



WASHTENAW COUNTY

OFFICE OF THE PROSECUTING ATTORNEY

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POLICY DIRECTIVE 2021-03: POLICY REGARDING OFFICER-INVOLVED VIOLENCE

I. Introduction and Background

In recent years, America has been rocked by multiple incidents in which civilians—mostly Black civilians—lost their lives at the hands of police. Among others, the killings of George Floyd, Breonna Taylor, Botham Jean, Tamir Rice, Eric Garner, and Walter Scott are seared into the national consciousness.¹

Many of these deaths spurred calls for criminal charges to be filed against the officers involved. But local prosecutor's offices have not engendered confidence in their ability to fairly evaluate officer-involved killings. In Minneapolis, for example, the Attorney General's Office took over the prosecution of George Floyd's killers after a letter from Minneapolis legislators asserted that "constituents, especially constituents of color, have lost faith in the ability of the [County Attorney] to impartially investigate and prosecute these cases."² Similar objections were raised after local prosecutors in Chicago³, St. Louis⁴, and New York City⁵ delayed or declined

¹ A non-comprehensive list of Black people who died at the hands of police in the United States between 2014 and May 31, 2020 includes **Eric Garner, John Crawford III, Michael Brown, Ezell Ford, Dante Parker, Michelle Cusseaux, Laquan McDonald, George Mann, Tanisha Anderson, Akai Gurley, Tamir Rice, Romain Brisbon, Jerame Reid, Matthew Ajibade, Frank Smart, Natasha McKenna, Tony Robinson, Anthony Hill, Mya Hall, Phillip White, Eric Harris, Walter Scott, William Chapman II, Alexia Christian, Aura Rosser, Brendon Glenn, Victor Manuel LaRosa, Jonathan Sanders, Freddie Gray, Joseph Mann, Salvado Ellswood, Sandra Bland, Albert Joseph Davis, Darrius Stewart, Billy Ray Davis, Samuel DuBose, Michael Sabbie, Brian Keith Day, Christian Taylor, Troy Robinson, Asshams Pharoah Manley, Felix Kumi, Keith Harrison McLeod, Junior Prosper, LaMontez Jones, Paterson Brown, Dominic Hutchinson, Anthony Ashford, Alonzo Smith, Tyree Crawford, India Kager, La'Vante Briggs, Michael Lee Marshall, Jamar Clark, Richard Perkins, Nathaniel Harris Pickett, Benni Lee Tignor, Miguel Espinal, Michael Noel, Kevin Mathews, Bettie Jones, Quintonio LeGrier, Keith Childress Jr., Janet Wilson, Randy Nelson, Antroine Scott, Wendell Celestine, David Joseph, Calin Roquemore, Dyzhawn Perkins, Christopher Davis, Marco Loud, Peter Gaines, Torrey Robinson, Darius Robinson, Kevin Hicks, Mary Truxillo, DeMarcus Semer, Willie Tillman, Terrill Thomas, Sylville Smith, Alton Sterling, Philando Castile, Terence Crutcher, Paul O'Neal, Alteria Woods, Jordan Edwards, Aaron Bailey, Ronell Foster, Stephon Clark, Antwon Rose II, Botham Jean, Pamela Turner, Dominique Clayton, Atatiana Jefferson, Christopher Whitfield, Christopher McCorvey, Eric Reason, Michael Lorenzo Dean, Breonna Taylor, and George Floyd.** See Code Switch, *A Decade of Watching Black People Die*, NPR (May 31, 2020), available at <https://www.npr.org/2020/05/29/865261916/a-decade-of-watching-black-people-die>.

² Alex Johnson, *Minnesota Attorney General to Take Over Prosecutions in George Floyd's Death*, NBC News (May 31, 2020), available at <https://www.nbcnews.com/news/us-news/minnesota-attorney-general-take-over-prosecutions-george-floyd-s-death-n1220636>.

