Rhetoric, Not Reform

Prosecutors & Pretrial Practices in Suffolk, Middlesex, and Berkshire Counties

CourtWatch MA

OCTOBER 2019

There's a lot of talk about progressive prosecutors, good prosecutors, reform-minded prosecutors. As an abolitionist project, we care about how people are treated in court and, ultimately, <u>eliminating the prosecuting</u> office.

We also want to do everything we can to make sure people are treated better right now. We have paid special attention to the Massachusetts counties with 'reformers' in office, to see whether their campaign promises and office policies result in actual decarceration, eliminate racial disparities, or keep more people out of the system entirely.

This report offers our analysis of prosecutor-led "pretrial reform" in Suffolk, Middlesex, and Berkshire Counties, based on publicly available data.







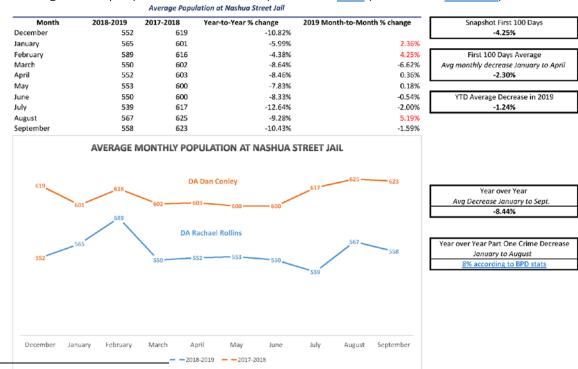
"Suffolk County CJ Reform on the Ground"

On Friday, October 4th, three members of the Suffolk County District Attorney's Office, along with one private defense attorney, are presenting a panel at the MCLE New England 20th Annual Criminal Law Conference entitled "Suffolk County CJ Reform on the Ground." As far as we know, neither organizers working to reduce pretrial detention nor people who have been prosecuted were invited to participate.

Here's a fact they might not tell you:

In Suffolk County, the Nashua Street Jail population is higher today than the day Dan Conley left office.

For the past few months, building off of our Suffolk County <u>First 100 Days Courtwatch Project</u>, we have been tracking the published <u>weekly counts</u> of the Nashua Street Jail¹ in an internal spreadsheet. Today, we're making our analysis public. Download the spreadsheet here (or view as a PDF here).²



¹ Editor's note: the pretrial jail population in Suffolk County is not exclusively held at Nashua Street. Some folks—including all people identified by the system as women—are held at South Bay (the Suffolk County House of Correction). This gender-binary-based detention is not defined by how people identify themselves: some people who identify as women may be held at Nashua Street, and some people who do *not* identify as women may be held at South Bay. Although South Bay jails some pretrial detainees, it also cages individuals serving post-conviction sentences and immigration detainees, and the published weekly count sheets do not disaggregate by pretrial/sentenced/immigration/etc. Since Nashua Street holds the majority of people detained pretrial, and exclusively holds pretrial detainees, it is a reasonable subject of analysis for pretrial trends in Suffolk County. The state auditor has publicly scolded the Sheriffs Association for failing to release data, but the sheriffs continue to sit on their data and prevent public scrutiny. This information is subject to public records requests, but the better fix is to require that sheriffs regularly publish information about how public resources are being used.

² General comment: a negative sign (-) in the spreadsheet represents a decrease in the population of the Nashua Street Jail. In cases of increases, when the increase was basically a 0% increase, we left it in black text; when it represented a more substantial percentage increase, we put it in red.

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Definitions & Methodology

We have presented these data in a few ways: specific date comparison snapshots, month-to-month average jail population changes, and year-over-year average jail population changes. As explained below, these metrics are all different in important ways.³

The weekly count sheets published by the Massachusetts Department of Research and Planning represent the actual, in-person "count" done by sheriffs in each county or administrators of DOC-run state prisons of all the individual humans incarcerated in their facility on that date. Jails and prisons are tasked with counting everyone each week and reporting that week's count to the state; these count sheets are the only regularly updated published data on the number of people incarcerated in Massachusetts jails and prisons. The weekly count sheets do not provide any breakdown for the number of people who are held pretrial, post-conviction, on probation or parole violations, or in immigration detention in each facility—nor do they include any racial or ethnic demographic breakdown.

We used these numbers—the weekly count statistics—to build a spreadsheet to track the population of the Nashua Street Jail in Suffolk County, and analyzed the data for three different metrics:

What's a snapshot? A snapshot measures the difference between one specific date and another specific date. It is a direct comparison of the jail count (or total population) on two different individual days. A snapshot can tell you only the difference from one day to another, but cannot represent trends in the flow of people into or out of jail over time.

What's the average monthly change? New people are admitted to jails every day, just as people are also released from jails every day. Because of these constant admissions and releases, the population of jails fluctuates constantly. Therefore, given the limited available data, the best way to get a sense for a jail's population over time is to calculate the average monthly population, and then compare each month to the month before to see whether the population is trending up (increasing) or trending down (decreasing) compared to the prior month or months. The average monthly change in the jail population reflects the percentage decrease in the number of people in the Nashua Street Jail, per month, since DA Rollins took office. We measure this change beginning from a January start date—the beginning of DA Rollins's time in office—to see the extent of progress during her term so far, within the year 2019. We recognize that new policies were not announced until the end of March 2019.

