

<table>
<thead>
<tr>
<th>Offense</th>
<th>Number of charges</th>
</tr>
</thead>
<tbody>
<tr>
<td>Robbery (PC 211)</td>
<td>148</td>
</tr>
<tr>
<td>Auto theft (VC 10851)</td>
<td>70</td>
</tr>
<tr>
<td>Burglary (PC 459)</td>
<td>48</td>
</tr>
<tr>
<td>Assault (PC 245)</td>
<td>45</td>
</tr>
<tr>
<td>Carrying a Concealed Weapon (PC 25400)</td>
<td>41</td>
</tr>
</tbody>
</table>

In 2017 and 2018, 24 juvenile cases were charged in adult court. 58 percent of these cases were transferred from juvenile court to adult court, while 42 percent were sent directly to adult court. Since the passage of Proposition 57 in 2016, DAs no longer have the authority to file young people directly in adult court. One possible explanation is that these were cases where the ACDA charged these youth as adults in 2016 but they showed up in the 2017–2018 data because the cases were still pending. However, based on the data provided, we have no way of knowing the reason for this discrepancy.

Our community survey shows widespread support for ending the prosecution of youth in adult court altogether.

Do you believe Alameda County should end the practice charging youth as adults, and instead expand alternative courts and programs for youth?

472 responses

85.2% Yes
14.8% No
Immigration Consequences

The ACDA immigration policy was obtained through a PRA request. This policy directed prosecutors to use abhorrent practices, including leveraging collateral immigration consequences in plea negotiations to get longer sentences. It recommended that it was more appropriate to leverage collateral consequences in circumstances where the ratio of offense “severity” to collateral consequence “severity” was highest. This version of the guidelines suggested that, since it was difficult for prosecutors to stay updated on collateral consequences, it was appropriate for prosecutors to measure the severity of collateral consequences based on a defendant’s willingness to endure them. This was abhorrent because it sought to leverage the harms and threat of deportation (and the attendant family separation and economic devastation) in order to extract longer jail or probation stays for individuals.

Recently, after consistent advocacy from community-based organizations, DA O’Malley has updated the ACDA internal immigration policy as of March 2020. The organizations are still working with O’Malley to create more progressive immigration guidelines and trainings for Alameda County prosecutors, with one training taking place in November 2020.

The 2020 updates include encouraging improvements under a new “Charging Determinations” section which states, “if the immigration status is known to the prosecutor, that status shall be taken into consideration when evaluating if charges will be filed, if there are alternatives to filing charges to which the individual can be referred, if charges are filed, which charges will be alleged.” Although this creates more prosecutorial discretion, this could reduce the number of charges filed against members of immigrant communities.

The updated guidance has also removed the problematic language that directed prosecutors to leverage immigration consequences in plea negotiations. Instead, prosecutors may negotiate down the charge if the collateral consequences are disproportionate to the crime. However, prosecutors are still given discretion to “ensure safety to the public” and consider the “violent nature of the crime.” Further, the new guidance states that “any information received from defense counsel or the defendant will not be shared with federal immigration officials.” Prosecutors are instructed to refer any case involving an undocumented victim of a “serious or violent crime” to the Alameda County Family Justice Center, which can assist such victims in obtaining a U or T-Visa.

There is still work to be done to ensure that the immigration consequences of crimes are mitigated on the front end (with charging decisions), and erased when they are discovered on the back end (vacating convictions with immigration consequences), to ensure the DA considers each case on its own without regard for a defendant’s prior conviction history.

Police Accountability

As public servants whose salaries are paid with tax dollars, and who are responsible for enforcing laws that are historically racist and classist in nature, police officers throughout the country continue to evade accountability to the very laws that they’re paid to enforce. DA O’Malley does not have a strong track record for holding law
enforcement officers in Alameda County accountable for their misconduct and abuses of power committed in the line of duty. There were over 100 instances since 2000 in which a law enforcement officer was not held accountable for their excessive use of force, other acts of violence, or violating the civil, constitutional, or human rights of community members while on the clock.\textsuperscript{45}

For instance, in 2017, the ACDA investigated two killings committed by members of the Fremont Police. One investigation of Fremont Police Officer James Taylor’s killing of Nana Adomako resulted in the ACDA clearing Taylor of any wrongdoing. Likewise, the investigation of Sgt. Jeremy Miskella and Det. Joel Hernandez’s killing of pregnant teenager Elena Mondragon ended in the same result.\textsuperscript{46} Fremont Police officers were cleared of any wrongdoing just months after the Fremont Police Union donated $10,000 to DA O’Malley’s re-election campaign. Miskella was head of the Fremont Police Union at the time of the donation. One other example comes from our court-watching observations regarding Alameda County Sheriff’s Sgt. James Russell:

\textit{In August 2018, Sgt. James Russell, a 20-year law enforcement veteran with the Alameda County Sheriff’s Office, was exposed for secretly recording at least four youths who were speaking privately to their lawyers, in violation of their constitutional rights. He admitted on his own body camera footage that he recorded the conversations and that he knew it was illegal. These actions violate CA Penal Code 692 in addition to the 4th, 5th, and 6th Amendments of the U.S. Constitution. The combination of community pressure and clear admission of guilt led the ACDA to charge Russell with four counts of felony eavesdropping. During a community stakeholder meeting with our coalition, DA O’Malley stated that she would be prosecuting Russell and seeking trial, without making any plea offers along the way.}

\textit{At the preliminary hearing, a judge heard the evidence, ruled that the case should go to trial, and denied Russell’s motion to reduce his charges from felonies to misdemeanors. Russell’s court date was expedited by nearly three weeks, during Alameda County’s shelter-in-place order, after his defense team reached a deal by way of a Certification Conference. At the same time, many of those incarcerated pre-trial at Santa Rita jail were having their speedy trial rights violated and having court dates delayed for weeks.}

\textit{Ultimately, Judge Jason Chin signed off on a deal in which Russell:}

\begin{itemize}
  \item Pled to four counts of misdemeanor eavesdropping (dropped from felonies, despite a previous court hearing that deemed the rights violations severe enough to warrant felony prosecution),
  \item Would be placed on probation for three years, and
  \item Would need to fulfill 180 hours of community service.
\end{itemize}

An unusual step in finalizing the plea deal required the Deputy District Attorney on the case, Tim Wagstaffe, to also sign off on the deal on behalf of the ACDA’s office. By agreeing to do so, the ACDA’s office officially reneged on its original commitment to take this egregious violation of young people’s rights to trial. The ACDA failed to hold Russell accountable despite having Russell on videotape admitting his illegal actions, despite multiple judges ruling that this violation of children’s rights was serious enough to warrant felony prosecution, despite 1,000 petition signatures supporting Russell’s full prosecution, and despite the ACDA’s commitment to take him to trial and not offer a plea deal.

