

IN **(JUSTICE)** in MERCED COUNTY

A Case for Change and Accountability



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EXECUTIVE SUMMARY

California and the United States as a whole incarcerate more people than anywhere else in the world, in both absolute and per capita terms.¹ District attorneys (DAs) in California can have a powerful role in curbing mass incarceration and hold tremendous discretion within the criminal legal system, but they have historically been subject to limited accountability.

This report outlines the practices and policies of Merced County District Attorney Kimberly Helm Lewis's office by presenting quantitative and qualitative findings. Based on these findings, the report makes recommendations for Merced DA reform in core practice areas: charging decisions in both adult and juvenile cases, diversion, parole, immigration consequences, and police accountability. Although DA Lewis campaigned on bringing "change" to the Merced County DA's Office, this report finds that the internal policies and practices that have historically driven over-criminalization, extreme sentencing, and racial disparities have largely remained unchanged.

Sixty-two percent of all charges filed under DA Morse in 2017–18 and DA Lewis in 2019–20 were for low-level offenses that should be declined to charge or diverted to community-based treatment programs. In stark contrast, only about five percent of charges filed under each administration in those two years were for serious or violent offenses. Despite the district attorneys' overwhelming focus on criminally prosecuting low-level offenses, access to diversion is limited, ineffectively targeted, and marked by very poor completion rates.

The Merced County DA should use its power to limit incarceration and undo its disparate impacts on communities of color. Key recommendations to reduce the footprint of prosecution and mass incarceration and redirect resources to more compassionate and effective community-based services are summarized below:

- **With respect to charging decisions**, do not charge offenses the ACLU lists as "decline to charge" in Appendix B, because it wastes limited resources and can worsen outcomes. Automatically refer cases the ACLU lists as "diversion" in Appendix B to pre-filing diversion programs, because health-based interventions are best suited solutions for all parties involved.
- **With respect to sentencing decisions**, reduce and eliminate excessive penalties by no longer seeking sentence enhancements or the death penalty.
- **With respect to youth justice**, create a policy to never charge children as adults.
- **With respect to diversion**, stop contracting with for-profit companies to run diversion programs and transfer the delivery of diversion programs to community-based organizations.
- **With respect to parole**, institute a policy where the Merced DA only involves itself in the parole process to support the release of individuals, much like the Los Angeles DA's new policy.
- **With respect to immigration**, require that prosecutors consider immigration status in order to mitigate immigration collateral consequences in their charging, plea negotiations, and post-conviction review practices.
- **With respect to police accountability**, support the creation of an independent entity to investigate and hold law enforcement accountable for their conduct.

INTRODUCTION

The Failure of Mass Incarceration

The United States represents just 5% of the world's population but accounts for 25 percent of the people behind bars.² The nationwide incarcerated population has increased by 700 percent since 1970.³ This is in part due to the country's racist and discriminatory policies and practices that ushered in an era of mass criminalization and incarceration, such as Nixon's War on Drugs and Bill Clinton's 1994 Crime Bill.⁴ While the country has spent more than \$1 billion on drug enforcement since 1970, drug use levels remain largely the same, if not worse.⁵ Across the country, there are twice as many people sitting in local jails awaiting trial and presumed innocent than in the entire federal prison system, highlighting the importance of local and county policy.⁶

The state of California convicts over 500,000 people annually,⁷ and if it were a country, California would have the fourth highest incarceration rate in the world.⁸ Despite recent reforms, the state continues to perpetuate racial disparities, including in arrests, prosecutions, and sentencing.⁹ Mass incarceration disproportionately affects people of color, people experiencing mental illness and substance-use disorders, and those with limited financial resources. California is no exception to these patterns.¹⁰

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.¹¹ In particular, Black men are incarcerated in state prisons at ten times the rate of white men. 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.¹²

Incarceration is extremely costly to the state and taxpayers. California spends over \$13 billion a year on prison operations, and over \$80,000 per incarcerated person.¹³ Despite the U.S. Supreme Court's 2011 ruling that California reduce its prison population to 137.5% of planned capacity, as of July 2019, 12 of the state's 35 prisons still operate above this cut-off.¹⁴ Largely due to COVID-related releases, as of April 2021, the state prison population is approximately 106.6 percent of design capacity.¹⁵ The state has also spent \$2.5 billion expanding its jails between 2007 and 2020.¹⁶

Incarceration has devastating and lasting psychological and material costs for incarcerated individuals, their families, and their communities. Without comprehensive reentry supports in place, formerly incarcerated individuals struggle to assimilate back into society and experience housing, education, and employment discrimination long after they've served their time.¹⁷ California has one of the country's highest recidivism rates, with fifty percent of incarcerated people ending up back in prison within three years of their release.¹⁸ California's criminal justice system has become unwieldy and ineffective, at great human and financial cost.

The Role of District Attorneys

District Attorneys (DAs) have one of the most influential roles within the criminal justice system. In California, as is the case in most states, DAs are elected officials. County-wide DA elections are held every four years at the same time as elections for the Governor, with the exception of Los Angeles and San Francisco counties.¹⁹ The ACLU's "Hey, Meet Your DA!" website summarizes the extent of their power: "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 ultimately taking plea deals — including people who plead 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.”²⁰

While DAs have historically positioned themselves as “tough on crime,” a number of prosecutors in high-profile races have won by campaigning on platforms of criminal justice reform.

Larry Krasner won the 2017 Philadelphia City District Attorney election with campaign platform 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.²¹ He eliminated cash bail, stopped prosecuting juveniles as adults, and declined to charge most drug possession and prostitution cases. The city's jail population decreased over 30 percent during his first two years in office.²² 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.²³ A study of DA Rollin's policy to no longer prosecute low-level offenses showed a large reduction in future involvement in the criminal legal system with no apparent increase in crime.²⁴

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,²⁵ ended the use of cash bail and reduced pretrial detention,²⁶ and offered diversion programs for primary caregivers as an alternative to incarceration.²⁷ In the November 2020 General Election, George Gascón defeated two-term incumbent Jackie Lacey to become District Attorney of Los Angeles County. Gascón's campaign website emphasizes reducing racial disparities and ending mass incarceration.²⁸ His platform included eliminating money bail and the death penalty, resentencing those convicted to death to life without parole, expansion of diversion programs, and detailed plans regarding law enforcement accountability, immigration-informed prosecution, and data transparency.

Merced County

Merced is a small county located in California's Central Valley, with a population of 277,680.²⁹ Merced County's state prison incarceration per arrest rate is slightly lower than the state average. In 2016, the county had 364 people held in state prison per 1,000 adult felony arrests, while that number for the state is 446.³⁰ There were 261 people in county jails per 1,000 adult felony arrests, roughly the same as the overall state number of 254.³¹ In 2016 Merced County had the highest unsentenced jail population in the state, with 98 percent of the average daily county jail population awaiting sentencing, compared to the state average of 66 percent.³²

Kimberly Lewis, who describes herself as a “career government attorney,”³³ was elected Merced County DA in 2018 and took office in January 2019. She defeated longtime incumbent Larry Morse, whose tenure at the DAs office was marked by repeated scandals. Morse had multiple sexual harassment allegations made against him, and Lewis centered workplace sexual harassment as a core part of her campaign against him. Morse also left an angry, expletive-filled voicemail for Public Defender Dave Elgin, which was publicly released and soured the relationship between the two offices.³⁴ Lewis also centered her campaign on promises to improve the DA Office's relationship with the Public Defender's Office and law enforcement agencies.³⁵

On election night, Lewis said that, “We've campaigned based on bringing change to Merced County and (voters) let us know tonight they agree that change is what they're looking for too.”³⁶ Aside from avoiding the public scandals of her predecessor, Lewis's promises for change remained vague throughout her campaign. This report aims to compare her record as a prosecutor against that of DA Morse in order to determine whether she has truly lived up to her campaign promise of bringing change to Merced County.

The crime rates in Merced held fairly stable between the end of DA Morse's tenure and DA Lewis' first year in office in 2019.³⁷ However, it is necessary to exercise caution in comparing prosecution practices in 2020, amid the initial outbreak of the COVID-19 pandemic. Overall crime in most California cities declined by an average of 7 percent

in 2020.³⁸ However, this decline was not uniform and was marked by an increase in violent crimes and a decrease in property crimes statewide. This trend appears to hold in Merced, as the Merced Sun Star reported that the City of Merced saw an 8.26 percent decrease in the total of overall crimes in 2020. Violent crimes increased by 5.13 percent while property crime decreased by 14.72 percent.³⁹

The Merced County DA's office was approved for a budget of \$15,273,216 for the fiscal year 2020-2021, while the Public Defender's (PD's) office was approved for a budget of just \$5,119,442.⁴⁰ The DA's office makes up 8.7 percent of the county's total "Public Protection" budget, while the PD's office only makes up 2.9 percent of it.⁴¹ It is important to note that while DAs try all criminal cases that they choose to file, public defenders only work on

cases where a defendant cannot afford their own attorney. The Merced County DA's total salary is \$205,867 per year, and with benefits it is \$332,840.⁴² In comparison, the Chief County Public Defender's total pay with benefits is \$248,364.⁴³

Aside from judicial services such as the DA and PD's office, the Merced County public protection budget also provides funding for the County Sheriff's office and county detention and corrections (see Appendix A). Judicial services account for 19.6 percent of the public protection budget, police account for 18.7 percent, and detention and corrections account for 36 percent. This highlights that the county is spending a lot of money on policing and criminalizing communities that could be more effectively spent on community-based services to prevent and respond to harm.