What's the average year-over-year change? Another way to assess change is to compare the average jail population this year (from January to September 2019) to the average jail population the prior year under DA Dan Conley (January to September 2018). However, it's important to remember that other factors—including the overall number of arrests each year, and therefore the overall number of cases pursued by the Suffolk County District Attorney's Office—may influence or explain why the jail population changes from one year to the next. If fewer people are being arrested or fewer crimes are reported, even if nothing changes in terms of prosecutor behavior or policy, automatically fewer people should be in jail.

³ None of our calculations include the monthly average for December. We included December in the chart and in the graph because it provides helpful context, but it would be inappropriate to include it in the overall year to year comparisons because DA Rollins did not assume office until January.

Findings

Compared to other 'reformers' around the country, DA Rollins's policies have not made meaningful change in the Suffolk County jail population.

- Snapshot: more people are in jail today than on DA Dan Conley's last day in office.
 On the Conley administration's last day in office⁴ <u>December 31, 2018</u> there were 537 people caged at the Nashua Street Jail. By contrast, there were 549 people caged at the Nashua Street Jail on <u>September 30, 2019</u>.
- The average monthly decrease of people jailed at Nashua Street since DA Rollins took office is *one* percent.
 - We used the weekly count statistics to calculate the average monthly count at Nashua Street Jail (we rounded to the nearest whole, because these numbers represent people who are incarcerated) and then compared each month to the month prior. From January to September 2019, the average month-over-month decrease in the jail population is a mere **1.24%**. This figure is not a comparison to the prior administration's record; it represents the measurable change in the average monthly jail population during DA Rollins's term so far.
- The average year over year decrease (2018 to 2019) in the population of the Nashua Street Jail: 8.4% from January to September.
 - Because we're comparing average monthly counts, not overall annual jail admissions, the average year-over-year decrease is the fairest point of annual comparison. The average year over year decrease between 2018 to 2019, from January to September, is 8.44%.

In Suffolk County, the jail population may be down yearover-year just because reported crime is down.

- The year over year decrease in reported crime according to BPD data: 8% from January to August. The Boston Police Department released aggregate incident reports (not arrests) showing an 8% decrease in certain categories of crimes ("Part One Crimes") between January and August from 2018 to 2019. The average year over year decrease in the Nashua Street Jail population during that same period (January to August in 2018 versus 2019) was 8.19%. The similarity in these figures may suggest that the overall decrease in reported crimes has in turn resulted in fewer arrests and a smaller volume of criminal cases. In other words, the decrease in reported crime may account for a significant portion of the decrease in the jail population, calling into question the implementation of the declination and bail policies by the Suffolk County District Attorney's Office. DA Rollins's office has yet to publish any data on the office's policy implementation.
- Snapshot: at the First 100 Days mark, the Nashua Street Jail population was down 4.25% compared to when DA Rollins took office. Across the country, progressive prosecutors have made commitments to reduce their jail population/pretrial detention in their first 100 days in office. This somewhat arbitrary snapshot compares the population on January 7 (the end of DA Rollins's first week) to the population on April 15 (her 100th day in office was April 12). We note: the jail population on April 15th [541 people] was still *higher* than the jail population on the Conley administration's last day in office of December 31st [537 people]. A different way to assess this

⁴ DA Dan Conley <u>left office</u> for private practice in September 2018. There was no elected DA between September 26, 2018 and January 2, 2019. But Conley's administration effectively continued, as Governor <u>Charlie Baker appointed</u> ADA John Pappas, 24-year prosecutor and eight-year SCDAO Chief Trial Counsel under Conley, as interim DA.

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period: the decrease in the average jail population from January to April was even less, just 2.3% (the percent decrease from the average January count [565 people] to the average April count [552 people]).

By comparison, other reform-minded district attorneys have seen <u>substantially larger snapshot</u> decreases over their first 100 days or a similar period.⁵

- o St. Louis County Prosecuting Attorney Wesley Bell announced that in his first 100 days the St. Louis County jail population was down 12%;
- o DA Larry Krasner's data analyst similarly announced Philadelphia's jail population was down 15.5% in his first 100 days;
- o DA Satana Deberry announced Durham's county jail population was similarly <u>down 15%</u> in her first 5 months.
- Increased BPD activity appears to directly affect the jail population. There were two periods with noticeable spikes in the jail population. The first spike happened immediately after DA Rollins took office. The jail population on Conley's last day was 537 people. But by the end of DA Rollins's first week, the population was up to 565 people jailed at Nashua Street. That initially stayed pretty consistent: the average population was 565 in January and even higher, up to 589 people, in February. A similar spike happened in August—a period in which the Boston Police Department engaged in aggressive policing of homeless populations on August 1st and 2nd in #OperationCleanSweep. Even though DA Rollins opposed the sweeps and spoke against them publicly, prosecutors respond to police conduct. The jail population noticeably increased in that single week, going from 539 people jailed on July 29th to 570 people jailed on August 5th.

Policy vs. Practice: What is the effect so far of DA Rollins's policies?