³ See Monica Davey, *Prosecutor Criticized Over Laquan McDonald Case is Defeated in Primary*, The New York Times (Mar. 16, 2016), available at <https://www.nytimes.com/2016/03/16/us/prosecutor-criticized-over-laquan-mcdonald-case-is-defeated-in-primary.html>.

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charges after civilians lost their lives to the police.

Tragically, Washtenaw County has not been immune from these national trends. In 2014, an Ann Arbor police officer shot and killed Aura Rosser, a Black woman, in her boyfriend’s home.⁶ The Washtenaw County Prosecutor’s Office (then under different leadership) opted to “keep” the case, and ultimately issued a report concluding that “Ms. Rosser’s death, although tragic, was justifiable homicide.”⁷

That outcome led to a pronounced (and sustained) community backlash. A coalition of community groups published a document entitled *The People’s Retort to the Prosecutor’s Report*, which highlighted perceived shortcomings of the Prosecutor’s conclusions.⁸ The American Civil Liberties Union (ACLU) of Michigan issued a statement criticizing the Washtenaw Prosecutor’s Office for not recusing itself—and seeking the appointment of an independent special prosecutor—at the outset.⁹ Today, over six years later, there are still marches and rallies in our community protesting the handling of Aura Rosser’s death.¹⁰

In the opinion of the current Washtenaw County Prosecutor, the Washtenaw Prosecutor’s Office should not have retained jurisdiction over the Aura Rosser case in the first instance. As the ACLU noted in its response to Rosser’s death, “[l]ocal prosecutors”—even when they are “fully capable of objectivity in these cases”—have inevitable “conflicts of interest, or at least the appearance of unfairness.”¹¹ Local prosecutors work with local police, day-in and day-out. In many cases, prosecutors depend “upon the goodwill of local police.”¹² They should not have to worry “about whether a decision to charge an officer with a crime will lead to other officers’ non-cooperation in other cases where their testimony is vital.”¹³

And even where the prosecutor is able to assess a potential charge against an officer objectively, the *appearance* of bias is unavoidable. Officer-involved violence is wrenching to the greater community. In such circumstances, the community deserves assurance that the prosecutor evaluating charges is unbiased—and has not been influenced by the close personal and

⁴ Cleve R. Wootson, Jr., *Voters Oust Prosecutor Accused of Favoring Ferguson Officer Who Killed Michael Brown*, *The Washington Post* (Aug. 8, 2018), available at <https://www.washingtonpost.com/news/post-nation/wp/2018/08/08/voters-oust-prosecutor-accused-of-favoring-ferguson-officer-who-killed-michael-brown/>.

⁵ David A. Graham, *The Election in Which Eric Garner’s Death Didn’t Matter*, *The Atlantic* (May 6, 2015), available at <https://www.theatlantic.com/politics/archive/2015/05/the-election-in-which-eric-garners-death-didnt-matter/392525/>.

⁶ Calder Lewis and Ben Rosenfeld, *Six Years After Police Killed Aura Rosser, Community Members Say They Won’t Forget Her*, *The Michigan Daily* (Nov. 8, 2020), available at <https://www.michigandaily.com/section/ann-arbor/aura-rosser-vigil>.

⁷ Washtenaw County Prosecuting Attorney Memorandum, *Re: MSP Report #10-1075-14*, at 12 (Jan. 30, 2015).

⁸ See Radical Washtenaw, *People’s Retort to the Prosecutor’s Report*, available at https://radicalwashtenaw.files.wordpress.com/2015/04/peoples_-retort.pdf.

⁹ American Civil Liberties Union of Michigan, *The Killing of Aura Rosser: Calling for Independent Prosecutors* (Apr. 1, 2015), available at <https://www.aclumich.org/en/news/killing-aura-rosser-calling-independent-prosecutors>.

¹⁰ See Lewis & Rosenfeld, *supra* n. 6.

¹¹ American Civil Liberties Union of Michigan, *supra* n. 9.

¹² *Id.*

¹³ *Id.*

professional relationships between prosecutors and police.