METHODS

On May 13, 2019 the ACLU of Northern California sent a California Public Records Act (PRA) to the Merced County DA (see Appendix D), which included requests for:

- Charging data for 2017 and 2018, including unique case identifiers, charges, enhancements, and outcomes for all misdemeanor and felony charges filed;
- Diversion data for 2017 and 2018 and policies relating to these programs;
- Information on positions the office took in parole hearings;
- Office policies, protocols, and guidelines for prosecutors; and
- Immigration-related policies.

The DA's office provided Excel spreadsheets responsive to the charging data request, and a series of documents only partially responsive to the request for diversion, parole, and policies. The initial charging data for 2017 and 2018 included gender demographics but did not include case numbers, racial demographics, or age data.

In February of 2021, the ACLU of Northern California followed up to request similar data on cases filed in the calendar years 2019 and 2020. The DA's office was headed by former DA Larry Morse in 2017–2018, and by current DA Kimberly Helm Lewis in 2019–2020. The multiple data sets allow for an analysis of how charging practices have differed between the two DAs. DA Lewis' office sent one spreadsheet with all juvenile and adult data. This time, the data included information on race and sentence enhancements, but still excluded case numbers. The lack of race and enhancement data from 2017–2018 precludes a comparison between the two DAs on these practices. The lack of case numbers from both DAs precludes any sort of analysis at the individual level, as one case can include multiple separate charges.

Data analysis on the charges filed were conducted by running descriptive statistical analyses using STATA, a statistical software for data science. This allowed us to see the most common charges and group charges into various categories, such as low-level or serious offenses. The data provided came in separate datasets for misdemeanors and felonies and no case numbers were provided.

In addition to the charging data, the DA's office provided:

- Multiple PDFs describing a diversion program called the Community Accountability Program (CAP) with some data on completion rates from 2017–2018.
- One PDF describing a diversion program called Pacific Education Services Delayed Entry of Judgment Program, but no data on referrals or completion rates was provided.
- One Excel spreadsheet with parole hearing cases from 2016–2019, with some information on whether the parole was granted or denied.
- Fifteen different PDFs describing internal policies. However, they provided no policies guiding discretionary filing, such as charging certain crimes as misdemeanors rather than felonies.

While we asked for updated policies from DA Lewis' office, none were provided. Nor were any policies related to mitigating any immigration consequences of charges for non-citizens.

In order to provide additional context for the data provided by the DA's office, we conducted three interviews with Merced community though the Merced County members: Claudia J. Gonzalez from Root & Rebound, a criminal justice organization that works primarily on reentry issues; and two anonymous Merced residents (one who is a student activist and organizer, and one who works in the criminal legal system for the county).

FINDINGS

Charging Decisions

Much of DAs' power lies in their discretion to decide whether to file charges for an alleged crime and what charges to file. DAs are able to dismiss and divert cases to reduce the impact of the criminal legal system on an individual, or they can file charges more punitively and add sentence enhancements to increase a person's punishment beyond the normal range. Prosecutorial discretion in charging can have a major impact on the lives, families, and communities of individuals charged.

In response to the ACLU's PRA request, the Merced County DA provided datasets that include every charge prosecuted by their office for calendar years 2017–2020. Former Merced County DA Larry Morse was in office during calendar years 2017–2018, while current DA Kimberly Lewis' first years in office were 2019–2020. She was sworn in on January 7, 2019.⁴⁴ This analysis compares the charging decisions under the different DAs by contrasting the biennium of 2017–18 against that of 2019–20. However, the comparison should be treated with caution because any trends reflected in March–December of 2020 may reflect changes in crime, due to the outbreak of the COVID-19 pandemic, rather than changes in charging practices.

RACIAL DEMOGRAPHICS

One of DA Lewis's campaign promises was to "create a quarterly report on arrests and charging decisions broken down by race and gender." No reports were found on the DAs website, nor given to us through PRA. However, charging data from 2019–2020 did include the race of people charged, whereas data from 2017–2018 did not. Race categories for 2019–2020 include Black, White, Hispanic, Chinese, Cambodian, Filipino, Guamanian, American Indian, Japanese, Korean, Laotian, Samoan, Hawaiian, Pacific Islander, Vietnamese, Asian Indian, Other Asian, Other and Unknown. This represents a significant improvement in data tracking,

however the lack of case-level identifiers precludes comprehensive racial analysis. It is only possible to know the race of a person charged with a particular offense, but we do not know whether multiple offenses were filed against the same person.

Furthermore, it is impossible to analyze racial disparities without similarly disaggregated census data. For example, while we know that 0.1 percent of charges were filed against Filipino people in 2019 and 2020, we do not know what percentage of the overall Merced population is Filipino. Available Census data only shows that 7.8 percent of the Merced County population is Asian. When disaggregated Asian ethnicities are reaggregated, 3.4 percent of all charges were filed against AAPI individuals. While it appears that the AAPI community as a whole is statistically undercharged, this almost certainly masks disparities across ethnic groups. Without disaggregated Census data, however, this is impossible to determine. For example, if Filipinos represent 1 percent of the overall county population, they may be statistically underrepresented in this data, but if they represent 0.01 percent, they may be vastly overrepresented.

While AAPI ethnic identities are relatively well-aggregated in this dataset, compared to other DA offices across the state, it is concerning that by far the most frequently charged ethnicity — Hispanic — is not disaggregated at all. While also far from perfect, the Census differentiates between Hispanic, Hispanic White, and Non-Hispanic White. The DA's charging data presents Hispanic and White as mutually exclusive, thereby making an analysis of racial disparities within the Hispanic community difficult. For standardization, this report will refer to individuals classified as Hispanic in the DA's charging dataset as Latinx.

Considering both the lack of individual or case-level data and the lack of disaggregated Census data, we must be very cautious about any inferences of racial disparities. For example, if 90% of charges filed

against Samoans are serious or violent felonies, but this is based upon a total of 20 charges filed against two individuals, it would be incorrect to extrapolate anything about that ethnic group’s behavior or treatment within the legal system from that information. Most of the analysis of racial disparities in this report focuses on disparities between Black, white, and Latinx individuals, because 97.4 percent of all offenses filed in 2019 and 2020 were charged to members of these three racial and ethnic groups. Although disaggregated racial data does not lend itself to the descriptive statistical analysis presented in this report, due to the very small numbers of charges and individuals represented, it can provide crucial qualitative information. Therefore, we have included the complete breakdown of offenses charged across all racial and ethnic groups in the appendices of this report.

The following table shows the racial and ethnic demographics of Merced County as a whole, as tracked by the US Census 2019 American Community Survey.⁴⁵

Race/Ethnicity	Percent
Black	3.9
American Indian and Alaska Native	2.5
Asian	7.8
Native Hawaiian and Pacific Islander	0.4
Two or More Races	3.2
Hispanic or Latinx	61.0
Non-Hispanic White	26.5

The following table shows the number and percent of charges filed against people of the racial and ethnic groups in 2019 and 2020 under DA Lewis, as this data was not collected in 2017 and 2018 under DA Morse.

Race/Ethnicity	Number of Charges	Percent of Charges
American Indian	37	0.15
Black	2,346	9.23
Cambodian	6	0.02
Chinese	9	0.04
Filipino	35	0.14
Guamanian	1	0.00
Hawaiian	24	0.09
Latinx	14,705	57.87
Indian	185	0.73
Japanese	6	0.02
Korean	5	0.02
Laotian	45	0.18
Other Asian	554	2.18
Pacific Islander	17	0.07
Samoan	5	0.02
Unknown	1,393	5.84
Vietnamese	18	0.07
White	6,019	23.69
Total	25,410	100

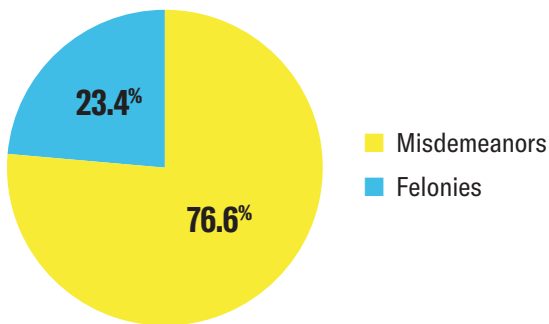
Despite the constraints described above, it is abundantly clear that The Merced DA disproportionately charges Black people. Black people represent less than 4 percent of Merced County residents, but are charged with nearly 10 percent of all offenses filed by the DA. Latinx people also appear to be slightly overcharged, as they receive 57.87 percent of all charges but represent 61.0 percent of the county’s population. White and American Indian people appear to be slightly undercharged, as White people represent 26.5 percent of the county but receive 23.69 percent of all charges filed. American Indian people represent 2.5 percent of the county and 0.15 percent of all charges filed. When reaggregated for comparison, Asian people comprise 7.8 percent of the county and are charged with 3.4 percent of offenses, and Pacific Islanders make up 0.4 percent of the county and receive 0.18 percent of charges.

FELONIES AND MISDEMEANORS

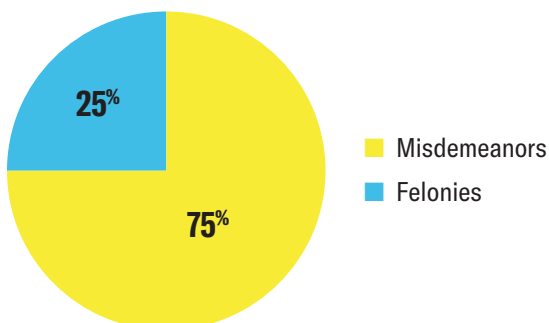
Overall, former DA Morse and current DA Lewis filed approximately 12,500 charges every year. The total number of charges filed in 2017 and 2018 under former DA Morse was 24,977. The total number filed in 2019 and 2020 under current DA Lewis was 25,410. Even with the decrease in overall crime rates associated with COVID-19⁴⁶ and campaign promises to reduce mass incarceration, DA Lewis brought more charges than her predecessor did.