In her campaign and while in office, DA Rollins announced two major policies aimed at reducing the number of people jailed pretrial (pretrial decarceration): a presumption to decline or dismiss 15 enumerated charges and a presumption of release without bail if a person was not a flight risk. We tracked these policies during her first 100 days, though DA Rollins did not release her <u>formal policy memo</u> until March 25th. Before the memo, we found her campaign commitments were not consistently <u>implemented</u>. Our last consistent day in court was April 16th, but ADAs were not trained on the memo until May 17th, one month later. This delay in implementation coupled with the lack of training and supervision for staff in the prosecuting office has had real consequences for people in court. **The jail population data cannot be ignored**.

DA Rollins's policies have not resulted in a substantial reduction in the number of people held in jail pretrial.

Why aren't we seeing the type of change this administration is committed to?⁶ Without official data from system stakeholders, we can't know with precision what's sending people to, and keeping people in, jail. Here are our theories for what's likely preventing decarceration:

⁵ In Philadelphia and Durham, other bail reforms may be contributing factors to the reduction in the jail population.

⁶ Editor's note: as the first Black woman elected District Attorney in Massachusetts, DA Rollins has experienced unique, targeted pushback from system stakeholders. Other 'reformers' in Massachusetts, also women, have not experienced the same kind of vitriol in the media or impediments to policy implementation in court. Racist rebukes of DA Rollins cannot be divorced from her pledge to seek fair treatment and racial parity in criminal prosecutions.

1. Failure to follow through on and implement policies.

We believe assistant district attorneys' ("ADAs") failure to follow the bail and declination policies may be a reason behind the lack of decrease in the jail population. We recommend that the Suffolk County District Attorney's Office focus on implementing these policies:

- Train ADAs to file nolle prosequi statements.
- Educate ADAs on the difference between risk of flight (willful intent to evade prosecution) and most defaults (court absences from mistake or incarceration in another jurisdiction or hospital/treatment stays or work obligations or lack of childcare or lack of transportation).
- Train ADAs to proactively recommend release on recognizance and educate judges on the harm of pretrial detention with in-court arguments.
- Build tools and establish processes that prevent ADAs from recommending bail unless they justify the decision in writing, after supervisor approval (as required by the memo).
- Create professional consequences when ADAs do not follow the policies.
- Make personnel changes. If people employed by the Suffolk County District Attorney's
 Office—especially those in a supervisory role—are opposed to or obstructing the stated
 goals of DA Rollins, they should be removed from their positions and/or terminated.

According to a study of pretrial detention by the Council of State Governments Justice Center, people *held on bail* represent the largest plurality of people held in jail pretrial for any reason. Other common reasons people are held in jail pretrial are that their bail was revoked (resulting in a 60 or 90 day hold, depending on the type of revocation), they are subject to a probation detainer, or they have an outstanding warrant that prevents release.

ADAs in Suffolk County continue to request and judges continue to impose bails that people can't pay, leaving them in jail for weeks or months before their cases are resolved. Unlike probation holds or outstanding warrants, an ADA's changed bail requests would likely directly impact bail determinations and, ultimately, pretrial detention. We recognize that judges set bail, but ADAs have tremendous capacity to frame and influence bail determinations. DA Rollins must train staff and establish consequences when they deviate from the Office's announced policies; otherwise, people will remain needlessly in jail. Every minute a person spends in detention is harmful.

2. Obstructionist judges are preventing reform from taking hold.

Too often, we have <u>seen judges in Suffolk County</u> who put up walls to DA Rollins's stated reform agenda and either expressly <u>reject the policy in court</u> or exceed the bounds of the separation of

⁷ This analysis of FY 2014 data from three counties (Hampden, Middlesex, and Essex) found that about half of people in jail could be bailed out and released if they could afford it, but of those people roughly 61% remained detained because of unaffordable bail. Across the three counties, 3,839 of the 13,059 jail admissions (29.4%) were *held on bail*. In Hampden County, 75% of people who were "not bailable" were stuck in jail because of bail revocation, a probation detainer, or an outstanding warrant: 14.4% of admits to Hampden County (584 of 4,050) were detained because of bail revocation; 14.1% because of probation; 11.4% because of warrants. Council of State Governments Justice Center, Working Group Meeting 3 Interim Report 13–14 (2016), https://csgjusticecenter.org/wp-content/uploads/2016/07/Justice-Reinvestment-in-Massachusetts Third-Presentation.pdf#page=13.

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powers to <u>prevent the legitimate exercise of discretion</u> by the District Attorney's Office to decline charges.

We have seen multiple judges deny motions to dismiss requested by ADAs employed by the Suffolk County District Attorney's Office, for example: <u>Judge Sally Kelly</u>, <u>Judge Richard Sinnott</u>, <u>Judge Thomas Horgan</u>, <u>Judge John McDonald</u>. We have also seen some of these same judges set bails in cases the prosecutor was seeking to dismiss (or in exceptional cases, <u>nolle pros</u>) or <u>should have dismissed</u> under <u>any fair read</u> of the policy.

Judges may well continue to be an obstacle to reform, which is why DA Rollins must demand that ADAs file nolle prosequi statements—not motions to dismiss—as often as possible, which the Supreme Judicial Court recently affirmed judges have no right to deny.