The light prosecution of Russell, and the treatment of officers in general, is contrasted by the harsh and punitive treatment of Black, Brown and low-income people who become involved with the criminal legal system. While Russell spent zero days behind bars, our court watchers found that the ACDA kept an unhoused person incarcerated for one week in Santa Rita Jail for stealing less than $20 worth of sanitary wipes.

In June 2018, a young Black father named Dujuan Armstrong died in custody at Santa Rita Jail, after Alameda County Sheriff’s deputies
placed him in a restraint device. In June 2019, DA O’Malley announced that her office had “declined to file criminal charges against deputies involved in Armstrong’s death,” stating “the evidence does not support criminal charges.” Similarly, O’Malley also failed to file criminal charges against any Santa Rita Jail deputies associated with the death of 20-year-old Christian Madrigal. Madrigal was found unresponsive after seemingly hanging himself, after being placed in ankle restraints, handcuffs, and chained to an isolation cell door, which is a violation of jail policy. Five days after he was found, he died. While the ACDA failed to hold Santa Rita Jail nor any deputies accountable, in 2020, the county agreed to pay a $5 million settlement to Madrigal’s family on the grounds of excessive force and wrongful death. While the settlement is an admission of wrongdoing on the county’s part, the fact that the ACDA yet again failed to hold the deputies responsible accountable further exemplifies their continued protection of law enforcement’s conduct that resulted in the death of community members.

These examples of failure to hold the police accountable demonstrates that Alameda County prosecutors — like so many other prosecutors across the country — take a soft approach to police misconduct, rarely bringing murder, manslaughter or serious felony charges against police officers, resulting in very few convictions for those abuses of power. These patterns highlight the need for an independent prosecutorial office housed outside of the ACDA for police crimes. Some factors that disincentivize DAs from bringing charges, such as how difficult it can be to persuade juries to convict police officers, are beyond the prosecutors’ control. Disturbingly, however, DA O’Malley accepted campaign contributions from the very law enforcement agencies that she refuses to charge. In addition to the $10,000 donation from the Fremont Police Union, O’Malley accepted at least $30,000 from other police unions, as well as $50,000 from Alameda County Sheriff Greg Ahern’s re-election campaign in 2018. Holding police officers accountable for illegal conduct is a crucial part of an anti-racist agenda to dismantle a system of mass incarceration that has targeted poor and working class Black, Indigenous, and people of color for decades. Along with DA’s tough-on-crime approach to prosecuting community members, their failure to hold law enforcement accountable for unethical search, seizure, and arrest practices has directly contributed to the rise of the prison industrial complex. In fact, many of these unchecked, non-lethal abuses of power contribute to mass incarceration by providing unethical plea negotiation leverage to prosecutors. Black and Brown communities have long been victimized by racial profiling and harassment, falsified reports and testimonies, illegal raids, unjust searches and planting of evidence, in addition to physical brutality and deadly use of force.

Currently, DAs have the highest level of power to hold police accountable, but they are allowing police to carry out these unethical and illegal practices with impunity. DAs are the only entity within the criminal legal system, outside of police departments themselves, who are responsible for addressing police misconduct. While some cities and counties are taking important steps toward abolition by creating community-led police oversight commissions with subpoena and disciplinary powers, there are limitations to the authority of these commissions. Until Black and Brown communities are given complete control and oversight over the presence and conduct of police in their neighborhoods, DAs must be expected to hold all law enforcement officers accountable for their role in perpetuating state-sanctioned violence and mass incarceration.

The May 2020 protests following the police killings of George Floyd, Breonna Taylor, Tony McDade, Alameda County resident Steven Taylor, and others, have once again brought the issue of racial disparities in police violence to the forefront. Police killings are not only prevalent, they disproportionately affect Black people, especially young, Black men. Police killings are more common in the U.S. than in other, similarly wealthy countries. Data suggests that in California between 2013 and 2019, the rate of police killings were nearly three times as high for Black people than for the average Californian. According to data from Fatal Encounters (a national database of people killed in interactions with police), there were 229 deaths in Alameda County from 2000–2020, either precipitated by police or where police were present.
Out of these deaths, 44 percent of victims were Black, despite Black people making up only 11 percent of Alameda County’s population.

After months of activism and demands, DA O’Malley has announced she will stop accepting campaign funds from police unions. Additionally, O’Malley has brought voluntary manslaughter charges against San Leandro officer Jason Fletcher for killing Steven Taylor. While it remains to be seen whether Fletcher will be convicted, this is an important step forward, and a display of community power. Additionally, in October 2020, O’Malley reopened the investigation into the 2009 murder of Oscar Grant at the hands of BART police only to conclude that she wouldn’t bring any charges against officer Anthony Pirone. In light of O’Malley’s poor record on police accountability and because the office works too closely with police departments to be truly independent in its review of routine abuses of power, brutality and killings by law enforcement, we believe new and different accountability mechanisms outside of the District Attorney’s office should be explored.

**Diversion Programs**

Diversion programs describe any programs, including treatment classes and group sessions, that may take the place of jail time in a sentence or plea offer. These programs can range from loosely structured to highly ordered, with similarly varying degrees of oversight and influence by the ACDA. Through public records requests, we received some participation data, public-facing documents describing various programs, and an internal handbook used to guide ACDA practices. The data were limited: The ACDA does not appear to track variables consistently across different diversion programs, making it difficult to compare certain numbers across programs, and participation data did not track demographic information for program participants.

Across the five programs for the years 2017–2018, there were 1,814 new referrals or participants. In that time period, 1,494 people graduated from their respective programs, and 759 failed or were terminated from their respective programs. Although it is unclear why these numbers fail to add up to the 1,814 new referrals total, one possibility is that the total may not capture pre-existing participants in each of the programs.

