

## Boston's US Atty Has Had A Rough Start. It May Get Worse

By **Brian Dowling** and **Chris Villani**

*Law360 (November 4, 2022, 10:29 PM EDT)* -- Talk of low morale, a lack of veteran prosecutors, and plummeting indictment numbers have plagued the U.S. attorney's office in Boston under Rachael Rollins as it prepares to defend its crown jewel "Varsity Blues" trial conviction to a First Circuit panel.

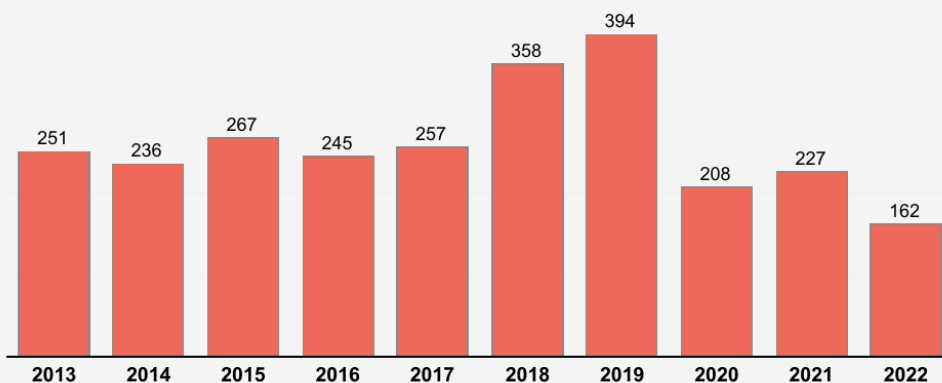
Boston prosecutors on Monday will aim to convince the appellate panel to uphold a jury's October 2021 verdict finding hedge fund founder John Wilson and casino executive Gamal Abdelaziz guilty of conspiring to get their children into top universities as recruited athletes with fake profiles.

The parents' claim that flawed legal theories tainted their trial has won the backing of some former U.S. attorneys and legal scholars — not to mention a sitting federal judge who tossed another conviction in the case — and threatens to steal back a prized win.

The high-stakes appeal comes in a year in which the Bay State office has seen its indictment numbers drop to a fraction of what they were under the last administration and even below 2020, when most of the office was working from home, according to a Law360 review of court filings. The first 10 months of 2022 show 46 fewer unsealed indictments than in the same period two years ago, when the federal court limited grand jury use during the worst of the COVID-19 pandemic.

### Federal Indictments at a Low in Mass.

From New Year's Day to Halloween, the U.S. attorney's office has obtained and unsealed fewer indictments in 2022 than during the same period in any year of the past decade.



Source: Law360 analysis of PACER filings

The office has also seen some high-profile courtroom setbacks, including a jury trial loss in the college admissions case, another "Varsity Blues" win that was flipped post-trial by the presiding judge, and several other cases that were dropped when new evidence came to light. In addition, Rollins, whose nomination set off a fierce partisan battle in Washington, finds herself under investigation for possible ethics violations.

The slump can be chalked up to a few different factors, including frustration within the rank-and-file in an office that seems to lack the fast pace and headline-grabbing cases that had become commonplace in recent years, according to Rollins' Trump-appointed predecessor in the office, Andrew Lelling.

"Frankly, I think you're contending with low morale in the U.S. attorney's office currently," Lelling said in an interview. "Things seem to be moving more slowly. From the [assistant U.S. attorneys] I talk to, there is more negativity and I think they are concerned about the direction of the office."

Lelling, now at Jones Day, is one of a number of experienced prosecutors who have left the office, along with former criminal chief Zach Hafer, who is now at Cooley LLP, and Karin Bell, the former deputy chief, who was tapped for a seat as an associate justice of the Massachusetts Superior Court.

The interim top prosecutor prior to Rollins' confirmation, Nathaniel Mendell, also moved into private practice after the change in administration. He draws an unbroken line between the office's productivity on criminal enforcement and morale of the front-line trial attorneys.

"Productivity is a function of internal process and morale," said Mendell, who is now a partner at Morrison Foerster. Mendell said the "huge numbers" of indictments returned under his and Lelling's leadership came as they streamlined management to make sure cases moved as quickly as possible.

Rollins, the former Suffolk County district attorney who is the first Black woman to lead the Boston federal prosecutor's office, declined an interview request from Law360.