Further, the Suffolk County District Attorney's Office must collect and release data about ADA bail requests (taking into account any changes in the overall case volume year over year), so we can better understand who is responsible—judges or ADAs—for the bails we're seeing and for keeping people in jail pretrial.

3. Major drivers of pretrial detention are ignored and overlooked by the existing policy.

Nashua Street holds *pretrial* detainees, but that does not mean it holds people detained exclusively because of *bail*. We are unaware of any published breakdown of how many people are held at Nashua Street Jail because of unpaid bail vs. held without bail or otherwise not bailable (because of bail revocation, a probation detainer, bail was or could have been paid but they had an outstanding warrant and so could not be released, they had the bail money but the court was out of GPS monitors or unwilling to process the bail payment so they're still detained, etc.).

The Suffolk County District Attorney's Office does not track bail revocations and The Rollins Memo had no policy on bail revocation. There are two types of bail revocation in Massachusetts: for a violation of pretrial conditions (a technical violation) and for a new criminal accusation (an arrest) while out on bail. These revocations result in different punishments: a technical revocation results in 90 days in jail; an arrest revocation results in 60 days in jail.

We have seen cases where ADAs <u>ask to revoke bail</u> – sending someone to a cage at Nashua Street or South Bay for a mandatory 60-day, two-month hold – when the policy calls for no new bail and the ADA is asking for no bail (release on recognizance) on the new arrest. This is a major gap in The Rollins Memo.

The same is true for requests for default warrants: warrants for a court absence or an unpaid fine or fee. ADAs continue to request default warrants, or fail to object when judges issue these bench warrants. Outstanding warrants contribute significantly to keeping people in cages.

We urge the Suffolk County District Attorney's Office to require that ADAs (1) nolle pros cases involving charges on the list of 15 regardless of the defendant's presence or absence in court; (2) never move to revoke bail in any cases only involving the 15 charges (as either the underlying case or the new arrest); and (3) never move to revoke bail on technical violations of pretrial release conditions, regardless of the charge.

The lack of reform results is not limited to Suffolk County.

Middlesex County's Hollow Bail Policy

In <u>January 2018</u>, Middlesex County DA Marian Ryan pledged not to seek cash bail in "<u>non-violent</u>, <u>low-level cases</u>," an unspecific pledge that parroted other prosecutor-led bail reform around the country. Community groups, like the Massachusetts Bail Fund, <u>were skeptical</u> that this vague commitment would make a dent in bail requests and bail-related detention. A little over a year after the policy was implemented, on <u>March 20, 2019</u>, DA Ryan's office <u>released aggregate data</u> on the 22,127 district court cases her office arraigned in 2018, the first full year of the policy. This data release was a laudable step for transparency! But the data show: critics were right to be skeptical.

The data released by the Middlesex County District Attorney's Office included statistics about prosecutor requests, but not case results. According to the data release: DA Ryan's line prosecutors had recommended cash bail in 3,257 cases, 22.6% of cases that proceeded past arraignment. Ryan said her office "did not request bail" in 10,497 cases (72.9% of cases that proceeded past arraignment), though the press release did not specify whether those cases involved recommendations of release on recognizance alone or release with other pretrial conditions, like an electronic monitor (GPS shackle) or pretrial supervision.

The initial data release also noted that Ryan's office requested to hold defendants without bail pursuant to 58A dangerousness hearings in 653 cases in calendar year 2018, representing 4.5% of cases that her office pursued past arraignment. DA Marian Ryan has made two additional aggregate data releases – reflecting the first two quarters of 2019 – which confirm roughly identical patterns in ADA requests for release, bail, and detention.⁸

These public data releases left <u>many questions</u> unanswered, such as: how do these results compare to DA Ryan's record in previous years, *before* the bail policy was in place? How do these results compare to statewide patterns of pretrial release and detention? How do these results compare to prosecutor requests for release on recognizance, cash bail, and detention without bail in other Massachusetts counties? Has the bail policy had any effect on the jail population—both year over year (pre-policy in 2017 and post-policy in 2018) as well as in the monthly average jail population since the policy was announced in January 2018?

To try to answer those questions, we had to consult other sources of data. We reviewed publicly available data from the Massachusetts Trial Court and statistics about the jail population gathered by a journalist.

⁸ The data analysis did not include demographic information, such as racial or socioeconomic factors. DA Marian Ryan publicly acknowledged this and said she had given researchers at Northeastern University the raw data to analyze for disparate treatment based on race/gender/ethnicity/city/town, and she would make their resulting analysis public. To our knowledge, that analysis has not yet been published.