Unfortunately, the DA’s office did not offer context to make sense of these figures. The data does not illustrate trends over time. It does not track consistently with charging data, making following individual cases from charges to disposition impossible. Nor do we know how graduating or failing to graduate from a diversion program impacted time spent in prison, jail, or on probation. In fact, there is no information about what leads people to fail or be terminated from a diversion program. Still, putting these numbers in the context of the ACDA’s total charging data offers some insights.

Of the 55,557 misdemeanors charged between 2017–2018, roughly 71 percent of charges were what we consider “low-level offenses” that either should not have been charged at all or should have been directed to pre-plea diversion. The ACDA data, while unlikely to be comprehensive, shows that fewer than 2,000 people participated in diversion programs during that same time. In other words, the ACDA diverted barely 5.4 percent of all cases. The diversion data given to us does not specify what charges people would have faced if they had not been diverted, including whether it would have been a misdemeanor or felony. For the number of diversion programs that exist in Alameda County, this number is unacceptably low and merits significant and immediate reform to ensure more people benefit from the diversion programs that exist.

The ACDA provided an office guidebook describing and listing exclusion and eligibility criteria for diversion programs and collaborative courts. In this report, we have recommended changes to these criteria for each program. For instance, a number of the programs require that individuals plead guilty to the offense charged in order to be eligible for the programs. Because of potential collateral consequences to guilty pleas, eligibility criteria such as these may be harmful and may undermine the purposes of diversion programs. Therefore, all diversion programs should be offered pre-plea.

The ACDA should amend its diversion guidebook to eliminate the many criteria that are currently excluding hundreds if not potentially thousands of people who could safely be diverted and offered resources. The office should seek to presumptively
divert all misdemeanors, and many felonies pre-plea as a standard practice and policy, with the list of offenses we list in this report as the starting place, and not the ceiling.

This vast array of programs could be used to divert a large portion of the people with low-level offenses that make up 70 percent of charges or 48 percent of cases in Alameda County. However, the DA is missing this opportunity by only diverting 5 percent of such charges. Instead of enforcing consistent policies for prosecutors in charging, sentencing, and diversion, plea offers vary widely depending on prosecutors. In observations of Deputy District Attorneys (DDA) William Bosseli, Sean Flynn, and Veronica Rios-Reddick, court watchers from local coalitions noted great discrepancies. In particular, DDA Boselli (who received total pay and benefits of $294,993.58 in 2019), practiced “tough-on-crime” prosecution to a much greater degree than the younger DDAs Flynn (who received total pay and benefits of $167,246.79 in 2019) and Rios-Reddick. Boselli’s approach is ill-suited, especially to low-level charges that would be best met with diversion programs. Prosecutorial discrepancies in a vacuum of clear policies produces further inequities in the county’s criminal legal system.

From our court observations, there were four misdemeanor trials in particular that offer insight into how diversion would better serve the needs of defendants, victims, and the larger community:

1. **Workplace Altercation**

   The first trial involved a young Black male who was being prosecuted for allegedly assaulting an older white co-worker. The altercation ensued after the defendant questioned his co-worker about his paycheck. The co-worker was filling in as a temporary supervisor at this branch, where they normally do not work. The conversation between the two escalated to a point where they were in each other’s faces, eventually resulting in a physical confrontation, where both workers ended up on the floor. While the jury found the defendant not guilty, a substantial amount of county resources were spent prosecuting the young man, on top of the emotional and financial hardship for both the individuals involved. Such a dispute would have been better suited for restorative justice, costing the county’s taxpayers far less, while also reaching a more holistic form of accountability for everyone involved in the initial altercation.

2. **Alleged sex work solicitation**

   The second trial involved a woman in her early 20s who was being prosecuted for allegedly soliciting or engaging in sex work. She was initially stopped while standing in front of a Jack in the Box restaurant. The same arresting officer had stopped this young woman nearly a year before, in 2018, at which time a police report was produced. During the trial, it was revealed that the arresting officer’s police report for the newer charge was a nearly verbatim copy of the 2018 police report, with few word changes. The trial lasted two days and ended in a hung jury, when the jurors could not unanimously reach a verdict. After the trial ended, one juror was especially critical of the District Attorney’s office, asking the prosecutor on the case why they would even try his young woman. To paraphrase, the prosecutor replied that their supervisor “just wanted to see what would happen if they took her to trial.”

   This particular case raises many concerning issues:

   1) The District Attorney’s office continues to prosecute young women for sex work, which contradicts DA O’Malley’s public stance as an advocate for young women and survivors of human trafficking. Moreover, the office appears to take a dehumanizing approach and view of the young women by taking her so far through the court system, “just to see what would happen.”

   2) The validity of the police report used to take this young woman to trial calls into question the integrity of prosecutorial charging decisions in Alameda County, especially during a time when more and more police officers are being exposed for misconduct, including perjury, and especially when taking into account the Oakland Police Department’s history of sexual misconduct or assault and human trafficking.
3) This approach is inconsiderate of the large amount of county tax dollars spent for the staff time of prosecutors, public defenders, judges, sheriff deputies, and additional courtroom clerks and staff for the entirety of the trial, as well as each preceding court appearance.

4) If convicted, the young woman would have been subjected to sexual education classes, an HIV test, and a stay-away order from areas known for sex work. These terms are harmful because they were a violation of privacy of the individual and essentially treat them like a vector of disease, stripped of their ability to make decisions about their own health and body. Mandatory testing and HIV/AIDS classes for individuals arrested for 647(b) offenses was repealed in 2018 by law for these reasons.

These terms contradict the District Attorney’s stated holistic approach to victim support, and would do little to address the root causes of any alleged solicitation or engagement in sex work. Diversion would be much more effective in supporting this woman and others like her.

3. Continued Prosecution of Sex Work

A third trial that our court watchers observed involved four people who were also being prosecuted for alleged solicitation or engagement in sex work. However, the cases were eventually dismissed the morning of the trial. On the same day and time that this trial was scheduled to take place, a meeting took place between DA O’Malley and a team of organizers and advocates to discuss the sex work prosecution mentioned above, as well as the office’s misguided and discriminatory practice of forcing people to take HIV tests and “AIDS education” classes. In the meeting, advocates discussed the heightened vulnerability and exposure to violence individuals in the sex trade experience due to the criminalization of sex work whether through choice, circumstance or coercion and offered suggestions for community-based alternatives that focus on economic and housing insecurity. Though in the meeting, DA O’Malley represented that it was not her goal or intention to arrest and charge sex workers, after a brief reprieve, arrests persisted and new charges against sex workers were filed months later.