In 2017 and 2018, more than three-quarters of charges filed by former DA Morse were misdemeanors. In those two years, his office filed 19,120 misdemeanor charges and 5,857 felony charges. In 2019 and 2020, current DA Lewis filed 19,063 misdemeanor charges and 6,347 felony charges. The vast majority of charges filed under both administrations were misdemeanors, but the structure of the data provided makes it impossible to analyze how many cases were composed entirely of misdemeanor charges, entirely felony charges, or a combination of the two.

Charge Type 2017–18 (DA Morse)



Charge Type 2019–20 (DA Lewis)



The ten most frequently filed misdemeanor charges were identical between the two administrations, although the exact number filed shifted slightly. The following table outlines the most common misdemeanor charges and the number of charges filed in 2017 and 2018 under DA Morse, as compared to 2019 and 2020 under DA Lewis.

Most Common Misdemeanor Charges

Offense	2017–18 Frequency (DA Morse)	2019–20 Frequency (DA Lewis)
DUI – VC 23152(a) and VC 23152(b)*	4,275	4,048
Driving with Suspended License – VC 14601 and subsections^	1,756	1,927
Drug Paraphernalia – HS 11364^	1,155	1,413
Meth possession – HS 11377^	1,126	1,068
Resisting Arrest – PC 148 and PC 148(a)(1)^	778	722
Driving without License – VC 12500^	725	762
Theft – PC 484 and subsections*	754	532
Domestic Violence – PC 243(e)(1)	580	660
Abandonment and Neglect of Children – PC 273.6	607	560
Vandalism – PC 594(a)^	426	478

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

Eight out of ten of the most frequently filed felony charges remained the same between the two administrations. The following chart lists the ten most frequently filed felony charges across all four years, from 2017–2020, and then breaks it down by the number filed by each DA. DA Lewis filed more felony charges than her predecessor in more than half of those types of cases.

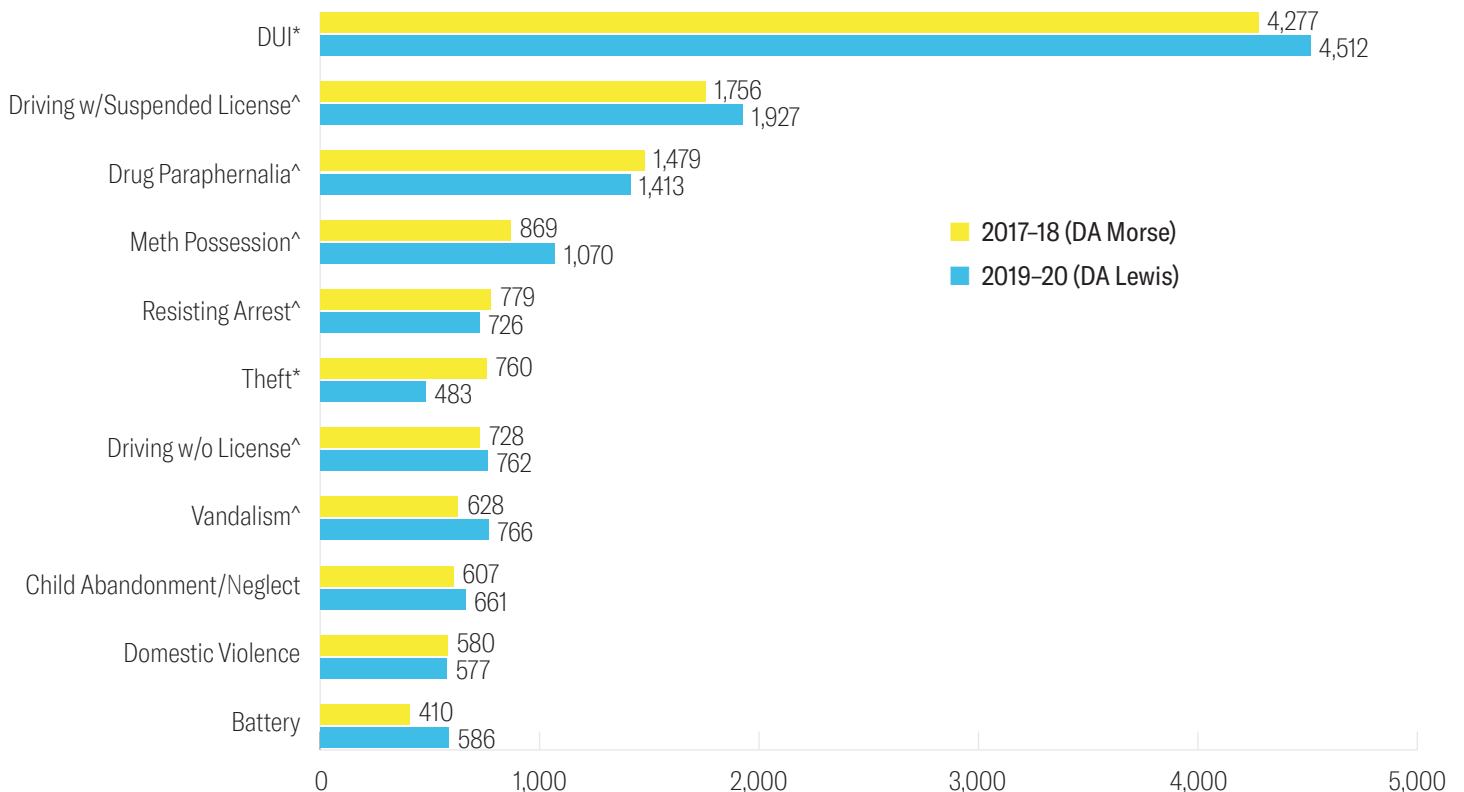
Most Common Felony Charges

Offense	2017-18 Frequency (DA Morse)	2019-20 Frequency (DA Lewis)
Domestic Violence — PC 273.5(a)	395	422
Burglary — PC 459*	286	279
Larceny — PC 496d	286	251
Criminal Threats — PC 422 and subsections^	276	252
Prohibited Firearm Possession — PC 29800(a)(1)	248	280
Vandalism — PC 594(a)^	202	288
Driving Stolen Vehicle — VC 10851*	227	249
Possession of Ammunition (Felon) — PC 30305(a)(1)*	189	246
Assault likely to result in serious bodily injury — PC 245(a)(4)	206	219
Assault With Deadly Weapon — PC 245(a)(1)	199	189

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

When looking at all felony and misdemeanor charges collectively, the most frequently filed charges were nearly identical between the two administrations. The most common offense across all years and both administrations were DUIs. The other most common offenses included low-level drug charges, driving without a license or suspended license, resisting arrest, petty theft, vandalism, child neglect, and domestic violence. Theft was one of the ten most common charges in 2017–18 but not 2019–20. Similarly, battery was one of the ten most common charges 2019–20, but not in the previous period. The following chart shows the frequency of the ten most common charges filed in 2017 and 2018 under former DA Morse alongside the ten most common charges filed in 2019 and 2020 under current DA Lewis.

Most Common Charges Filed By DAs Morse and Lewis



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

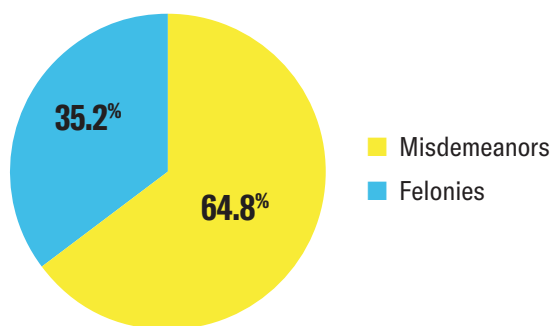
The charges that dominated the DA caseload under former DA Morse continue to be the most frequently charged offenses under DA Lewis. Most of these offenses are relatively low-level and could be better addressed outside of the criminal legal system. The eight most commonly filed charges across 2017–2020 were all low-level charges, which continued to be filed at nearly identical rates across the two administrations. The vast majority of charges for these most common offenses were filed as misdemeanors, although the DA filed them as felonies in certain cases. The slight increases or decreases in the number of charges filed under each DA could result from shifts in prosecutorial practices, but they are small enough that they likely reflect changes in crime and arrest rates.

WOBBLERS

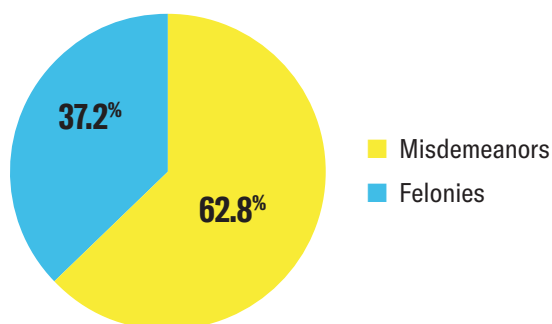
Wobblers are a set of offenses that a prosecutor may choose to file as either a felony or a misdemeanor. Because of the difference in the impact that a felony conviction can have on an individual versus a misdemeanor conviction, such as longer sentences and long-term consequences for housing and employment during reentry, this is an area where prosecutorial discretion can have significant consequences. We ran the following analysis using a list of 951 known wobbler charges.

Wobblers represent a significant portion of charges filed in Merced County. In 2017–2018, former DA Morse filed 11,203 wobbler charges, representing 43.5 percent of all charges filed. In 2019–2020, current DA Lewis filed 10,755 wobblers, representing 43.3 percent of all charges. Over a third of wobblers were charged as felonies by both administrations, and close to two thirds were charged as misdemeanors.