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Here's what we learned:

- The Middlesex County District Attorney's Office outpaces all but two counties in requests to hold people in indefinite pretrial detention, without the possibility of release. According to data from the Massachusetts Trial Court, DA Ryan's office requested 598 dangerousness hearings in FY 2019, up from 524 in FY 2018—even though Middlesex filed fewer criminal charges overall in FY 2019 than FY 2018. Middlesex has the third-highest volume of dangerousness hearings of all counties in the Commonwealth, holding hundreds of people in jail each year without the possibility of release, until their cases resolve via dismissal, plea, trial, or death.
- DA Ryan's office requests release on recognizance less often than actual statewide release rates. According to a May 2019 <u>statewide analysis</u> by the Massachusetts Trial Court on release decisions in 150,883 Massachusetts district and municipal court cases arraigned after September 2017, 80.2% of people were released on recognizance, 16.1% had bail imposed, and 3.7% were held without bail. A separate <u>June 2019 study</u> of 149,441 cases found a statewide release-on-recognizance rate of 80.7%. While both of these studies found that more than 80% of people are released without bail across the Commonwealth, DA Ryan's ADAs only request release on recognizance in 73% of Middlesex County cases. The Middlesex District Attorney's Office fails to make requests that match actual statewide release rates.

In Middlesex County, DA Ryan still requests bail more often than judges impose it across the Commonwealth.

- DA Ryan's office requests bail more often than bail is actually set statewide. DA Ryan's ADAs requested cash bail in 23% of district court cases that proceeded past arraignment, but across the state, judges only set bail in 16% of cases! It's not a perfect comparator, but as we've said before, ADAs drive the conversation around bail in court: they get to make the first argument, usually establish the upper limit for a requested bail amount, and set the stage for judges to rubber stamp bail requests or simply split the difference between the ADA request and the defense request. If DAs want to claim they can make change, they need to be held responsible when no change is made or their records of decarceration pale in comparison to statewide trends.
- The average year over year decrease in the male population of the Middlesex County jail: 15.3% from 2017 to 2018. As stated above, DA Ryan announced bail policy in January 2018. Therefore, this year-over-year metric measures the percent change in the jail population comparing the year before and the year after the bail policy announcement. These data were published in a July 2019 long-form piece by Dan Glaun for Mass Live News on bail policy and changing pretrial practices in Middlesex County. The report included the month to month and year over year change in the Middlesex County jail population (males only). The jail population was down an average of almost 16% year over year comparing 2017 and 2018.

According to information from the Middlesex Sheriff's Office, the average number of pretrial detainees in the county jail decreased about 16% from 2017 to 2018. The data shows that the number of people held decreased month-to-month in each month except December, where the population held steady.

Average male pre-trial detention population in Middlesex County jail

Month	2017	2018	Percent change, year over year
January	554	453	-18.3
February	558	457	-18.1
March	536	442	-17.6
April	533	437	-17.9
May	562	444	-21.0
June	553	453	-18.2
July	556	478	-14.1
August	562	465	-17.3
September	549	474	-13.7
October	557	466	-16.3
November	517	459	-11.2
December	464	465	0.2

Table: Dan Glaun/MassLive • Source: Middlesex County Sheriff's Office • Get the data

• The year over year decrease in the female population admitted to pretrial detention at MCI-Framingham from Middlesex County: 17.9% from 2017 to 2018. Women incarcerated pretrial in Middlesex County are sent to state prison in Framingham. We don't have monthly averages for women held pretrial at MCI-Framingham from just Middlesex, but we do have the number of Middlesex women admitted to Framingham pretrial, which likewise decreased about 18% between 2017 (pre-bail policy) and 2018 (post-bail policy).

Criminally Sentenced and Pre-trial Inmates Housed at MCI-Framingham under the Jurisdiction of Middlesex County Released during 2014 through 2018 by Admission Type								
		Admission Year						
	Admission Type	2014	2015	20 🐠	2017	2018	Total	
_	In Temporary Custody	743	664	698	661	543	3,309	
T is	Probation Violator		1				1	
ě	In on a MA Parole Detainer		1				1	
_	Total Number of Pre-Trial	743	666	698	661	543	3,311	17.85%

As in Suffolk County, these year-over-year decreases are a positive sign and give us reason to be optimistic. However, just like in Suffolk County, the year-over-year change on its own is not the whole

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story. To evaluate how meaningful the year-over-year decrease is and whether it is due to the bail policy, one would need to know what other factors are at play. Were arrests up or down in this period? Was the overall case volume up or down? We could not readily find published data to answer those questions.

In the first year after DA Ryan announced bail policy, the average monthly population of Middlesex County Jail *did not decrease*.

Mass Live News reported only one of the three metrics we use to evaluate the effect of a prosecuting office's bail policies: the **year over year change** in the jail population. We recreated the data and graphed the jail numbers (males only) published by Mass Live News to evaluate the **average monthly change** in the jail population within the 2018 calendar year, starting from when DA Ryan announced the bail policy in January 2018, as well as a **snapshot** from before and after the policy.