4. Inhumane Jail Time

In a fourth case, DDA Bosseli argued to keep an individual incarcerated at Santa Rita Jail an additional few days for stealing less than $20 worth of sanitary wipes. The case should have never made it that far, nor should it have been charged at all. As a crime of poverty, county resources spent to both incarcerate and prosecute the individual should have never been spent. Just a quarter of (25 percent) Boselli’s total pay of $268,000 would have paid for all of the individual’s basic needs and stabilized them for an entire year.

These case studies demonstrate the ACDA’s need for prosecutorial guidelines — both for prosecutors involved in plea bargaining and those making initial charging decisions — so that someone’s case outcome doesn’t change drastically based on the prosecutor assigned to the case. It also indicates the need for policies directly related to the use of diversion, and how system-involved individuals and the county would benefit from an expanded use of diversion.

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Do you support ending the practice of charging poor, homeless, and mentally-ill communities, and instead expanding their options for mental health services?

- **Yes**: 10.3%
- **No**: 89.7%

476 responses
Do you support community-based alternatives to incarceration such as community programs, mentorship and counseling, services that provide basic needs, etc?

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462 responses

Our community survey shows widespread support for expanded diversion:

It’s time that O’Malley responded to the demands of local residents, and enacted common-sense policies that guide streamlined prosecutorial practices and much broader use of diversion. In particular, the DA should widen eligibility for diversion programs, and also streamline data tracking across programs, so program participation and efficacy can be adequately analyzed. Specific guidelines on both are detailed in the Recommendations section of this report.

Parole, Resentencing, and Disparate Impact

The California Sentencing Institute indicates that 67 percent of incarcerated people from Alameda County are Black, despite only making up 11 percent of the county population. However, the ACDA does not publish racial data systematically, so there is no way to see how specific decisions like charging or sentences sought by the DA’s office interact with race. By failing to track demographic data in a publishable form, the DA can claim ignorance when it comes to how their decisions deepen racial inequities in the county’s carceral system.

First, given that state-level data confirms the aforementioned disparities, the ACDA should change its relationship to the parole board. While prosecutors do not have decision-making power over the release of incarcerated people to parole, their opposition to release carries significant weight. The ACDA’s office did not track its support or opposition in parole hearings until 2018, and offered no qualitative documentation of its approach to parole. In 2018, out of 198 parole hearings attended by the ACDA, it opposed 139, or 70 percent. ACDA continues to not track the position of the next of kin in any of these hearings. This is important to track because many times DAs oppose parole even when the victim’s next of kin supports release. It’s time the DA removed itself from offering opinions in these hearings, unless it is to support the release of individuals, and let the parole board do its job of determining whether an individual is suitable for release.

The DA should shift considerable staff resources to resentencing and record clearances. It’s becoming clear, especially as a result of realignment, that shortening sentences and releasing people from prison does not pose a threat to public safety, but has positive impacts on communities and families. With changes to state laws, there are now more opportunities to shorten sentences for those in prison that DA O’Malley should take advantage of. Changes to Penal Code 1170(d) in 2018 make it possible for DAs to refer people to the court for resentencing. County DAs are granted significant latitude on what cases they consider, and the DA should therefore maximize resentencing recommendations for all people who are currently in state prisons, particularly people who would be impacted by recent statutory changes that repealed or added discretion to sentence enhancements. The Los Angeles District Attorney just announced sweeping resentencing policy that could serve as a model for Alameda County.

DEATH PENALTY

Race has, and continues to play, a significant role in who is sentenced to death in Alameda County, and both the race of the victim and the race of the defendant come into play.

There are currently 41 men and one woman on death row from Alameda County. Of these 42 individuals, 50 percent are Black and 71 percent are people of color. Nineteen percent were 21 years old or younger at the time of their alleged offense, and 38 percent were 25 years old or younger. This is
significant because California law now recognizes that individuals convicted of first-degree murder without special circumstances who were 25 years old or younger at the time of their offense should be given an opportunity to show that they have changed after serving a significant portion of their sentence.

While the vast majority of homicide victims in Alameda County are Black, the majority of death row cases from the county involve at least one white victim. White victims accounted for approximately 41 percent of the total number of victims from these cases. In contrast, according to several studies, white victims are a small fraction of the total number of homicide victims in the county.\(^67\) For example, one report found that between 2000–2004, white victims made up just 5.4 percent of all homicide victims in the county.\(^68\)

While the vast majority of these death row cases were prosecuted in the 1980s, 90s and early 2000s under the leadership of Jack Meehan (1981–1994) and Tom Orloff (1994–2009), three men have been tried and sentenced to death in Alameda County since O’Malley was appointed DA in November 2009.\(^69\) All three of these men are Black, and one was 22 years old at the time of the alleged offense. O’Malley was seeking the death penalty for a Latinx man, Mark Anthony Estrada, who is accused of killing a Hayward police officer. Estrada was 21 years old at the time of the alleged offense and has no prior criminal record.\(^70\) However, DA O’Malley recently announced to community advocates on Sept. 15, 2020 that she is no longer seeking the death penalty in this case.

On several occasions O’Malley has touted how infrequently she uses the death penalty compared to her predecessors, yet she failed to publicly support either Proposition 34 (2012) or Proposition 62 (2016), which would have eliminated the death penalty, and failed to oppose Proposition 66 (2016), which aimed to speed up executions. Propositions 34 and 62 were supported by more than 62 percent of Alameda County voters. During a meeting with community advocates, DA O’Malley expressed openness to resentencing people who are currently on death row from Alameda County, yet has not made any progress towards doing so.

### Inadequate Data & Lack of Transparency

The data tracking and reporting practices of the Alameda County DA’s office are far from adequate. Adult charging data contained no disposition information for individual cases or demographic data for individuals charged. Juvenile data, as mentioned above, contained rows with combinations of charges, which made counting unique charges extremely challenging. Parole hearing data had no information explaining the reasons why the ACDA took a position on any particular individual’s release.

For diversion, the data was delivered in formats that made it difficult to analyze, and tracking methods were disparate across programs making aggregation and comparison challenging. To better understand the impact of diversion programs and how participation may be impacted by prosecutorial discretion, data for all diversion programs must be consistently recorded, clearly labeled, and provided in a format, like a spreadsheet, conducive to data analysis.