Discretionary Wobbler Filings 2017–18 (DA Morse)



Discretionary Wobbler Filings 2019–20 (DA Lewis)



The most frequent wobbler charges were also identical across both administrations, although there are some notable differences in whether those charges were more likely to be filed as misdemeanors or felonies. The following chart outlines the ten most common wobblers, from 2017–2020, and breaks it down by administration.



Discretionary Wobbler Filings

Wobbler Offense	2017–2018 (DA Morse)		2019–2020 (DA Lewis)	
	Misdo	Felony	Misdo	Felony
DUI — VC 23152 and subsections*	4,279	2	4,349	163
Theft — PC 484 and subsections*	754	6	483	0
Vandalism — PC 594(a)^	426	203	478	288
Domestic Violence — PC 273.5(a)	114	395	509	48
Battery — PC 242	408	2	585	1
Burglary — PC 459, 459.5*	237	287	244	262
Criminal Threats — PC 422^	20	276	25	178
Driving Stolen Vehicle — VC 10851*	17	227	8	249
Assault by Means Likely to Produce Great Bodily Injury — PC 245(a)(4)	13	206	20	219
Possession of Ammunition (Felon) — PC 30305(a)(1)*	20	189	246	11

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

Prosecutors’ decisions to file wobblers as felonies, rather than misdemeanors, reflects how punitive their office is in its charging practices. While the vast majority of DUI charges were filed as misdemeanors under both administrations, there was a notable increase in the number of DUIs filed as felonies under DA Lewis. Although former DA Morse was more likely to file domestic violence charges and possession of ammunition charges as felonies, DA Lewis was more likely to file these as misdemeanors. Burglary, criminal threats, driving a stolen car, and assault were all more likely to be filed as a felony by both administrations.

Overall, DA Lewis was slightly more likely to file the most common wobblers as misdemeanors than her predecessor, with 83 percent of the ten most common wobblers filed as misdemeanors, compared to 80 percent under DA Morse. Despite these modest differences, the wobbler filing practices are very similar between the two administrations.

The following table shows the racial disparities in discretionary wobbler filings among Black, Latinx, and White people charged by the DA in 2019 and 2020. Race data was unavailable for 2017 and 2018. A complete list of wobbler filings across all races and ethnicities can be found in Appendix D.

Wobbler Filings by Race/Ethnicity, 2019–2020

Race/Ethnicity	Total Number of Wobblers	Number of Wobblers Filed as Felonies	Percent Filed as Felonies
Black	1,032	508	49.2
Latinx	6,356	2,298	36.1
White	2,332	937	40.2
All Race/Ethnicity Total	10,755	4,005	37.2

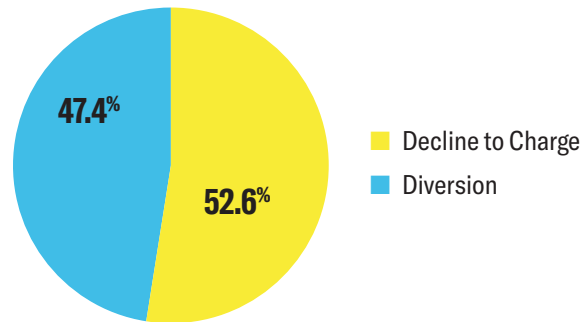
Black people were substantially more likely to have their wobbler charges filed as felonies than Latinx or white people. Nearly half (49.2 percent) of all wobblers charged against Black people were filed as felonies, compared to a little over a third (36.1 percent) for Latinx people and 40.2 percent for white people. Because being convicted of a felony charge can have far-reaching and long-term consequences for an individual, the Merced DA should presumptively file all wobblers as misdemeanors to address racial disparities and minimize the harms of mass incarceration.

LOW-LEVEL

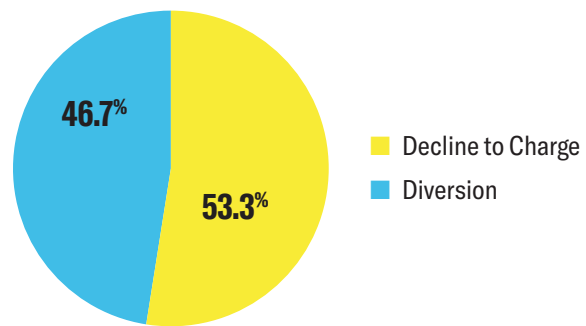
Formal contact with the criminal legal system stemming from low-level charges can increase the likelihood that someone will be arrested again later.⁴⁷ A 2021 study of charging practices under the Suffolk County District Attorney's Office in Massachusetts found that declining to charge a set of low-level nonviolent misdemeanors reduced the likelihood of future criminal justice involvement with no increase in local crime rates.⁴⁸ The ACLU has developed a list of low-level offenses that should be declined to charge or diverted pre-filing (see Appendix B.) This list includes extremely low-level charges, like possession of drug paraphernalia or driving with a suspended license, that are so minor that they shouldn't be criminally prosecuted, as well as charges like DUIs and petty theft that should be diverted to rehabilitative programming.

The majority of all charges filed in Merced under both DA Morse and DA Lewis are for low-level offenses. In 2017–2018, former DA Morse's office filed a total of 15,553 low-level charges, making up 62 percent of total charges. 7,376 (47.4 percent of low-level charges) are on the ACLU's diversion list and 8,177 (52.6 percent of low-level charges) fall within the decline-to-charge list. In 2019–2020, DA Lewis' office charged a total of 15,745 offenses on the low-level list, similarly constituting 62 percent of total charges. Out of all the low-level offenses, 7,357 (46.7 percent of low-level charges) fall on the diversion list and 8,388 (53.3 percent of low-level charges) are on the decline-to-charge list.

Low-Level Offenses 2017–18 (DA Morse)



Low-Level Offenses 2019–20 (DA Lewis)



The ten most common low-level offenses did not change between the two administrations. For most offenses, DA Lewis filed a greater number of low-level charges than her predecessor did.



Most Common Low-Level Charges

Most Common Low-Level Offenses	Recommendation	2017–2018 Frequency (DA Lewis)	2019–2020 Frequency (DA Lewis)
DUI — VC 23152(a) and VC23152(b)	Diversion	4,277	4,512
Driving with Suspended License — VC 14601 and subsections	Decline to Charge	1,756	1,927
Drug Paraphernalia — HS 11364 and subsections	Decline to Charge	1,479	1,413
Meth possession — HS 11377	Decline to Charge	869	1,070
Resisting Arrest — PC 148(a)(1)	Decline to Charge	779	726
Driving without license — VC 12500(a)	Decline to Charge	725	762
Vandalism — PC 594(a)	Decline to Charge	628	766
Theft — PC 484 and subsection	Diversion	760	541
Trespassing — PC 602	Decline to Charge	519	634
Prohibited Firearm Possession — PC 29800(a)(1)	Diversion	248	277

The following table shows the percent of charges filed against Black, Latinx, and white people that are low-level, broken down into the percent of charges that should be diverted or declined to charge. A complete table with frequencies of low-level charges for all disaggregated racial and ethnic categories can be found in Appendix E.

While adopting the ACLU’s decline to charge and diversion lists would reduce harm and improve outcomes for everyone, white people would be slightly more likely to have their charges dropped than Black or Latinx people. Latinx people would be more likely to have their charges diverted than Black or white people. Despite these modest disparities, all groups would benefit from a comprehensive decline-to-charge and pre-file diversion policy.

Low-Level Charges by Race, 2019–2020

Race/Ethnicity	Percent of Charges Decline-to-Charge	Percent of Charges Diversion	Total Percent of Charges Low-Level
Black	33.3	25.8	57.1
Latinx	32.4	30.1	62.5
White	37.3	25.1	62.4
All Race/Ethnicity Total	33.0	29.0	62.0

SERIOUS OR VIOLENT

To further understand Merced DA’s charging practices, we looked at how often they were charging crimes that were serious or involved the threat of or actual physical harm to another person, defined in the Penal Code as serious or 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.

In 2017–2018, DA Morse’s office charged 1,279 serious or violent offenses. 1,227 were charged as felonies and 52 were charged as misdemeanors. This only represented 5.1 percent of total charges. In 2019–2020, DA Lewis’ office charged 1,385 serious or violent offenses. 1,322 were charged as felonies and 63 were charged as misdemeanors. This was only 5.4 percent of total charges. Despite prosecutors’ rhetoric about protecting public safety by focusing on preventing and addressing violent crime, these types of offenses make up a tiny portion of their overall caseload.

The five most common serious or violent felonies did not differ between the two administrations, and the relative frequency of these charges is listed in the table below.

Serious or Violent Offenses

Serious or Violent Offense	2017-18 Frequency (DA Morse)	2019-20 Frequency (DA Lewis)
Burglary — PC 459	300	270
Criminal Threats — PC 422(a)	296	203
Robbery — PC 211	121	139
Gang Participation — PC 186.22(a)	113	111
Sex with Minor — PC 288(a)	92	107

Across all racial and ethnic groups, the percent of serious or violent filings were very low. There were 176 serious or violent charges filed against Black people in 2019 and 2020, representing 7.5 percent of all charges filed. There were 823 such charges filed against Latinx people across the same period, representing 5.6 percent of all charges. There were 306 serious or violent charges filed against white people, representing 5.1 percent of all charges. A complete list of all serious or violent charges, fully disaggregated by race and ethnicity, can be found in Appendix F.

SENTENCE ENHANCEMENTS

DAs have the power to charge defendants with sentence enhancements, which increase a defendant’s sentence beyond the normal range, often based on prior convictions or allegations. Nearly 80 percent of people incarcerated in California state prisons have been affected by a sentence enhancement,⁴⁹ even though their marginal deterrent effect on already-lengthy prison sentences is modest at best.⁵⁰

Data on enhancements was only given for the 2019–2020 data set, and the findings are outlined below. In 2019–2020, the DA’s office charged a total of 5,204 sentence enhancements. Sentence enhancements are much more frequently charged on top of felony charges rather than misdemeanor charges. In 2019–2020, 35 percent of felony charges had enhancements while 16 percent of misdemeanor charges did.