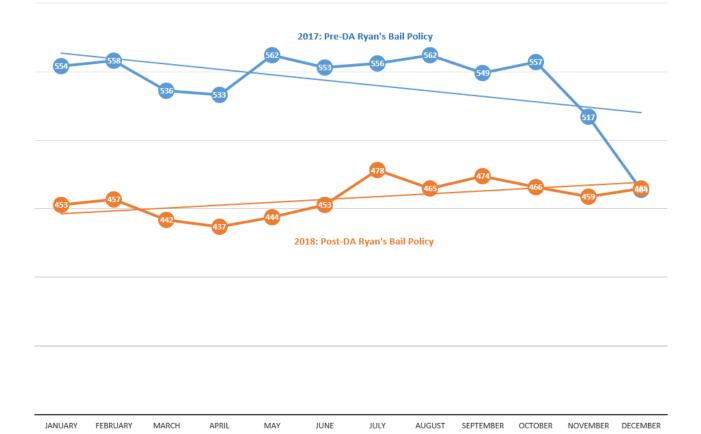
Month	2017	2018	Percent change, year over year	Percent change, month to month
January	554	453	-18.23%	-2.37%
February	558	457	-18.10%	0.88%
March	536	442	-17.54%	-3.28%
April	533	437	-18.01%	-1.13%
May	562	444	-21.00%	1.60%
June	553	453	-18.08%	2.03%
July	556	478	-14.03%	5.52%
August	562	465	-17.26%	-2.72%
September	549	474	-13.66%	1.94%
October	557	466	-16.34%	-1.69%
November	517	459	-11.22%	-1.50%
December	464	465	0.22%	1.31%
AVERAGE	541.75	457.75	-15.27%	0.05%

- The Middlesex County jail population (males only) had an average monthly increase of .05% in 2018. Since DA Ryan announced her bail policy in January 2018, the jail population basically stayed the same, with a trend line that is slightly up. In other words, from January to December 2018, the jail population in Middlesex County plateaued—possibly suggesting limited effect from the bail policy itself on the jail population. While we are heartened by the year-over-year decrease described above, the slight monthly increase since the policy is cause for concern.
- Snapshot: more people were in jail after a full year of DA Ryan's bail policy than in the month she announced it. In January 2018, an average of 453 males were jailed in Middlesex County. In December 2018, an average of 465 males were jailed in Middlesex County. Furthermore, the average jail population was higher by one person—465 vs. 464—in December 2018 compared to December 2017. As the graph below depicts, the jail population was also generally higher in the second half of 2018 (July to December) compared to the first half of 2018 (January to June), again suggesting an upward trend line in 2018 (more people were in jail on average in the second half

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of the year). This was true even though the prior year the jail population dramatically decreased between October and December 2017. A policy isn't *progressive* if it doesn't make progress.

Middlesex County Jail Monthly Avg Pre-Trial Population (males only)



This analysis makes clear the value of comprehensive data when prosecutors announce seemingly decarceral policies; the policies cannot be evaluated without data. We're very glad DA Ryan continues to release data, but as in Suffolk County, without a more detailed breakdown of the reasons people are held in jail (bail, warrants, bail revocation, 58A dangerousness, etc.) and information about both prosecutor behavior and judicial/probation behavior, the sources of pretrial detention will remain cloudy.

Berkshire County's Increasing Reliance on 58A Dangerousness Hearings

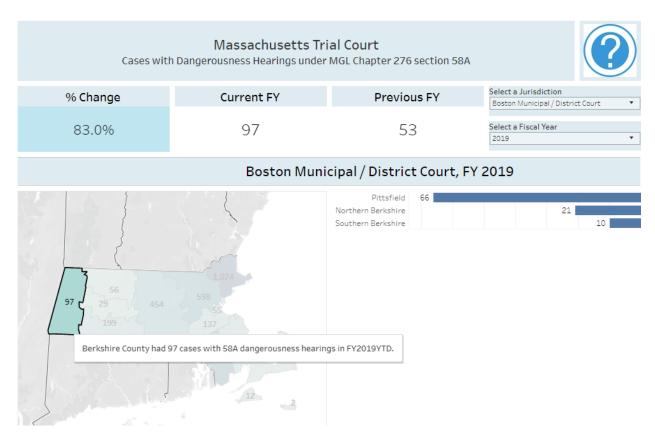
In February 2019, Berkshire County District Attorney Andrea Harrington announced a <u>new bail policy</u> requiring ADAs not to request cash bail unless the defendant is a known flight risk and requiring that if ADAs think the defendant threatens public safety, they must invoke the dangerousness statute (G.L. c. 276 § 58A). In interviews about the policy, DA Harrington pledged that she would "<u>aggressively utilize</u>" the dangerousness statute. We had <u>reservations</u> about this pledge from its inception.

<u>Data released by the Massachusetts Trial Court</u> on dangerousness hearings show that DA Harrington kept to her pledge to "aggressively utilize" dangerousness hearings to detain people compared to the prior administration. While Berkshire County's overall numbers are still lower than most other counties, and

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very low compared to a few prominent outliers (<u>Essex</u>, Bristol, Middlesex, and Worcester), under DA Harrington, 58A holds without bail are **up 83%**.

Under DA Harrington, Berkshire County has increased the use of pretrial detention without bail by 83%, a higher percentage increase than any other county in the Commonwealth.



This trend is *very* concerning. It is not decarceral to replace bail with indefinite pretrial jail. In FY19, DA Harrington's office held 97 people under 58A requests in district courts, with no chance at pretrial release. The overall volume of charges pursued by the Berkshire County District Attorney's Office is just 7,208 in district courts. By contrast, in FY19, DA Rollins's office held only 55 people under 58A requests in municipal or district courts, in a county with an overall volume of charges of 39,797 in those courts. Berkshire County requests for 58A dangerousness holds have also dramatically increased by percentage in Superior Court: 1 request in FY18 versus 10 requests in FY19, a 900% increase.