All in all, the poor data provided by the DA’s office allows for very limited analysis and findings. DA O’Malley’s constituents demand greater accountability through data tracking and reporting.

**From our survey:**

#### Do you support the District Attorney providing timely, publicly available, accurate data of the people she is prosecuting?

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<td>No</td>
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476 responses

The ACDA needs to keep more comprehensive, high-quality data, and it needs a policy to support this goal and help maintain public accountability.
RECOMMENDATIONS

Based on our findings through record analysis, community engagement, and court-watching, we have composed a list of policy recommendations for DA O’Malley.

We hope our efforts will support continued dialogue between the ACDA and its constituents, Alameda County residents who are most impacted both by crime and mass incarceration simultaneously.

Charging Decisions

Develop consistent internal guidelines for discretionary charging decisions that incorporates the following:

Youth Justice:

• Institute a policy to never charge any person under the age of 18 in adult court.

• Institute a policy of presumptively seeking pre-plea restorative justice diversion for the five most common charges for youth, which were robberies (PC 211), Auto theft (VC 10851), Burglary (PC 459), Assault (PC 245), and Carrying a concealed weapon (PC 25400). All of these offenses, or variations of them, should be eligible for pre-plea diversion.

Overall charging recommendations:

• Institute an “open-file” policy where the prosecutors in the ACDA’s office are instructed to share the entirety of their case files with the defense at the earliest stage possible to avoid the routine practice of over-charging and arrive at a just resolution.

• Follow the lead of Contra Costa and Los Angeles DAs and institute a “Decline to Charge Policy” for certain low-level and petty offenses which made up nearly 1 in 4 of the charges the ACDA brought in 2017 and 2018. This would decriminalize low-level offenses or offenses related to poverty and reduce the number of people criminally charged in Alameda county by 23 percent.

• Institute a “Presumptive Pre-Plea Diversion” for certain offenses (listed in the appendix), which made up 36 percent of all charges brought by the ACDA in 2017 and 2018. This would allow for greater utilization of all existing diversion programs and seek long-term and sustainable solutions to harm, while also seeking to restore victims holistically. The combined impact of the Decline to Charge and Presumptive Pre-Plea Diversion Policies would reduce criminal charge filings by over 50 percent in Alameda County.

• Institute a policy to charge most, if not all, wobblers as misdemeanors instead of felonies. There’s wide support for this policy in Alameda County, as 86 percent surveyed residents expressed they would support the District Attorney charging all wobblers as misdemeanors. Specifically, Burglary (PC 459), Driving a Stolen Vehicle (VC 10851a), Larceny (PC 496d(a)), Battery (PC 242), and Carrying a loaded firearm (PC 25850) are all 10 times more likely to be charged as felonies instead of misdemeanors. If these offenses cannot be diverted pre-plea, the presumption should be to charge them as misdemeanors.

• Eliminate the use of all enhancements, including but not limited to racist gang enhancements, status enhancements, and Three Strikes sentencing, since these policies are major drivers of extreme sentencing and racial disparities. The San Francisco and Los Angeles District Attorneys already have this policy in place.

• Institute a policy to never seek a “Life Without the Possibility of Parole” sentence.

• Institute a policy to never seek the death penalty.
Immigration Consequences

- Require, not just recommend, that prosecutors avoid immigration consequences in their charging, plea negotiations and post-conviction review practices.
- Designate an office point person who will ensure office-wide compliance with the new immigration policy, adopted in March 2020, and be available for community input when there are instances of noncompliance.
- Adopt a default posture of erasing old convictions for the purposes of eliminating immigrations consequences (stipulating to post-conviction motions) brought where someone has already completed their criminal sentence. This would allow for people to seek relief that avoids immigration and other consequences after a conviction.
- Identify ways to proactively join or support policy or litigation efforts that protect and advance the rights of immigrants.
- Institutionalize community involvement by creating regular opportunities to engage with immigrants’ rights communities and advocates and ensure a process to incorporate their demands.

Police Accountability

- Support the creation of an independent office to investigate and hold law enforcement accountable for their illegal conduct.
- Pledge to never accept law enforcement campaign contributions for future campaigns.
- Publish the names of police officers in Alameda County whom the ACDA has already deemed unreliable to use as witnesses, otherwise known as the Brady list.
- Develop guidelines and practices of reviewing an officer’s history of serious misconduct or use of force in each case, regardless of whether any disciplinary action was taken.
- Establish office-wide guidelines and practices to disclose to the defense the arresting officer’s history of misconduct at the earliest point of prosecution.
- Create a staff of two to three attorneys to retrieve information on past and current police officers’ records of misconduct or dishonesty, so the office may review any cases where those officers played a material role in the arrest and prosecution of individuals. This would require adopting new procedures and standards for review. For example, the ACDA could develop a method of intake where defense counsel may submit cases for review.

Diversion Programs

It is commendable that the ACDA and Alameda County courts offer diversion programs. Alternatives to criminal charges and incarceration benefit the public and help address racial disparities in our criminal legal system. It’s also commendable that DA O’Malley has been responsive to suggestions and recommendations to improve the county’s diversion programs, including expanding eligibility criteria for the county’s Mentor Diversion program.

Still, the ACDA should continue to review eligibility criteria, with the goal of expanding criteria for diversion programs such as the Mentor Diversion program. Additionally, the ACDA should publish and make these revised criteria available for both practitioners and the public. Specifically, with respect to eligibility criteria for its diversion programs, the ACDA should:

- Create a policy that refers Estes robberies (instances of shoplifting where someone “uses force or threat of force” to escape) to diversion programs;
- Create a policy that refers young people (age 26 and under) with stand-alone gun possession charges to diversion programs such as the Mentor Diversion program.
- Transition DUI cases to diversion: The county is missing a significant opportunity by not transferring most or all DUI cases to a collaborative court in lieu of incarceration. If the DA could shift the 922 individuals convicted of DUIs in the last two years to diversion, it would have a sizable impact on the county’s budget and outcomes.
- Drug courts: make burglaries and Estes robberies eligible for this program; lower the look-back period for a strike felony from
five years to one year. In general, extend the decriminalization of drug possession.