Top 10 Most Common Sentence Enhancements, 2019–2020

Enhancement	Frequency
DUI with .15% BAC — VC 23578	1,884
DUI with .20% BAC — VC 23538(b)(2)	728
DUI Prior — VC 23540	659
Strike Prior — PC 667(b)-(i)	531
Second Strike — PC 1170.12	489
Prior Felony — PC 667.5(b)	331
Gang Enhancement — PC 186.22(b)(1)(A)	295
On Bail — PC 12022.1	160
DUI Priors — VC 23546	165
Prior Domestic Violence Evidence — EC 1109	128

Four of the ten most common sentence enhancements are related to DUIs. In certain jurisdictions, enhancements for Blood Alcohol Content (BAC) are used to determine the type and length of DUI school ordered by the court in misdemeanor DUI cases. In such instances, they would not extend a person’s prison sentence, but no additional context was provided by the Merced DA, and those vehicle codes were listed as enhancements. In any case, if substance abuse is at the core of someone’s behavior, then treatment and rehabilitative support are a

much more appropriate response than incarceration, and people should be automatically diverted to substance abuse programming.

Six of the ten most common sentence enhancements do not have anything to do with the alleged crime, but increase punishment based upon someone’s past involvement with the criminal legal system. Punishing people for their past involvement in the criminal legal system is problematic because they already served their sentence, and it also is racially discriminatory because it perpetuates existing inequities in arrests and sentencing. For example, one of the most common enhancements in 2019–20 was an additional year added to the sentences of people who had previously served prison or jail terms (PC 667.5(b)). Legislators banned this sentence enhancement, effective January 1, 2020,⁵¹ because it “re-punishes people for previous jail or prison time served instead of the actual crime when convicted of a non-violent felony” and it “exacerbates existing racial and socio-economic disparities in our criminal justice system.”⁵² The tenth most common charge coded as an enhancement by the Merced DA is Evidence Code (EC) 1109, which allows prosecutors to present evidence of past domestic violence as substantive character evidence. This doesn’t directly add to the length of someone’s sentence, but it similarly disproportionately impacts people who have had prior contact with the legal system.

Another common enhancement was for alleged gang activity, although there is no evidence that gang enhancements reduce crime or deter individuals from joining gangs.⁵³ Gang enhancements have come under increased scrutiny for fueling racial disparities within the carceral system. Statewide, 92 percent of defendants charged with gang enhancements are either Black or Latinx.⁵⁴ According to the data provided by the Merced DA, 96 percent of gang enhancements filed in 2019 and 2020 were charged to people of color. Sixty-one percent were charged to Latinx people, 19 percent to Black people, and 17 percent to Asian people. Only 4 percent of gang enhancements were filed against white people.

In 2017 former DA Morse initiated the “VIPER” program in 2017 to try and address gang-related crime through “predictive policing.”⁵⁵ While gang participation and violence is a serious issue facing Merced County residents, Claudia J. Gonzalez with

Root & Rebound says that, “The VIPER program approach is not actually helping young people stay away from gangs, it is just criminalizing them under the guise of suppressing violence and “protecting” the community.” Rather than doubling down on law-enforcement approaches to criminalize gang participation, Merced should invest in proven models that prevent and address harm from a public health perspective. One example is Richmond-based Advance Peace, founded by DeVone Boggan. Advance Peace assigns mentors from the community to high-risk, trauma-impacted, and underserved young men. This program helped Richmond accomplish an 80 percent decrease in firearm assaults in 2014 from what it was in 1990.⁵⁶

Beyond the stark racial disparities in the application of gang enhancements, there are notable racial disparities in the application of all enhancements. The following table shows the percent of charges filed against Black, Latinx, and white people that receive a sentence enhancement. More than 1 in 5 charges filed against both Black and Latinx people receive an enhancement. While still concerningly high, White people receive enhancements at a notably lower rate than Black or Latinx people, with 15 percent of charges including an enhancement. A complete table with disaggregated race data can be found in Appendix G.

Sentence Enhancements by Race, 2019–2020

Race/Ethnicity	Percent of Charges That Receive Enhancement
Black	21.7
Latinx	21.5
White	15.4
All Race/Ethnicity Total	20.5

Youth Justice

The California Penal Code expressly acknowledges “the diminished culpability of youth as compared to adults.”⁵⁷ The part of the brain directly related to the ability to understand choices and consequences does not fully develop until the mid-twenties.⁵⁸ Prosecutors should prioritize non-carceral, rehabilitative responses to crimes committed by youth who will naturally grow to have significantly more self-regulatory capacity in just a few years. However, this does not appear to be the current approach in Merced County, where hundreds of youth are processed through the juvenile legal system every year.

The Merced DA provided data on all charges brought against minors under 18 between 2017 and 2020. Similar to adult cases, the data was broken up into separate files for felonies and misdemeanors with no subject identifiers, making a comprehensive case-level analysis impossible.

Although race data was again only available for 2019 and 2020, due to improved data practices under DA Lewis, the racial disparities among juveniles criminally charged by the DA are even more pronounced than in the adult system. The following table shows the racial and ethnic demographics of Merced County as a whole, as tracked by the US Census 2019 American Community Survey.⁵⁹

Race/Ethnicity	Percent
Black	3.9
American Indian and Alaska Native	2.5
Asian	7.8
Native Hawaiian and Pacific Islander	0.4
Two or More Races	3.2
Hispanic or Latinx	61.0
Non-Hispanic White	26.5

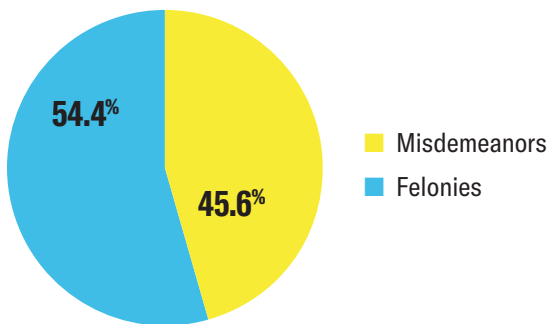
The following table shows the breakdown of charges filed against juveniles by race in 2019 and 2020, because this data was not collected in 2017 and 2018.

Race/Ethnicity	Number of Charges	Percent of Charges
American Indian	13	1.06
Black	176	14.26
Hawaiian	3	0.24
Latinx	666	54.32
Other Asian	30	2.45
Unknown	222	18.11
White	116	9.46
Total	1,226	100

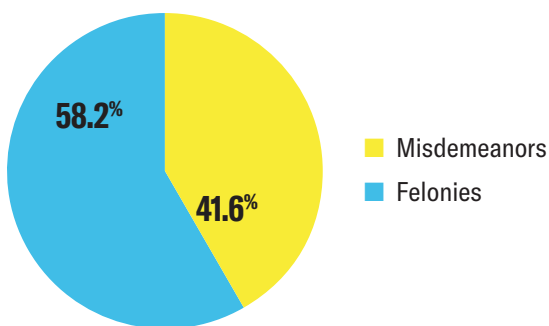
More than fourteen percent of charges were filed against Black youth, though the Merced County Black population is under 4 percent. A greater percentage of youth had unknown racial or ethnic identities, with 18 percent of all youth being unclassified. Again it appears that American Indian, Pacific Islander, and Asian youth — broadly defined — are all statistically undercharged. While white adults were only slightly undercharged, this disparity is much more prominent among youth, with white youth representing less than 10 percent of all charges filed, despite comprising more than a quarter of the population. Because the numbers of youth charged by the Merced DA are so small, a complete analysis of racial disparities in charging is not possible.

The Merced County DA’s office brought a total of 1,510 charges against juveniles in 2017–2018 and 1,226 charges in 2019–2020. While the total number of adult charges increased slightly under DA Lewis, juvenile charges declined by 18.8 percent. Unlike adults, the majority of charges filed against youth were felony charges.

Juvenile Charges 2017–18



Juvenile Charges 2019–20



FELONY CHARGES

In 2017 and 2018 the DA’s office filed 822 felony charges against 361 minors. In 2019 and 2020, this dropped to 714 felony charges against 293 minors. Although the total number of charges and cases declined across the biennium, the most common felony charges remained relatively constant. The following table shows the ten most common felony charges filed across all four years from 2017 through 2020, broken down by administration.

10 Most Common Youth Felony Charges

Offense	2017-18 Frequency (DA Morse)	2019-20 Frequency (DA Lewis)
Robbery – PC 211	77	53
Assault – PC 245(a)(4)	77	48
Gang Participation – PC 186.22(a)	43	55
Burglary – PC 459	48	48
Driving Stolen Vehicle – VC 10851(a)	52	41
Vandalism – PC 594(a)	51	31
Criminal Threats – PC 422(a)	49	12
Assault with Deadly Weapon – PC 245(a)(1)	29	24
Minor possession of handgun – PC 29610	15	38
Larceny – PC 496d	28	23

Most felony charges decreased under DA Lewis, with the exception of gang participation and minor in possession of a handgun. The increase in the frequency of charges for participation in a street gang, which was the most common felony charge filed against youth in 2019 and 2020, is particularly noteworthy. Out of the 55 gang enhancements charged to youth in 2019–2020, 37 (67 percent) were charged to Latinx youth, ten (18 percent) were charged to Black youth, three (5 percent) were charged to Asian youth and one (2 percent) was charged to white youth. As noted above, gang enhancements exacerbate racial disparities in mass incarceration without improving public safety or deterring gang activities. The Merced DA should commit to not filing gang enhancements against youth or adults.