In a statement emailed through her spokeswoman, Rollins defended her office's decisions to change course on cases as new information came to light, and rejected the notion that case counts are a measure of the office's success.

"Finality — or sunk costs — should never be prioritized over doing what is right. Our role as ministers of justice does not end with an initial charging decision," Rollins said in the statement. "Justice requires us to demonstrate character, integrity and compassion when we get things wrong."

"As far as the data is concerned," she continued, "I do not believe that the measure of an excellent prosecutor or prosecutor's office is exclusively the number of indictments and convictions, and the lengths of sentences. My top priority as district attorney and United States attorney was and still is, keeping all of our communities safe."

### **New Faces, Few Cases**

If criminal charges are the lifeblood of a federal prosecutor's office, then the Boston office appears in need of a transfusion.

Between New Year's Day and Halloween, the U.S. attorney's office, which Rollins took over on Jan. 10,

obtained and unsealed 162 grand jury indictments, a 28% reduction from the same period in 2021 and a 22% dip from 2020, when court-ordered COVID-19 restrictions created added difficulties for prosecutors to bring matters to the grand jury.

Boston federal prosecutors' 2022 numbers also fall far short of the 394 indictments handed up in cases in the first 10 months of 2019 and the 358 seen in the same period in 2018.

Those banner years followed a streak of consistent indictment numbers under former U.S. Attorney Carmen Ortiz, who led the office from November 2009 until the weeks leading up to former President Donald Trump's taking office in January 2017.

The count taken from indictments appearing on the docket does not include an unknown number of indictments that currently may be under seal. The statistic also doesn't include defendants charged through complaints and informations, but those numbers are also at multiyear lows.

In addition to pushing back on using case counts as a yardstick, Rollins said her prosecutors brought 19 cases to trial in the last fiscal year, which ended Sept. 30. During the previous fiscal year, the office tried just three cases, Rollins said.

Rollins explained that resources dedicated to trying a backlog of cases also limited the office's ability to investigate and charge new ones.

Retired U.S. District Judge Nancy Gertner, who chaired the committee that ultimately recommended Rollins for U.S. attorney, said the decline in case filings isn't necessarily an indication of trouble in the office. Gertner, a senior lecturer at Harvard Law School, was one of five legal scholars to sign onto a brief backing Wilson's appeal in the "Varsity Blues" case.

The decline in indictments could be due to the Boston office backing off on what's long been an "over-federalization of street crime," Gertner said.

Lelling disputed that explanation, saying the cases represented by the big case counts starting in 2017 were far from the type of "quick-hit gun and immigration cases" that other observers have dismissed them as.

"That's incorrect," he said in reference to the criticism. "We were proud of the fact that not only did we have an increase in productivity, they were quality cases."

The former U.S. attorney said the "tremendous influx of new talent into the office" could be one factor in the low numbers. Lelling said he hired 51 assistant U.S. attorneys into the office of about 125 government lawyers. Those new faces came as veterans of the office left, including Bell, Hafer, Mendell, plus lead "Varsity Blues" prosecutor Eric Rosen, longtime mob prosecutor Fred Wyshak, former national security unit chief B. Stephanie Siegmann, and David Lazarus, who helped spearhead the high-profile prosecution of former Insys Therapeutics Inc. executives.

"The office has rapidly shifted from a veteran corps of AUSAs to a relatively inexperienced corps of AUSAs," Lelling said. "That will lead to lower numbers in the short term as these new AUSAs get their bearings."

## **Trial Tribulations**

In addition to the relative dearth of indictments and an absence of the big-ticket cases that had garnered national attention for the Boston office, prosecutors have been saddled with a number of high-profile courtroom setbacks in 2022.

At the start of the year, the government was forced to drop criminal charges against Massachusetts Institute of Technology professor Gang Chen, who was accused of concealing his ties to China on a federal grant application. The decision, 10 days into Rollins' tenure, came as prosecutors got new information about the materiality of Chen's alleged paperwork omissions.

A former Analog Devices Inc. engineer, Haoyang Yu, largely beat a case claiming he stole company trade secrets to jumpstart a side business selling computer chips. Shortly after that verdict, prosecutors dropped related charges against his wife.