- Behavioral Health court: expand eligibility for people on parole; create clear guidelines for people who are not on MediCal or SSI but are otherwise eligible to participate in this program.
- Mentor Diversion program: clarify eligibility criteria around “little to no criminal history”; expand eligibility to include gun possession charges, Estes robberies, burglaries, and assault cases; expand eligibility to include people who have prior felonies.
- Early Intervention court: reduce look-back period for a felony conviction from five to one year; include people with prior felonies; expand eligibility to include individuals who may be on gang databases; expand eligibility to include people currently on felony probation.
- Reentry court: expand eligibility to include people who have been sentenced to life terms; expand eligibility to include people who have pending misdemeanor charges;
- Misdemeanor Pre-charging Diversion Program: expand eligibility to include people with DUI convictions, prior felony convictions; expand eligibility to include people who have been on misdemeanor probation; expanding eligibility to include people who may be on a gang database.
- Homeless and Caring court: expand eligibility to include people who have outstanding parking tickets.
- Transitional Age Youth Program (TAY-P): Make this program pre-plea, to reduce the impact of collateral consequences, especially immigration consequences.
- Ensure all diversion is pre-charge or pre-plea.

Parole and Sentencing

- In the interest of justice, the ACDA should completely remove itself from the parole process and let the parole board know that it does not oppose the release of any incarcerated person who comes before the board. It should only involve itself in the process to support the release of individuals.
- Follow the lead of San Francisco DA Chesa Boudin by formally instituting a Sentencing Planning Program that tailors sentencing to better meet the goals of “recidivism reduction and community safety.” Independent evaluators have already reported on the efficacy of the San Francisco program in achieving these goals.
- Continue building and expanding on the existing 1170(d) resentencing work and seek to shrink the number of people incarcerated in state prisons from Alameda County by 50 percent.

Data Quality

The ACDA should improve its data practices by keeping:

- An internal policy to guide its employees on data input and maintenance.
- Consistent, disaggregated data for diversion programs, including participation/exclusion data that can easily be incorporated with other adult and juvenile charging data; in other words maintaining data consistently across diversion programs so that individuals can be easily tracked through each program.
- Demographic data for cases, including age and race data.
- Disposition data for cases, including sentencing and final charges.
- Variables in adult charging data that distinguish between charges in separate codes, for instance to distinguish between the Penal Code and the Vehicle Code.
- Disaggregated data for juveniles charged in juvenile court that is similar to adult charging data.
- Data in Excel documents (as opposed to PDFs) so that it can be shared and analyzed more easily.
- An end-to-end tracking system that follows cases all the way from arrest to parole and probation, including alternative resolutions to incarceration.
In 2020, with the global COVID-19 crisis affecting every aspect of American life, the experience of incarcerated individuals and the role of prosecutors became pivotal in managing the spread of the disease.

In fact, health advocates, organizers, and community have long been calling for a fundamental shift in the way our country and counties address harm, as health conditions have always been threatened within jails and prisons.

Infectious disease outbreaks — including of flu and tuberculosis — have always plagued jails and prisons and in turn impacted surrounding communities because of the porous nature of incarceration, with staff coming in and out daily, transfers between facilities, and newly arrested people entering jails. And, for just as long, decarceration has been uplifted as a viable and effective public health solution. For example, one 2018 study found that decreasing incarceration rates from just 3 percent to 2 percent of the general population reduces TB infections in prison by 44 percent and by 21 percent in the general population.72

Recent statistical analyses used COVID-19 caseload data to again reveal how the impacts of incarceration reverberate far beyond the walls in which people are imprisoned. The research found that in Alameda County specifically, mass incarceration was responsible for over 2,500 additional confirmed COVID-19 cases in the community between May 1 and August 1 alone. That is, we likely could have prevented over 2,500 COVID-19 cases by more aggressively decarcerating.73

Because Alameda County is not alone in its failure to decarcerate, it is useful to compare that raw number (2,500+ confirmed cases) with surrounding counties’ data. The raw additional number of cases (~2,500) in a place of Alameda County’s size (with a population of roughly 1.6 million people) means that for every 100,000 people in Alameda County, there were 156+ confirmed COVID-19 cases that are directly attributable to failures to decarcerate. By comparison, San Francisco County faced about 75 confirmed COVID-19 cases per 100,000 people. That is, Alameda County was about two times worse off than SF, which has more aggressively decarcerated its jails. Incarceration — much like COVID-19 — causes immeasurable suffering, threat, and hardship to individuals, families, and communities, and our county officials must take bold and decisive action to prevent further harm.

Since the onset of the pandemic and the parallel mass uprising against police violence, ACDA has been willing to meet with stakeholders about mitigating the health impacts of COVID-19 and the continued abuse of power by law enforcement. Areas in which ACDA has committed to policy changes, implementation, or interventions include:

- Agreeing to review and release individuals serving 45–60 days left of their sentences.
- Agreeing to no longer accept campaign contributions from law enforcement.
- Pressing charges against San Leandro Police Officer Jason Fletcher for the killing of Steven Taylor.
- Advocating for the extension of Alameda County’s emergency bail schedule.
- Updating ACDA’s immigration policy to mitigate collateral consequences, and inviting the Immigrant Legal Resource Center to lead a training for the ACDA’s office staff.
- Beginning to review cases and committing to meeting with families of loved ones seeking resentencing under 1170(d)(1), a law that allows DA’s to re-sentence people by taking into consideration their rehabilitation efforts and conduct while incarcerated.
Intervening to block the transfer of two youth, plus additional co-defendants, to the adult court system.

Intervening to allow a young person access to necessary services in Behavioral Health court that were previously denied by DDAs.

Intervening to recall an extreme sentence to instead offer alternatives to incarceration that were previously denied by DDAs.

We commend ACDA for the progress made in the above areas. In comparison to other counties in California, Alameda County is possibly within the top 10 in terms of their response to COVID-19 pandemic. However, there are many ways in which the DA’s office should go beyond their current practices to dramatically depopulate Santa Rita Jail and work with relevant county agencies and community-based organizations to secure safe housing, employment, health services, and other basic human rights for the accused. The long-term community health effects will continue to be felt for years to come.

Additionally, we commend ACDA for intervening in cases where DDAs were unwilling to offer alternatives to incarceration for cases in which services were deemed appropriate, both by ACDA O’Malley, as well as trained mental and behavioral health professionals. It will be important for ACDA to immediately adopt and rigorously implement the policy recommendations of this report to mitigate the impact of DDAs such as William Bosseli, Matt Golde, and Dave Stein, who continue to act in ways that require intervention. Along with policy changes, Alameda County would benefit from the replacement of these DDAs with prosecutors who are more aligned with our county’s progressive character. Reassignment of these DDAs would allow DA O’Malley to take corrective action regarding the disproportionate power of white men in DA’s offices across California who are dictating the punishment of primarily communities of color and poor communities with little to no accountability.