MISDEMEANOR CHARGES

In 2017–2018, the DA’s office filed 688 misdemeanor charges to youth in 281 separate cases. In 2019–2020, this number dropped to 512 misdemeanor charges filed across 207 cases. The frequency of all ten most common juvenile misdemeanor charges dropped under DA Lewis. While this is promising progress, the Merced DA should similarly develop a broad decline-to-charge policy for youth and presumptively find non-carceral solutions for all youth. The following table shows the ten most common misdemeanor charges filed across all four years from 2017 through 2020, broken down by administration.

Most Common Youth Misdemeanor Charges

Offense	2017-18 Frequency (DA Morse)	2019-20 Frequency (DA Lewis)
Resisting Arrest – PC 148(a)(1)	104	63
Battery – PC 242	71	65
Vandalism – PC 594(a)	68	29
Theft – PC 484(a)	31	26
Shoplifting – PC 459.5	38	16
Assault – PC 240	28	24
Driving without License – VC 12500(a)	29	22
Battery on Peace Officer – PC 243(b)	17	15
Larceny - PC 496(a)	18	7
Intoxication - PC 647(f)	16	8

Among the ten most frequently filed misdemeanor charges across all four years, DA Lewis consistently filed fewer charges than her predecessor did. One noteworthy exception to this trend is the charge of possessing live ammunition (PC 29650) which was never filed under DA Morse in 2017 or 2018 but was filed 20 times by DA Lewis in 2019 and 2020.

TRYING YOUTH AS ADULTS

Decades of research has failed to find evidence that transferring minors into the adult legal system has any deterrent effect, and youth that are tried as adults are more likely to be charged with a future crime than youth adjudicated in the juvenile system.⁶⁰ Although it was uncommon for youth to be tried as adults in Merced, there were three youth transferred to adult court in 2017–18 under DA Morse and two youth transferred to adult court in 2019–20 under DA Lewis.

After the passing of Prop 57, DAs no longer have the authority to file young people directly in adult court. That discretion now lies with the judge. However, DA Lewis attempted to transfer a 14-year old boy to adult court in February 2021. The DA’s office issued a comment, stating, “Our decision today to request transfer to adult court in no way means the case will automatically be tried in adult court. Rather, this request means the juvenile court will thoroughly assess the circumstances and render a decision in consideration of a wide range of elements. Only then will we know if this case will ultimately be handled in juvenile or adult court.”⁶¹ A few days later, the California Supreme Court unanimously ruled that 14 and 15-year olds cannot be charged in adult court, upholding that law from 2018.⁶² In their opinion, the California supreme court wrote that before, “society believed that young people were fully developed at around age 14. Now, research has debunked that myth and cognitive science has proven that children and youth who commit crimes are very capable of change.” The Merced DA should keep youth out of the criminal legal system and should never try children as adults.



Death Penalty

In 2019, Governor Gavin Newsom signed an executive order placing a moratorium on the death penalty in California. The Governor's press release stated that "the death penalty is unevenly and unfairly applied to people of color, people with mental disabilities, and people who cannot afford costly legal representation."⁶³ More than six in ten people on California's death row are people of color.⁶⁴

Out of the 737 incarcerated individuals currently on death row, none of them were tried in Merced county, and only one individual is a Merced county native.⁶⁵ In 2019, DA Lewis attempted to pursue the death penalty against an already incarcerated individual who faced new charges of murder, attempted murder, and conspiracy. In regards to the death penalty and its correlation with racial disparities and other social issues, DA Lewis said "my role as District Attorney does not permit that kind of wider analysis when reviewing an active case... Rather, I and the office as a whole must limit our analysis to the current law, understanding it as the active expression of the societal beliefs of our state."⁶⁶ The exact cost of pursuing the death penalty varies by case, but a 2008 study conservatively estimated an additional cost to taxpayers of \$500,000.⁶⁷ The Merced DA should commit to never pursuing the death penalty, as doing so is unethical, discriminatory, and a massive waste of time and resources.



Diversion

Diversion programs describe any program that may take the place of jail or prison time in a sentence or plea offer. Diversion programs can include treatment classes and group sessions, but vary greatly in their design and outcomes. In response to our PRA request, the DA's office provided some summary-level information on two diversion programs, the Community Accountability Program (CAP) and the Pacific Education Services Delayed Entry of Judgment Program (PES DEJ). Notably absent was any mention of mental health diversion, and it is unclear if there are additional programs offered. No demographic information on program participants or their specific charges was provided.

The CAP program is run by Corrective Solutions, a for-profit, private company that administers diversion programs in dozens of jurisdictions and has a reputation of predatory collection practices.⁶⁸ For example, "in some jurisdictions, the company failed to honor its pledge to assess offenders' economic status and dole out assistance from indigent fund accounts it manages for prosecutors."⁶⁹ The company has been sued numerous times for its Bad Check programs in particular. The first bad check program in California started in Merced County in 1988, with American Correctional Counseling Services, which has since rebranded as Corrective Solutions.⁷⁰ In 2009 ACCS, which was working in dozens of DA offices across the country, was sued by consumer advocates for aggressive and misleading tactics.⁷¹ They would send letters to people that appeared to be from the DA's office threatening prosecution if they didn't pay accidentally bounced checks in full, pay a number of fees, and attend diversion classes - even though that wasn't true. They would routinely send these letters to people who never received a courtesy notice and to people whose checks bounced for less than the minimum amount specified by the DA's office. Corrective Solutions was sued again in 2016 for violations of the Fair Debt Collection Practices Act.⁷²

Although writing bad checks is not one of the example eligible charges provided by the DAs office in their materials on Corrective Solutions' diversion programs, the organization's history of manipulative and predatory practices is deeply concerning. Furthermore, all of the charges that

the CAP program addresses are extremely low-level offenses that should be declined to charge, rather than diverted. Diverting charges like Minor in Possession of Alcohol is particularly egregious when you consider that a person must pay for and attend a 4.5-hour class to successfully avoid prosecution.

The following is a list of the charges that are eligible for the program:

BP 4060 — Possession of Controlled Substance
BP 4140 — Possession of Hypodermic or Syringe
BP 25658.5 — Attempt by Minor to Buy Alcohol
BP 25661 — Minor Using False ID to Buy Alcohol
BP 25662 — Minor in Possession of Alcohol
VC 12500 — Unlicensed Driver
VC 14601.1 — Non-DUI Suspended or Revoked License
HS 11357(b) — Possession of Less than oz. of Marijuana
HS 11357(c) — Possession of More than oz. of Marijuana
HS 11364 — Possession of Drug Parahernalia
PC 593d(a) — Unauthorized Cable Connection
PC 602 — Trespass
PC 640 — Beating Vending Machine
PC 647(f) — Public Intoxication

In 2017, there were 279 CAP participants and only 44 (16 percent) completed the program. In 2018, there were 106 CAP participants and only 20 (19 percent) completed the program. These numbers reveal a massive failure rate. The total number of people that participated in the CAP program in 2017–2018 was 385, and no diversion data was provided for 2019–20.

Documents from the DA’s office also showed reasons for failure for each CAP diversion case, which include: failed to enroll, class not attended, community service hours incomplete and case fees unpaid, license still suspended. According to the reports provided by the Merced DA’s office, in all but two of the failed cases in 2017, reasons for failure included “failed to enroll” and “case fees unpaid.” Average fees were \$290, but in some cases they were \$40, \$185, \$395 and \$410, and \$435. The two cases where “case fees unpaid” was not a reason for failure had fees of \$40 and \$185.

The other diversion program that the DA’s office gave information about is the Delayed Entry of Judgment Program. This program is also run by a private, independent contractor called Pacific Education Services (PES). Despite their work in more than a dozen counties throughout California, almost no public information is available on PES. This lack of transparency and accountability of a private-run diversion program is concerning, especially given the broader context of massive for-profit corporations like GEO and Corrections Corporation of America rebranding themselves as rehabilitation and diversion providers.⁷³

The Merced DA stated that PES offers classes on:

- Theft/Vandalism/Property Violation
- Positive Anger Control/Violence Intervention Workshop
- Parenting Skills Workshop
- Financial Planning
- Drug and Alcohol Education
- Choices, Changes, Challenges
- Sexual Misconduct
- HIV Education

No data was given on the success or enrollment of the program. Defendants must plead guilty or no contest and must pay restitution and all class fees. Prior to 2018, it was standard in California that a defendant must plead guilty before being eligible for diversion. However, a 2018 assembly bill changed it so that a court may grant pretrial diversion to defendants that plead not guilty.⁷⁴

In addition to the lack of transparency on the part of private for-profit providers, low completion rates, and the steep financial cost for participants, recent studies suggest that extremely low-level charges, like those currently being diverted through CAP and PES, should not be filed at all.⁷⁵ Declining to charge all of the extremely low-level offenses that are currently being diverted to private for-profit companies could reduce the likelihood of future criminal justice involvement without compromising public safety. Non-profit community-based providers should instead provide diversion resources and capacity to divert charges on the ACLU’s diversion list, rather than those on the decline-to-charge list.

Parole

Although DA's typically focus most of their resources prosecuting crimes, they can also choose to play a significant role in the parole release process. The California Board of Parole Hearings determines an incarcerated person's suitability for release on parole.⁷⁶ Prosecutors can support or oppose an individual's release, and although their position is nonbinding, it carries significant weight. As part of the PRA request, the ACLU asked for "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."

The Merced DA sent one Excel file with information on parole hearings for people sentenced to life, but not on any other parole hearings. The spreadsheet includes tabs, but there are not sufficient explanations or legends to help interpret the information, and the data provided are not consistent from tab to tab. When requesting more information and clarification, the DA's office stated they did not have the information.