All Detention is Dangerous: Prosecutor Decision-Making Matters

All pretrial detention is harmful. Any amount of time spent incarcerated pretrial has lasting, devastating consequences. In some cases, pretrial detention is life-ending: at least **thirteen people** have died in some

⁹ LÉON DIGARD & ELIZABETH SWAVOLA, JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION, VERA INST. OF JUSTICE (Apr. 2019), https://storage.googleapis.com/vera-web-assets/downloads/Publications/for-the-record-justice-denied-pretrial-detention/legacy_downloads/Justice-Denied-Evidence-Brief.pdf.

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form of pretrial detention in Massachusetts in 2019 alone, whether in county jails, state prison, state psychiatric hospitals, or local police custody. ¹⁰ One additional man died in New Hampshire custody a few days after an initial arrest in Northampton, MA and transfer to New Hampshire on a parole violation. ¹¹

So far in 2019, at least THIRTEEN PEOPLE *have died* in some form of pretrial detention in Massachusetts.

Only some of the names and identities of people who died this year in Massachusetts in pretrial detention have been published; four of the thirteen people we identified are unnamed in press reports. While we don't know the ages of three of the thirteen people who died in pretrial detention, the average age at death among the people whose age was reported was 40.7 years old, suggesting premature death. We created the chart below, with links to the isolated press reports about their deaths, to honor their memories and say the names of people who have died in state custody, while still presumed innocent.

REPORTED DEATHS IN MASSACHUSETTS PRETRIAL DETENTION, 2019					
NAME	AGE	Caging Institution (Prosecuting County)	Month		
Unidentified Man	?	Worcester Police holding (Worcester)	<u>May 2019</u>		
Mark B. Trafton	59	Ash Street Jail (Bristol)	<u>May 2019</u>		
Richard Pike	51	Middleton Jail (Essex)	May 2019		
Cristhian Geigel	<u>39</u>	South End Boston Police holding (Suffolk)	May 2019		
Daniel Allende	29	Holyoke Police holding (Hampden)	May 2019		
Unidentified Man	?	Nashua Street Jail (Suffolk)	<u>June 2019</u>		
Michael Baker	40	Middleton Jail (Essex)	<u>June</u> 2019		
Devonrick Schouten	30	MCI-Framingham (Middlesex)	<u>June 2019</u>		
Unidentified Woman	31	Bristol County Jail (Bristol)	<u>July 2019</u>		
Unidentified Man	?	South End Boston Police holding (Suffolk)	<u>July 2019</u>		
Shayne Stilphen	28	South End Boston Police holding (Suffolk)	<u>July 2019</u>		
Jeffrey Link	51	Bridgewater State Hospital (Bristol)	<u>Sept. 2019</u>		
Scott Lajoie ¹²	49	Bristol County Jail (Bristol)	<u>Sept. 2019</u>		

¹⁰ See generally, e.g., Michael Levenson, Deaths in police custody underscore dangers for people arrested with drug issues, BOSTON GLOBE (July 30, 2019, 7:29 AM), https://www.bostonglobe.com/metro/2019/07/30/deaths-police-custody-underscore-dangers-for-people-arrested-with-drug-issues/QP9yv3wDCHFOkWYzY5hLwJ/story.html; Letter to the editor: Sheriff Hodgson fails to take jailhouse suicides serious, Lowell Sun (July 18, 2019), https://www.thesunchronicle.com/opinion/letters-to-editor/letter-to-the-editor-sheriff-hodgson-fails-to-take-jailhouse/article-a5a2318e-43a3-5d81-9a23-5b38dac9c200.html; see also Chris Burrell & Hannah Schoenbaum, Jail Suicides Drop In Massachusetts After Years Of Increases, WGBH NEWS (Mar. 4, 2019), https://www.wgbh.org/news/local-news/2019/03/04/jail-suicides-drop-in-massachusetts-after-years-of-increases.

¹¹ Liora Engel-Smith, Autonsy: Cheshire County jail inmate died by suicide. SENTINEL (May 14, 2019)

¹¹ Liora Engel-Smith, *Autopsy: Cheshire County jail inmate died by suicide*, Sentinel (May 14, 2019), https://www.sentinelsource.com/news/local/autopsy-cheshire-county-jail-inmate-died-by-suicide/article d535e476-2e85-5d77-aca0-4202485ff42e.html.

¹² At the time of publication, this death had not been reported in the press. His case (docket #1932CR002613 in Fall River District Court) was dismissed on October 1, 2019 because Mr. Lajoie had died while in custody of the Bristol County Jail in Dartmouth awaiting trial, held on § 58A dangerousness (no possibility of pretrial release).

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In one case, a <u>trans man</u> named Devonrick Schouten being prosecuted by the Middlesex District Attorney's Office ("MDAO") died while incarcerated pretrial at MCI-Framingham state prison, where all people identified by the Commonwealth as women are sent by the MDAO to be jailed pretrial. Schouten had been arraigned on May 28, two months before he died. He was charged by the MDAO with attempted murder and assault and battery with a dangerous weapon, in a case in which he was arguing self-defense. He said he stabbed the alleged victim because the woman was strangling him.