Furthermore, had stronger policies around mental health, homelessness, and youth justice been in place, the above interventions by DA O’Malley would not have been necessary. As local advocates continue pushing Alameda County elected officials to increase mental and behavioral health resources, quality job opportunities, and housing, DA O’Malley is in a strong position to take initiative and end the criminalization and prosecution of poverty, homelessness, mental illness, and addiction.
Appendix A: 2019–2020 Alameda County Budget Appropriation by Program

<table>
<thead>
<tr>
<th>Program</th>
<th>Total Appropriations</th>
<th>Percent of Total Budget</th>
</tr>
</thead>
<tbody>
<tr>
<td>Capital Projects</td>
<td>$205,421,554</td>
<td>5.8 percent</td>
</tr>
<tr>
<td>Cultural, Recreation &amp; Education</td>
<td>$36,600,582</td>
<td>1 percent</td>
</tr>
<tr>
<td>General Government</td>
<td>$258,494,745</td>
<td>7.3 percent</td>
</tr>
<tr>
<td>Measure A1</td>
<td>$156,135,608</td>
<td>4.4 percent</td>
</tr>
<tr>
<td>Public Assistance</td>
<td>$863,906,394</td>
<td>24.4 percent</td>
</tr>
<tr>
<td>Public Protection</td>
<td>$767,509,670</td>
<td>21.7 percent</td>
</tr>
<tr>
<td>Public Ways &amp; Facilities</td>
<td>$121,180,466</td>
<td>3.4 percent</td>
</tr>
<tr>
<td>Health Care Services</td>
<td>$927,468,774</td>
<td>26 percent</td>
</tr>
<tr>
<td>Non Program Activities</td>
<td>$147,812,261</td>
<td>4.2 percent</td>
</tr>
<tr>
<td>Contingency &amp; Reserves</td>
<td>$58,986,111</td>
<td>1.7 percent</td>
</tr>
</tbody>
</table>

Appendix B: 2019–2020 Alameda County Public Protection Budget Appropriation by Department

<table>
<thead>
<tr>
<th>Public Protection Department</th>
<th>Appropriation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Defender</td>
<td>$50,800,000</td>
</tr>
<tr>
<td>Trial Court Funding</td>
<td>$40,400,000</td>
</tr>
<tr>
<td>Public Protection Realignment</td>
<td>$4,300,000</td>
</tr>
<tr>
<td>District Attorney</td>
<td>$84,600,000</td>
</tr>
<tr>
<td>Probation Department</td>
<td>$156,200,000</td>
</tr>
<tr>
<td>Sheriff’s Office</td>
<td>$431,200,000</td>
</tr>
</tbody>
</table>
Appendix C: Initial Records Request to the ACDA’s Office

1. Records of prosecution data within your possession for calendar year 2017 and 2018, including but not limited to,
   a. Unique identifiers for each person, charges, and outcomes for all minors (any persons under the age of 18) prosecuted directly in adult court in Contra Costa County (adult court is defined as a court of criminal jurisdiction) (otherwise known as “pipeline” or “direct file” cases) under Welfare and Institutions Code section 707.
   i. Unique identifiers for each person, charges, and outcomes for all minors prosecuted in adult court in Contra Costa County after any of the following:
      1. a judicial certification to adult court following a juvenile transfer hearing under the newly amended Welfare and Institutions Code section 707 subsection (a);
      2. a juvenile defendant’s waiver of transfer hearing or stipulation to adult court following the District Attorney’s motion to transfer to adult court.
   b. Unique case identifiers, charges, and outcomes for all minors prosecuted in juvenile court in Contra Costa county, including, but not limited to demographic data, charges filed, and case outcomes during the calendar year of 2017 and 2018.
   c. Unique case identifiers, charges, and outcomes (including diversion) of all misdemeanor charges for minors and adults in Contra Costa county.
   d. Unique case identifiers, charges, enhancements, and outcomes (including diversion) of all felony charges for minors and adults in Contra Costa county.

2. All documents and records related to all diversion programs offered or used by the DA’s office, how many people utilized those programs, demographics of those people, the charges they were facing, outcomes of those cases, requirements for completing diversion, and any charges or costs associated with those diversion programs for calendar years 2017 and 2018.

3. All records relating to how many parole hearings the office attended, how many hearings your office opposed, and how many parole hearings your office opposed when the next of kin took no position in the calendar years of 2017 and 2018.

4. Copies of all office policies, including but not limited to Brady compliance policy, charging and plea deal offer policies, pardons and commutations, etc. Request #3 is not limited to calendar year 2017 and 2018.

5. Copies of all office policies that relate to immigration including but not limited to:
   a. Records that refer to office efforts to implement its obligations under Penal Code 1016.3(b).
   b. Records that refer to office efforts to implement its obligations under Penal Code 1473.7.
   c. Records, memoranda, and emails that relate to the creation and development of an immigration policy for the office.
   d. Request #5 is not limited to calendar year 2017 and 2018.

6. All records concerning implementation of SB 1421, including copies of any new policies, training manuals or procedures regarding SB 1421, including any policies, procedures or training manuals for making SB 1421 requests, maintaining SB 1421 records, disclosures of SB 1421 requests to criminal defendants, revisions of any Brady policies in light of SB 1421, and all policies and procedures for reviewing all criminal convictions, arrests, and charging decisions, in view of SB 1421. Request #4 is not limited to calendar year 2017 and 2018.
### Appendix D: List of Low-Level Offenses

Note: The “Common Corporate Offenses” list is too long to practically include in this appendix, but it is available upon request.