The data included whether the incarcerated person was denied or granted parole. In 2017–2018, there were 33 hearings for individuals sentenced to life. Only 3 cases were granted parole, while 21 were denied. Five cases were deemed 'stip,' meaning the person was denied parole without a hearing. The information provided stated that "the DA's Office opposed release in all listed hearings in 2017 and 2018." No information about parole hearing outcomes or the DA office's position was provided for 2019 and 2020. The Merced DA should stop opposing release on parole and should only involve itself in the parole process to support someone's release.

Immigration

An estimated 10 percent of Merced County residents are undocumented. An estimated 23 percent of all children (76 percent of whom are US citizens) residing in Southwest and East Merced have at least one undocumented parent.⁷⁷ Certain criminal convictions can result in immigrants being placed in removal proceedings and deported,⁷⁸ and prosecutors have a responsibility to protect community safety while also keeping communities intact.

California law requires prosecutors to "consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution."⁷⁹ The ACLU's PRA requested documents relating to the Merced DA's policies on immigration-informed prosecution, but they did not provide any.

Claudia J. Gonzalez of Root & Rebound, a nonprofit that works with incarcerated people across California, including Merced, stated that misdemeanor prosecutors in Merced County are generally helpful when it comes to immigration consequences for undocumented people charged with a crime. For example, misdemeanor prosecutors will work with defendants who have a DACA hearing coming up, to drop or divert charges before the hearing. According to Gonzalez, felony prosecutors are not as helpful. To keep communities both safe and whole, the Merced DA should establish clear protocols on how to avoid adverse immigration consequences for defendants, witnesses, and survivors.

Police Accountability

Police accountability and systemic racism in policing remain at the forefront of public discourse, bolstered by Black Lives Matter protests denouncing the murders of unarmed Black people at the hands of police. Despite their role as chief prosecutors, DAs have historically failed to hold law enforcement accountable for illegal conduct.

The Merced County Sheriff's Department and the Merced Police Department both rank poorly according to the independently evaluated Police Scorecard. The Police Scorecard is the first nationwide public evaluation of policing in the United States and it rates communities based on public records of police violence, accountability, racial bias, and other policing outcomes. The Merced County Sheriff's Department received a score of 39 out of 100, and the Merced Police Department received a score of 50.⁸⁰ According to their metrics, "Counties with higher scores spend less on policing, use less force, are more likely to hold officers accountable and make fewer arrests for low-level offenses."⁸¹

At least seven people were shot and killed by law enforcement in Merced County between 2015 and 2018 when former Merced DA Morse was in office.⁸²

Not a single officer appears to have been criminally charged in response to these deaths. In 2018, there was a high-profile instance of City of Merced police using excessive force on William Colbert, a Black man who was making a purchase at a gas station. After the clerk called the police because of a credit card dispute with Colbert, police arrested him. Bodycam footage shows white police officers tackling and choking him. Despite the video evidence, the Merced Police Department's internal investigation found no wrongdoing.⁸³ The Merced County DA's office did not file charges against any of the officers.

Since DA Lewis took office in 2019 at least one person has been shot and killed by police.⁸⁴ During

her campaign, DA Lewis issued statements in support of police accountability: "I think a central role of the district attorney is to work as a check and balance for law enforcement... Some of the ways that we can do that in excessive force cases are: One: We need to identify problems that are specific to Merced. The second thing is that we need to work to bring body cameras to all the law enforcement agencies in Merced County."⁸⁵ DA Lewis can prove her commitment to police accountability by cooperating fully with the Attorney General Office's third-party investigations when law enforcement officers kill unarmed civilians and supporting the creation of an independent investigatory body for all other police misconduct.



RECOMMENDATIONS

Based on our analysis of the Merced County DA's data and policies, interviews with community stakeholders, and a review of academic literature and DA practices in other parts of the state, we have composed a list of policy recommendations for the Merced County DA's office. These recommendations were created with the goals of:

- Reducing the number of people involved in Merced County's criminal legal system.
- Reducing racial disparities.
- Reducing harsh sentencing and allowing for more people to come home from incarceration through legal avenues available to the DA.

The DA should decrease the incarcerated population in Merced County and provide more rehabilitative alternatives. She should pivot away from outdated and ineffective practices, invest in working diversion programs, and create new opportunities for restorative justice. By aiming to decrease the number of people in jails and prisons, the DA can open up much-needed funding to invest in these reforms and redirect funds to other county agencies that offer critical public services.

Charging Decisions

- Follow the lead of Contra Costa and Los Angeles DAs and institute a "Decline to Charge Policy" for certain low-level and petty offenses (given in Appendix B), which made up nearly 1 in 3 of the charges in Merced County in 2019–2020.
- Institute a list of "Diversion" offenses (listed in Appendix B) and automatically divert these charges pre-filing. This would allow for greater utilization of diversion programs and promote long-term and sustainable solutions to harm. The combined impact of the Decline to Charge and Presumptive Pre-Plea Diversion Policies would reduce criminal charge filings by about 62 percent in Merced County.

- Institute a policy to charge most wobblers as misdemeanors instead of felonies. Specifically, Domestic Violence (PC273.5), Burglary (PC459), Criminal Threats (PC422), Driving a Stolen Vehicle (VC10851a), and Assault (PC245(a)(4)) were all more likely to be charged as felonies instead of misdemeanors in 2019–2020. 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 the 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.
- Publicly support state legislation to decriminalize low-level decline-to-charge offenses, re-classify wobblers as misdemeanors, and eliminate sentence enhancements to standardize these practices and ensure equal access to justice across the state.

Youth Justice

- Institute a policy to never transfer a child under 18 to adult court.
- Institute a policy of automatically seeking pre-plea restorative justice diversion for the most common charges for youth.
- Publicly support state legislation to end the adult prosecution of children under 18 and expand developmentally appropriate alternatives to incarceration for all youth.

Death Penalty

- Institute a policy to never seek the death penalty.
- Publicly support state legislation to end the death penalty.

Diversion

- Institute a list of “Diversion” offenses (listed in Appendix B) and automatically divert these charges pre-filing.
- Ensure all diversion is pre-filing and does not require any admission of guilt.
- Stop contracting with private, for-profit companies to run county diversion programs and instead move delivery of all diversion programs to community-based organizations. Restrict the DA and Probation Department’s role to referrals and oversight.
- Stop requiring people to pay fees in order to participate in diversion programs.

Parole and Sentencing

- Institute a policy to only participate in the parole process to support an individuals’ release; Parole decisions should not need to involve the DA’s office, whose role in the current criminal legal system is to prove the original case, not determine whether individuals should be granted their freedom once eligible for parole. Unless the DA intervenes to support a person’s release through parole, they should leave the determination of parole eligibility to the Parole Board.
- Adopt priority criteria for prosecutor-initiated resentencing in line with Los Angeles DA Gascón’s resentencing policy, so that more people whose incarceration does not serve the interest of justice can return to their communities.

Immigration

- Establish a clear policy requiring prosecutors to consider immigration status in order to mitigate immigration collateral consequences in their charging, plea negotiations and post-conviction review practices.
- Establish a clear policy that prohibits the sharing of information about people who are undocumented with immigration officials.
- Establish policies to refer undocumented survivors of serious crimes to legal services organizations that can help them obtain a U or T-Visa.

Police Accountability

- Support the creation of an independent entity to investigate and hold law enforcement accountable for misconduct.
- Ensure compliance with AB 1506, which requires the California Attorney General to investigate all officer-involved killings of unarmed civilians.
- Establish guidelines to prevent officers with a history of misconduct, lying, or convictions from serving as a witness for prosecution.
- Pledge not to accept law enforcement contributions for future campaigns to avoid conflicts of interest.

CONCLUSION

The demographics and political makeup of Merced County are shifting, and the DA's practices should evolve to reflect the community's calls for criminal justice reform. The majority of Merced voters supported Proposition 47, which reduced some crimes from felonies to misdemeanors, Proposition 36, which reformed the 'three strikes law,' and Proposition 57, which increased opportunities for parole for certain incarcerated individuals.⁸⁶ The residents of Merced County see the need for criminal justice reform, and DA Lewis's practices should reflect those ideals.

DAs can be powerful agents for change and reshape the criminal justice system in their locality. DAs hold significant discretion when it comes to charging wobblers, enhancements, and diverting and dismissing charges, which can heavily impact someone's sentence and life. DA Lewis can and should wield her power to curb mass incarceration and reduce racial disparities in the criminal legal system. We hope that this report can help promote meaningful avenues for change for the Merced County DA's office.