Boston prosecutors were also forced to scrap a 5-year-old Foreign Corrupt Practices Act case against a former U.S. Army colonel and a lawyer just days before they were set to be tried for a second time. The defense won a second bite at the apple because the colonel's lawyer was so inept during the first trial that it tainted the result. But, similar to the MIT professor's case, new information — this time coming as the FBI unearthed text messages suggesting the two defendants were innocent — doomed the case.

The government took a pair of losses in the "Varsity Blues" college admissions case. After telling reporters that everyone had been "held accountable" in the headline-grabbing prosecution following the conviction of former University of Southern California water polo coach Jovan Vavic, Rollins saw that win reversed when the trial judge tossed the guilty finding and ruled that it was based on a flawed legal theory.

Prosecutors are appealing that ruling, but they cannot turn to the First Circuit for help following the acquittal of Massachusetts businessman Amin Khoury on charges he bribed his daughter's way into Georgetown University through illicit payments to the elite school's tennis coach.

Rollins' office has claimed the Khoury case is not technically a "Varsity Blues" prosecution, but a U.S. Department of Justice webpage titled "Investigations of College Admissions and Testing Bribery Scheme" listed the case as part of that prosecution until the day a Boston jury convicted Vavic on all counts.

Most recently, federal prosecutors agreed to dismiss a politically charged criminal case against a Massachusetts state court judge accused of allowing an undocumented immigrant to evade custody when agents showed up to arrest him in the judge's courtroom.

Rollins recused herself in that case after suing over civil arrests in courthouses by U.S. Immigration and Customs Enforcement when she was district attorney, and the matter was overseen by the U.S. attorney in Rhode Island.

The U.S. attorney's office's troubles have not been limited to inside the courtroom.

Rollins is facing an investigation by the U.S. Office of Special Counsel over whether she violated the Hatch Act by attending a political fundraiser that featured first lady Jill Biden. A spokesman for the Office of Special Counsel confirmed it received a complaint about the fundraiser but declined to comment on the status of any investigation. Rollins declined to comment on the ethics probe.

## Jury's Still Out

Gertner applauded Rollins for her office's "gutsy" moves to back out of the MIT professor grant fraud case and the U.S. Army colonel prosecution.

"The ability to drop cases when there is an error — when there is innocence — is a big deal because it means the U.S. attorney is taking responsibility for that," Gertner said, adding that when she was on the bench she too often saw a "kick-the-can-down-the-road" mentality that waited for a judge to do the right thing.

Rollins also should get credit for giving trial attorneys more discretion on sentencing recommendation decisions, Gertner said.

The former judge said it might be too early to measure Rollins' impact in the office because as U.S. attorney she's not able to refashion the Boston federal prosecutor's operation the way she did as district attorney.

"She is not autonomous in the way she was as a district attorney," Gertner said. "She doesn't have the ability to say, 'Here are the 15 things we will prioritize, here are the cases we will decline,' unless they are [Attorney General Merrick Garland's] priority."

Trial setbacks aside, the office has notched its share of wins, including the recent conviction of former State Police Association of Massachusetts head Dana Pullman and Beacon Hill lobbyist Anne Lynch on racketeering, wire fraud, obstruction and tax charges for a kickback scheme.

In May, a jury convicted a former Massachusetts tribal chairman, Cedric Cromwell, and architect David Dequattro on a handful of the bribery and extortion charges that sketched out a quid pro quo agreement between the men in connection with the tribe's \$1 billion casino development.

Prosecutors also landed seven guilty pleas related to an eBay Inc. team's cyberstalking of two married Massachusetts journalists. The two leaders in that scheme were sentenced in September to 57 months and 24 months in prison.

One antidote to the apparent morale slump at the U.S. attorney's office, in Lelling's estimation, could be the type of major "Varsity Blues" prosecution that Rollins' office is defending on Monday.

"The big cases do energize the building," Lelling said. "There's a lot of pride in saying, 'I am working at a U.S. attorney's office that brings these kinds of cases.'"

The prosecution of dozens of parents and college officials tied to ringleader William "Rick" Singer was a major sponge of attorney resources in the federal prosecutor's office, but netted three trial convictions and dozens of guilty pleas from Hollywood celebrities, business magnates and others that kept the office in the headlines for months.

"'Varsity Blues' was covert until the end and that was a drain on resources internally," Lelling said.

"There are aggressive, experienced AUSAs in that unit and tomorrow they could announce some really great case."