In the words of the ACLU, “[t]hat’s why a prosecutor without local ties should be brought in right from the start.”¹⁴ And Michigan law provides an avenue for doing just that. Under MCL 49.160, when “the prosecuting attorney of a county determines himself or herself to be disqualified by reason of conflict of interest . . . he or she shall file with the attorney general a petition” seeking the appointment of a Special Prosecuting Attorney.¹⁵ Upon granting the petition, the Attorney General may either take the matter over, or may appoint a “special prosecuting attorney” to oversee the matter instead.¹⁶

Although nothing in Michigan law provides that a Prosecuting Attorney *must* recuse in a case involving police violence, there is a growing consensus that such recusals are best practices. The ACLU,¹⁷ the NAACP¹⁸, Campaign Zero¹⁹, and multiple scholars and practitioners²⁰ have all called for the appointment of special prosecutors in cases of alleged police violence. The Washtenaw County Prosecutor’s Office agrees with these voices. **Accordingly, the Washtenaw County Prosecutor’s Office will henceforth recuse itself from all local cases involving police violence. The Prosecutor’s Office will seek the appointment of an independent special prosecutor in all such cases.**

It bears emphasis that this Policy is being adopted with the goal of ensuring fair and impartial justice for *all* parties. The Washtenaw County Prosecutor’s Office appreciates that police officers regularly place themselves in harm’s way. The Prosecutor’s Office is further aware that many officers have tragically lost their lives in the line of duty.²¹ Police officers habitually put their lives on the line in the name of public safety—and they deserve fair and impartial justice when they are accused of a crime.

The appointment of a special prosecutor in cases involving police violence will ensure that charging decisions are not influenced by the close relationship between prosecutors and the police. Just as important, this Policy will also ensure fair and impartial justice for police officers.

¹⁴ *Id.*

¹⁵ MCL 49.160.

¹⁶ *Id.*

¹⁷ See American Civil Liberties Union of Michigan, *supra* n. 9.

¹⁸ See NAACP, *Protect and Preserve Our Lives Pledge*, available at <https://www.naacp.org/campaigns/protect-preserve-lives-pledge/>

¹⁹ See Campaign Zero, *Independent Investigations and Prosecutions*, available at <https://www.joincampaignzero.org/investigations>.

²⁰ See, e.g., Kate Levine, *Who Shouldn't Prosecute the Police*, 101 Iowa L. Rev. 1447, 1489-94 (2016), Kami Chavis Simmons, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 Wash. U. J.L. & Pol'y 137 (2015); Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 Harv. L. Rev. F. 235 (2015)

²¹ In our neighboring Wayne County, for example, eight Detroit police officers were shot or killed over a period of 8 months from 2016-2017. See Robert Allen, *8 Detroit Officers Have Been Shot Or Killed In The Past 8 Months*, The Detroit Free Press (May 1, 2017), available at <https://www.freep.com/story/news/local/michigan/detroit/2017/05/01/detroit-police-officer-shootings/101159594/>. The names of the officers who lost their lives were **Collin Rose, Myron Jarrett, Ken Steil, and Waldis Johnson**. See *id.*, see also Cara Bell, *Detroit Police Officer Shot In The Line Of Duty In 2017 Dies From Injuries*, WXYZ News (June 1, 2020), available at <https://www.wxyz.com/news/detroit-police-officer-shot-in-the-line-of-duty-in-2017-dies-from-injuries>

Under this Policy, officers who are facing criminal charges will know that their case will be evaluated by an independent prosecutor, not a locally elected Prosecuting Attorney who might be influenced by community pressure.

II. Policy Directive

1. “Law-Enforcement Officer” Defined: For purposes of this Policy, a “law-enforcement officer” means a police officer who serves under the authority of the State or a subdivision of the State, a sheriff or deputy sheriff, and all other the public-safety officers listed in MCL 750.81d.²²

2. Mandatory Recusal in All Cases Involving Law-Enforcement Officer Violence Against Civilians: In all cases where a law-enforcement officer is alleged to have engaged in an act of violence against a civilian, and where criminal charges are sought or could plausibly be sought, the Prosecutor’s Office will recuse itself from all involvement in the case. The Prosecutor’s Office will immediately file a petition with the Attorney General under MCL 49.160, requesting the appointment of a Special Prosecuting Attorney.