The MDAO asked that he be <u>held on alleged dangerousness</u> under § 58A of the bail statute, jailing him without the possibility of release before trial or resolution of his case. ¹³ Though Schouten identified as a trans man, he was jailed at a women's prison, and died on June 25, 2019 behind bars, before the case had been investigated, two months after being arraigned, at age 30.

The Middlesex District Attorney's Office, the same prosecuting office that sent him to the cage where he died, was also responsible for investigating the circumstances of his death. DA Marian Ryan's office told a reporter in July that the death is "not considered suspicious."

Even when it doesn't result in death, all jail is dangerous detention. And beyond its many deprivations, jail is destabilizing—interrupting social relationships, employment, education, family responsibilities, access to medications, parental rights. If someone's case is ultimately dismissed, they will have lost time, freedom, and may lose their children, their job, their housing, or access to treatment because of pretrial detention. Of course jail also impedes one's ability to participate in their defense—to help identify witnesses, review and gather evidence to support an alibi or misidentification, consult privately and confidentially with counsel. Almost 60 years of research shows that jail coerces pleas, regardless of guilt or innocence, and can be criminogenic, creating so much instability or chaos in a person's life as to induce new criminal activity or open someone up to new criminalization. ¹⁴ And in Massachusetts, the racial disparities in pretrial practices cannot be overlooked: according to the limited available data, people of color face higher median bails and are jailed more often than white people. ¹⁵ Reducing pretrial incarceration makes us all safer, as fewer people are jailed and have their lives destabilized through loss of jobs, housing, medical and mental health care, and positive social supports.

¹³ According to <u>data released by the Massachusetts Trial Court</u>, the Middlesex District Attorney's Office requested 598 dangerousness hearings in FY 2019, up from 524 in FY 2018—even though Middlesex filed <u>fewer criminal</u> <u>charges overall</u> in FY 2019 than FY 2018. Middlesex has the **third-highest** volume of dangerousness hearings of *all counties* in the Commonwealth.

¹⁴ See, e.g., Anne Rankin, The Effect of Pretrial Detention, 39 N.Y.U. L. REV. 641, 641 (1964); see also Charles E. Ares, Anne Rankin & Herbert Sturz, The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole, 38 N.Y.U. L. REV. 67 (1963) (describing the Manhattan Bail Project); see also Paul Heaton, Sandra Mayson & Megan Stevenson, The Downstream Consequences of Misdemeanor Pretrial Detention, 69 STAN. L. REV. 711 (2017), https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/02/69-Stan-L-Rev-711.pdf.

¹⁵ This is the first time we focus on racial disparities in this report because almost all of the data we cite lacked a racial or ethnic demographic breakdown. The Massachusetts Trial Court only publishes aggregate statistics and disaggregates by "white" and "non-white." The weekly count sheets published by the Commonwealth do not have any racial or demographic breakdown. DA Ryan's data are being privately analyzed by researchers at Northeastern University for racial and other demographic disparities, and that analysis has not yet been published. The lack of regularly published information about racial disparities must be redressed, especially because the few reports on racial disparities in pretrial detention suggest staggering overrepresentations of people of color held in jail pretrial in Massachusetts.

Conclusion & Recommendations

As abolitionists, we are committed to disrupting all avenues to holding people in jail awaiting the resolution of their case.

We are encouraged that the jail populations in both Suffolk County and Middlesex County are down year-over-year according to the data we reviewed. But we remain concerned that the policies of each prosecuting office do not appear to be responsible for driving those decreases.

Prosecutors in Massachusetts may talk about reform and decarceration, but the limited available data suggest their *practices* don't live up to their rhetoric.

In Suffolk County the average monthly jail population is down an average of one percent since DA Rollins took office, and in Middlesex County the jail population was on average slightly higher by the end of 2018 than when DA Ryan announced office bail policy. In Middlesex County, DA Ryan requests more dangerousness hearings—detaining people pretrial without the possibility of release—than in almost any other county. And in Berkshire County, DA Harrington has increased the use of dangerousness hearings at a higher rate than any other county according to the most recent year of data.

We are deeply disappointed that these prosecutors' records have not resulted in more pretrial decarceration. We are also frustrated by the lack of data available from these offices and from sources across the state to evaluate the drivers of pretrial detention and racial disparities in pretrial detention, whether from the Sheriffs Association, individual elected sheriffs, individual prosecuting offices, or the Massachusetts Trial Court. These data should be regularly published and tracked by the state, so we can understand (1) what sends people to jail and keeps people in jail pretrial and (2) why spending on incarceration continues to rise while the number of people in our jails and prisons falls.

Offices <u>should not be given</u> any additional resources to meet these reporting requirements. Transparency is a basic principle of good government, and under Title VI of the federal Civil Rights Act, all government entities <u>receiving federal funds</u> are required to show they deliver services and benefits in a nondiscriminatory fashion; tracking data on the race and ethnicity of people prosecuted and held in pretrial detention is the only way to prove compliance with federal civil rights laws.

Communities in Massachusetts deserve to know why and how elected officials and public employees are incarcerating our neighbors, friends, and loved ones—requiring a massive expenditure of public funds for county jails and local police departments—on the basis of criminal accusations alone, before any judge or jury has reviewed evidence associated with their arrest.