<table>
<thead>
<tr>
<th>Charge</th>
<th>Recommended DA Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advertising without a License — BP 7027</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Contracting without a License — BP 7028</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Failure to bring minor to continuing education — EC 48454</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Simple Drug Possession — PC 11350</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Drug Possession for Sale — PC 11351</td>
<td>Default Pre-Plea Diversion</td>
</tr>
<tr>
<td>Peyote Possession — HS 11363</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Drug Paraphernalia Possession — HS 11364</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Meth Possession — PC 11377</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Under the Influence of Drugs — HS 11550</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Resisting Arrest — PC 148, PC 69</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Possession of Dagger — PC 21310</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Possession of Metal Knuckles — PC 21810</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Possession of Nunchaku — PC 22010</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Possession of Billy Club — PC 22210</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Possession of Stun Gun — PC 22620, PC 22610</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Disturbing the Peace — PC 415</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Criminal Threats — PC 422</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Possession of Burglary Tools — PC 466</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Petty Theft — PC 484</td>
<td>Default Pre-Plea Diversion</td>
</tr>
<tr>
<td>Appropriation of Lost Property— PC 485</td>
<td>Default Pre-Plea Diversion</td>
</tr>
<tr>
<td>Vandalism — PC 594</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Possession of Vandalism Tools — PC 594.2</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Trespassing — PC 602</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Disorderly Conduct — PC 647</td>
<td>Default Pre-Plea Diversion</td>
</tr>
<tr>
<td>Loitering for Prostitution — PC 654.22(a)</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Driving Stolen Vehicle — VC 10851</td>
<td>Default Pre-Plea Diversion</td>
</tr>
<tr>
<td>Driving without License — VC 12500</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Driving with Suspended License — VS 14601</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>DUI — PC 23152</td>
<td>Default Pre-Plea Diversion</td>
</tr>
<tr>
<td>Vehicle Registration — VC 4152.5, VC 4159</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Bringing Drugs to a Prison — PC 4573</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Burglary — PC 459* (no person present)</td>
<td>Default Pre-Plea Diversion</td>
</tr>
<tr>
<td>Repeat Theft — PC 490.2</td>
<td>Default Pre-Plea Diversion</td>
</tr>
<tr>
<td>Identity Theft — PC 530.5</td>
<td>Default Pre-Plea Diversion</td>
</tr>
<tr>
<td>Indecent Exposure — PC 314</td>
<td>Default Pre-Plea Diversion</td>
</tr>
<tr>
<td>Robbery — PC 211* (Estes robberies, no injuries, etc.)</td>
<td>Default Pre-Plea Diversion</td>
</tr>
<tr>
<td>Possession of Ammunition (Minor) — PC 29650</td>
<td>Decline to Charge</td>
</tr>
<tr>
<td>Possession of Ammunition (Felon) — PC 30305</td>
<td>Default Pre-Plea Diversion</td>
</tr>
<tr>
<td>Carrying Loaded Firearm — PC 25850</td>
<td>Default Pre-Plea Diversion</td>
</tr>
<tr>
<td>Carrying Concealed Firearm — PC 25400</td>
<td>Default Pre-Plea Diversion</td>
</tr>
<tr>
<td>Prohibited Firearm Possession — PC 29800</td>
<td>Default Pre-Plea Diversion</td>
</tr>
</tbody>
</table>
Appendix E: Demographics of survey respondents

53.2 percent of respondents identified as male, while 45.8 percent identified as female, with the remaining 1 percent identifying as either transgender or gender-non conforming (GNC).

The racial identities captured were varied, with 30.2 percent identifying as Latinx, 27.6 percent as Black or African American, 21.1 percent as white or Caucasian, 12.7 percent as Asian or Pacific Islander, 6.1 percent as Mixed Race, and 1.3 percent as Indigenous or Native American.

Respondents’ place of residence in the county responses indicated 41.9 percent living in Hayward, 16.1 percent in Castro Valley, 10.4 percent in Oakland, 9.4 percent in San Lorenzo, 7 percent in San Leandro, 4.2 percent in Alameda, 1.9 percent in Union City, 1.7 percent in Ashland, 1.7 percent in Fremont, 1.3 percent in Berkeley, 1.1 percent in Dublin, 0.8 percent in Pleasanton, 0.6 percent in Cherryland, 0.6 percent in Albany, 0.4 percent in Emeryville, 0.2 percent in Fairview, 0.2 percent in Piedmont, 0.2 percent in Livermore, and 0.2 percent in Newark.

Time spent living in Alameda County responses indicated that 19.7 percent lived in the county for more than 30 years, 16 percent for 21–30 years, 16.4 percent for 16–20 years, 12.8 percent for 11–15 years, 13.9 percent for 6–10 years, 13.2 percent for 2–5 years, and 8 percent for less than one year.
Registered voters comprised 67.4 percent of all respondents, while the remaining 32.6 percent were unregistered. Individuals who voted in the District Attorney Democratic primary election in June 2018 comprised 58.5 percent of all respondents, while 41.5 percent did not participate.

In terms of being directly impacted by crime, 44.8 percent of respondents are survivors, while 55.2 percent have never been a victim of crime. Additionally, 34.9 percent responded that they have been personally impacted by the criminal legal system, with 11.8 percent having been arrested, 6.3 percent having been formerly incarcerated, 5.7 percent having been previously or currently on probation, parole, or some form of supervision. Those who have a systems-impacted family member comprised 22.9 percent of all respondents, while 48.9 percent have never been impacted by the criminal legal system.
ENDNOTES


7. Harris, supra note 8


9. Harris, supra note 8


Two charges of interest where circumstances especially matter are 1) burglaries (PC 459) and robberies (PC 211). Currently, both are considered serious violent offenses regardless of circumstances. We would like DA O’Malley to take a closer look at cases with these charges and examine the facts of each case. Burglaries where no one was present in the house, and robberies without serious injuries, could be safely diverted through restorative justice programs.

There is no comprehensive list of wobblers in the CA Penal Code.


“Fatal Encounters,” https://fatalencounters.org/view/person-csv/?gview_search=&filter_2=&filter_42=&filter_10=&filter_13=Alameda&filter_46=CA&filter_16=&filter_1=gv_start=gv_end=&mode=all


https://mappingpoliceviolence.org/states


https://indd.adobe.com/view/0a7caf9e-b3c9-4d32-999f-ef6686bb0b8e


California Sentencing Institute, Center on Juvenile and Criminal Justice, http://casi.cjcj.org/


“Realities of Violence: Data and Statistics.” *Alameda County*, Sep. 18, 2003,


“District Attorney Nancy O’Malley.” *Office of the Alameda County District Attorney*, https://www.alcoda.org/about-us/omalley_bio. In two of these cases, the decision to seek death was made by O’Malley’s predecessor, however, even when she inherited the cases as DA, she actively decided to continue seeking the death penalty. The cases were tried in 2010 and 2012. She made the decision to seek death in the third case, which went to trial in 2016.