If the Attorney General declines to appoint a Special Prosecuting Attorney, the Prosecuting Attorney will, pursuant to MCL 776.18, designate an outside attorney to oversee the matter as a Special Assistant Prosecuting Attorney. The Special Assistant Prosecuting Attorney will not be otherwise employed or engaged by the Prosecutor’s Office, and will have no meaningful ties to Washtenaw County. The Special Assistant Prosecuting Attorney will oversee the matter in its entirety, and the Prosecutor’s Office will remain otherwise recused.

3. Required Course of Action by Assistant Prosecuting Attorneys: If an Assistant Prosecuting Attorney (APA) receives a warrant request that (1) involves an act of violence against a civilian by a law-enforcement officer, and (2) where criminal charges are sought or could plausibly be sought, the APA shall immediately inform the Chief Assistant Prosecuting Attorney and the Prosecuting Attorney. The APA shall take no further action on the case until and unless the Chief Assistant Prosecuting Attorney or the Prosecuting Attorney direct otherwise.

4. Conduct Covered By This Policy: This Policy applies categorically, and without exception, to any case where (1) a law-enforcement officer is alleged to have engaged in an act of violence against a civilian during the course of their duties, and (2) where criminal charges are sought or could plausibly be sought. It does not apply where, for example, it is clear that a law-enforcement officer acted appropriately under the circumstances, and no criminal charges could

²² Specifically: (1) a “police officer of this state or of a political subdivision of this state including, but not limited to, a motor carrier officer or capitol security officer of the department of state police”; (2) a “police officer of a junior college, college, or university who is authorized by the governing board of that junior college, college, or university”; (3) a “conservation officer of the department of natural resources or the department of environmental quality”; (4) a “conservation officer of the United States department of the interior”; (5) a “sheriff or deputy sheriff”; (6) a “constable”; (7) a “peace officer of a duly authorized police agency of the United States, including, but not limited to, an agent of the secret service or department of justice”; (8) a “firefighter”; (9) any “emergency medical service personnel described in section 20950 of the public health code, 1978 PA 368, MCL 333.20950”; or (10) an “individual engaged in a search and rescue operation as that term is defined in [MCL 750.50c].” MCL 750.81d(7)(b).

plausibly be sought under those circumstances.

Where the facts are disputed or unclear, however, APAs should err on the side of caution, and should consult with the Chief Assistant Prosecuting Attorney or the Prosecuting Attorney before taking any action on the case.

5. Off-Duty Officers: This Policy applies categorically to any case in which a law-enforcement officer is alleged to have engaged in an act of violence against a civilian *during the course of their duties*. It does not apply to situations in which an officer is alleged to have committed crimes while off-duty.

Given the close relationship between police and prosecutors, however, it may be necessary for the Prosecutor's Office to recuse itself in a case involving an off-duty police officer. In such circumstances, APAs should consult with the Chief Assistant Prosecuting Attorney or the Prosecuting Attorney before taking any action on the case.

6. No Substantive Rights Created: This Policy is an exercise of discretion by the Washtenaw County Prosecuting Attorney's Office. Nothing in this Policy purports to affect the legality or propriety of any law enforcement officer's actions. Nothing in this Policy shall be interpreted to create substantive or enforceable rights.

8. Exceptions: Requests for deviations from this Policy shall be made in writing, and require the approval of the Chief Assistant Prosecuting Attorney or the Prosecuting Attorney. Because it is important to categorically articulate a position on recusal *before* a high-profile incident of alleged officer violence occurs, there will be no exceptions granted to this Policy in *any* case involving death or serious injury. A deviation from this Policy will be considered only in exceptional circumstances, and where public safety or ethical considerations require that deviation.



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