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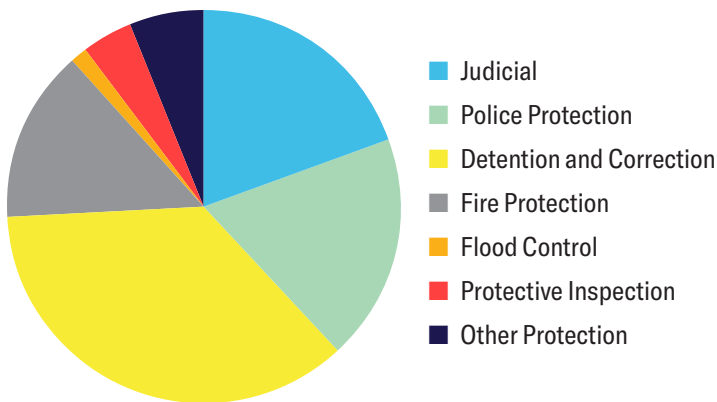
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APPENDIX A

Merced County Public Protection Budget Appropriation by Department

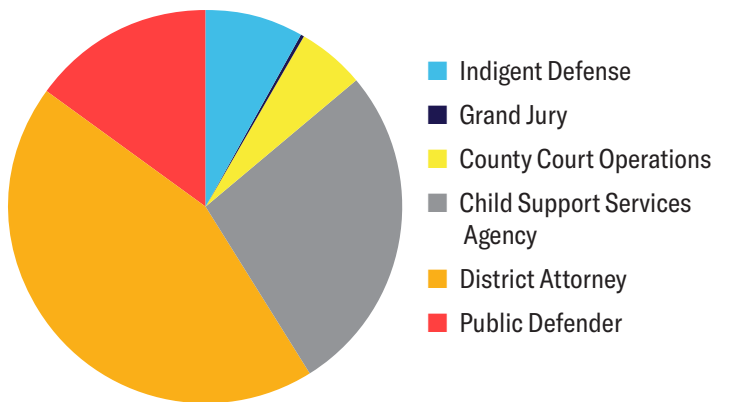
Public Protection Department	Budget Appropriation (\$)
Judicial	34,665,178
Police Protection	32,994,562
Detention and Correction	63,556,274
Fire Protection	25,159,646
Flood Control	2,114,542
Protective Inspection	7,253,762
Other Protection	10,800,641

Public Protection Budget



Public Protection Judicial Services Department	Budget Appropriation (\$)
Indigent Defense	2,891,498
Grand Jury	55,671
County Court Operations	1,860,500
Child Support Services Agency	9,464,851
District Attorney	15,273,216
Public Defender	5,119,442

Public Protection Judicial Services Department Budget



APPENDIX B

List of Low Level Offenses

Note: The list of wobblers is too long to practically include in this appendix, but it is available upon request.

Charge Type	Recommended DA Action
Advertising without a License — BP 7027	Decline to Charge
Contracting without a License — BP 7028	Decline to Charge
Failure to bring minor to continuing education — EC 48454	Decline to Charge
Simple Drug Possession — PC 11350	Decline to Charge
Drug Possession for Sale — PC 11351	Default Pre-Plea Diversion
Peyote Possession — HS 11363	Decline to Charge
Drug Paraphernalia Possession — HS 11364	Decline to Charge
Meth Possession — PC 11377	Decline to Charge
Under the Influence of Drugs — HS 11550	Decline to Charge
Resisting Arrest — PC 148, PC 69	Decline to Charge
Possession of Dagger — PC 21310	Decline to Charge
Possession of Metal Knuckles — PC 21810	Decline to Charge
Possession of Nunchaku — PC 22010	Decline to Charge
Possession of Billy Club — PC 22210	Decline to Charge
Possession of Stun Gun — PC 22620, PC 22610	Decline to Charge
Disturbing the Peace — PC 415	Decline to Charge
Criminal Threats — PC 422	Decline to Charge
Possession of Burglary Tools — PC 466	Decline to Charge
Petty Theft — PC 484	Default Pre-Plea Diversion
Appropriation of Lost Property— PC 485	Default Pre-Plea Diversion
Vandalism — PC 594	Decline to Charge

Charge Type	Recommended DA Action
Possession of Vandalism Tools — PC 594.2	Decline to Charge
Trespassing — PC 602	Decline to Charge
Disorderly Conduct — PC 647	Default Pre-Plea Diversion
Loitering for Prostitution — PC 654.22(a)	Decline to Charge
Driving Stolen Vehicle — VC 10851	Default Pre-Plea Diversion
Driving without License — VC 12500	Decline to Charge
Driving with Suspended License — VS 14601	Decline to Charge
DUI — PC 23152	Default Pre-Plea Diversion
Vehicle Registration — VC 4152.5, VC 4159	Decline to Charge
Bringing Drugs to a Prison — PC 4573	Decline to Charge
Burglary — PC 459* (no person present)	Default Pre-Plea Diversion
Repeat Theft — PC 490.2	Default Pre-Plea Diversion
Identity Theft — PC 530.5	Default Pre-Plea Diversion
Indecent Exposure — PC 314	Default Pre-Plea Diversion
Robbery — PC 211* (Estes robberies, no injuries, etc.)	Default Pre-Plea Diversion
Possession of Ammunition (Minor) — PC 29650	Decline to Charge
Possession of Ammunition (Felon) — PC 30305	Default Pre-Plea Diversion
Carrying Loaded Firearm — PC 25850	Default Pre-Plea Diversion
Carrying Concealed Firearm — PC 25400	Default Pre-Plea Diversion
Prohibited Firearm Possession — PC 29800	Default Pre-Plea Diversion

APPENDIX C

PRA Request Letter

District Attorney Kimberly Lewis
Merced County District Attorney's Office
550 West Main Street
Merced, CA 95340
dainfo@co.merced.ca.us

Re: ACLU's May 13, 2019 CPRA Request; Seeking Determination on Production Timeline for Responsive Records

Dear District Attorney Kimberly Lewis:

I am following up on our May 13, 2019 CPRA Request relating to your office's prosecution data, diversion programs, office directives and policies, and policies related to implementation of S.B. 1421. On May 23, 2019 your office sent an acknowledgment email that requested an extension for determining disclosable records and for setting a production timeline. While I understand that it takes time to process these requests, I want to make sure our request has not been forgotten. Our public interest work depends on timely responses from public agencies.

As you know, the CPRA imposes strict timelines for responding to such requests and mandates that all state and local agencies, upon receipt of a request for public records, (1) determine whether the requested records are "disclosable"—in whole or in part—and (2) "promptly notify" the requestor of that determination "within 10 days from receipt of the request." Cal. Gov't Code § 6253(c). Only in specifically enumerated "unusual circumstances" may an agency extend this timeline. See Cal. Gov't Code § 6253(c)(1)-(4). In exercising a determination-notice extension, the agency must (1) give written notice to the requestor, (2) set forth the reasons for the extension, and (3) set forth the date on which a determination is expected to be dispatched—in no event shall that date "result in an extension for more than 14 days." *Id.*

It has now been 32 calendar days since your receipt of our initial request. At most, CPRA permits that the office provides us a determination as to what documents you intend to produce and your production timeline within 24 days. As we still do not know what of the records we requested that your office intends to produce or when we can expect those records to be produced, we are at a standstill. We look forward to any clarifying questions you may have, and we anticipate further discussing any objections you may raise as to our request.

However, at this point the failure to produce records appears to be in clear violation of the Public Records Act. Please commit to identifying disclosable records and to a production timeline by the close of business on **Wednesday, June 19, 2019**, so we are not forced to judicially compel production. An agency may be liable for the attorneys' fees and costs incurred to litigate the production of records improperly withheld. Cal. Gov't Code § 6259(d).

To assist with the prompt release of responsive material, we ask that you make records available to us as you locate them, rather than waiting until all responsive records have been collected and copied. We prefer records be sent in electronic format.

The goal of this request is to serve the public interest. We do not wish for this process to be adversarial. If I can provide any clarification that will help expedite your attention to our request, please contact me at yhaile@aclunc.org or my direct phone line at 415-293-6350.

I appreciate your time and help with this request.

Sincerely,

Yoel Haile

Criminal Justice Associate
ACLU of Northern California

APPENDIX D

Discretionary Wobbler Filings by Race/Ethnicity, 2019–2020

Race/Ethnicity	Total Charges	Total Wobblers	Wobblers Filed as Felonies
American Indian	37	12	9
Black	2,346	1,032	508
Cambodian	6	2	0
Chinese	9	4	0
Filipino	35	19	11
Guamanian	1	1	0
Hawaiian	24	11	5
Latinx	14,705	6,356	2,298
Indian	185	81	25
Japanese	6	2	2
Korean	5	1	1
Laotian	45	18	7
Other Asian	554	215	82
Pacific Islander	17	8	0
Samoan	5	2	2
Unknown	1,393	654	115
Vietnamese	18	5	3
White	6,019	2,332	937
Total	25,410	10,755	4,005

APPENDIX E

Low-Level Charges by Race/Ethnicity, 2019–2020

Race/Ethnicity	Total Charges	Total Low-Level Charges
American Indian	37	19
Black	2,346	1,339
Cambodian	6	3
Chinese	9	9
Filipino	35	19
Guamanian	1	1
Hawaiian	24	16
Latinx	14,705	9,187
Indian	185	118
Japanese	6	3
Korean	5	2
Laotian	45	19
Other Asian	554	297
Pacific Islander	17	13
Samoan	5	2
Unknown	1,393	933
Vietnamese	18	11
White	6,019	3,754
Total	25,410	15,745

APPENDIX F

Serious or Violent Charges by Race/Ethnicity, 2019–2020

Race/Ethnicity	Total Charges	Total Serious or Violent Charges
American Indian	37	2
Black	2,346	175
Cambodian	6	0
Chinese	9	0
Filipino	35	0
Guamanian	1	0
Hawaiian	24	1
Latinx	14,705	823
Indian	185	12
Japanese	6	0
Korean	5	0
Laotian	45	1
Other Asian	554	36
Pacific Islander	17	1
Samoan	5	0
Unknown	1,393	27
Vietnamese	18	1
White	6,019	306
Total	25,410	1,385

APPENDIX G

Sentence Enhancements by Race/Ethnicity, 2019–2020

Race/Ethnicity	Total Charges	Total Charges with Sentence Enhancement
American Indian	37	10
Black	2,346	508
Cambodian	6	2
Chinese	9	0
Filipino	35	0
Guamanian	1	0
Hawaiian	24	4
Latinx	14,705	3,164
Indian	185	30
Japanese	6	2
Korean	5	0
Laotian	45	14
Other Asian	554	164
Pacific Islander	17	6
Samoan	5	1
Unknown	1,393	368
Vietnamese	18	3
White	6,019	928
Total	25,410	5,204