



WASHTENAW COUNTY

OFFICE OF THE PROSECUTING ATTORNEY

ELI SAVIT
PROSECUTING ATTORNEY

VICTORIA BURTON-HARRIS
CHIEF ASSISTANT PROSECUTING ATTORNEY

POLICY DIRECTIVE 2021-04: POLICY REGARDING RESISTING & OBSTRUCTING

I. Introduction and Background

Law enforcement officers hold positions of particular trust. Law enforcement officers—acting on behalf of the government—have authority to arrest a person, to use force, and to investigate wrongdoing. For many people, an interaction with police represents the most direct (and most visceral) reminder of the power the government maintains over our lives.

At the same time, law enforcement officers have a trying—and dangerous—job. Law enforcement officers are first responders when a gun is fired, and when violence occurs. They rush headlong into potentially dangerous situations, often before every threat has been uncovered. Day in and day out, our law-enforcement officers put their lives on the line to protect public safety. They deserve the ability to complete their duties without unnecessary interference, and without the threat of harm. And public safety demands no less.

For these reasons, “resisting and obstructing” a police officer is a criminal act in the State of Michigan. A person who “assaults, batters, wounds, resists, obstructs, opposes, or endangers” a police officer may be charged with a felony punishable by up to 2 years in prison.¹ Harsher penalties attach if a resisting-and-obstructing charge causes injury, serious impairment of a bodily function, or death.² Resisting-and-obstructing charges apply not just to local police officers, but to firefighters, emergency-medical-service personnel, and other law-enforcement officials as well.³

¹ MCL 750.81d(1).

² MCL 750.81(d)(2)-(4).

³ The full list of persons for whom a resisting-and-obstructing charge applies includes (1) conservation officers of the Department of Natural Resources or Department of Environmental Quality; (2) conservation officers of the United States department of the interior; (3) a sheriff or deputy sheriff; (4) a constable; and (5) 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; a firefighter; any emergency medical service personnel described in section 20950 of the public health code, MCL 333.20950; or an individual engaged in a search and rescue operation as that term is defined in MCL 750.50c. See MCL 750.81d(7)(b).

In addition, a separate law—MCL 750.479—contains a resisting-and-obstructing framework is applicable to “Public Officers,” who are defined as: medical examiners; township treasurers; judges; magistrates; probation officers; parole officer; prosecutors; city attorneys; court employees; court officers; and other officers or duly authorized persons. MCL 750.479.

This Policy applies to both laws—i.e., the resisting-and-obstructing framework set out in MCL 750.81, as

200NORTHMAINSTREET • P.O.BOX8645 • ANNARBOR, MICHIGAN48107-8645
TEL. (734) 222-6620 • FAX (734) 222-6610
www.washtenaw.org

Justice, Justice, Shall You Pursue

Resisting-and-obstructing is a serious crime, with serious penalties. A person charged with resisting-and-obstructing is being charged with undermining an officer in the performance of his or her official duties. Such conduct, of course, is unacceptable. The Washtenaw County Prosecutor's Office will, after reviewing all available evidence, continue to vigorously pursue such charges where appropriate, *especially* where a person assaults a law-enforcement officer.

That said, the Washtenaw County Prosecutor's Office cannot ignore the recent spate of high-profile incidents involving police officers who abused their positions of authority. The killings of George Floyd, Eric Garner, and Philando Castile (among others) involved officers who escalated a routine police stop or arrest—and ultimately inflicted lethal force on Black civilians. Those killings were caught on camera, and galvanized national movements. But there have also been a recent spate of incidents here in Michigan in which law-enforcement officers are alleged to have assaulted civilians.⁴ In some cases, law-enforcement officers sought to cover up those assaults by manipulating video evidence.⁵

All of this speaks to a broader truth: Interactions between police and civilians are often fraught and tense. Some such interactions involve escalation and assaults by the civilians. Other incidents, however, involve unnecessary escalation (and assault) by a law-enforcement officer. It is therefore crucial for a prosecuting attorney—who serves as a “minister of justice”⁶—to obtain all relevant facts before filing charges arising out of a police-civilian encounter.

That basic principle is particularly important given the unique position of public trust occupied by law-enforcement officers. Washtenaw County residents deserve to know that when a resisting-and-obstructing charge is filed, it is justified by the facts, and in the interests of justice. They deserve to know that a resisting-and-obstructing charge will be filed only where a civilian engaged in affirmative conduct to obstruct or assault a police officer—not where an officer escalated a situation, or where there was simply a tense interaction between officers and civilians. At the same time, our law-enforcement personnel deserve to know that when a resisting-and-obstructing charge *is* filed, the Prosecutor's Office has every confidence that the case is supported by the evidence, and is in the interest of justice.

well as to the parallel scheme outlined in MCL 750.479.

⁴ See, e.g., Cole Waterman, *Fired Saginaw Police Officer Charged by Michigan AG in Jail Assault*, MLive.com (Sept. 15, 2020), available at <https://www.mlive.com/news/saginaw-bay-city/2020/09/fired-saginaw-police-officer-charged-by-michigan-ag-in-jail-assault.html>; American Civil Liberties Union of Michigan, *Police Brutality in Taylor*, available at <https://www.aclumich.org/en/cases/police-brutality-taylor>.

⁵ In 2018, for example, a Michigan Department of Corrections officer was found liable for kicking a food door shut on a mentally ill inmate's hand. See, e.g., Tom Perkins, *MDOC Officer Ordered to Pay \$16k Over An Assault On A Mentally Ill Muslim Inmate*, The Metro Times (Feb. 22, 2018), available at <https://www.metrotimes.com/table-and-bar/archives/2018/02/22/mdoc-ordered-to-pay-16k-over-assault-on-mentally-ill-muslim-inmate>. The officer attempted to “cover up the incident” by “mov[ing] a camera so that it pointed away from [the inmate's] cell.” *Id.* The officer also wrote that the *inmate* “had assaulted him by grabbing his arm, and [the inmate] was later found guilty of assaulting an officer.” *Id.*

⁶ American Bar Association, *Model Rules of Professional Conduct*, R.3.8: *Special Responsibilities Of A Prosecutor – Comment*, available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/comment_on_rule_3_8/.

Accordingly, and as outlined in further detail below, it shall henceforth be the policy of the Washtenaw County Prosecutor’s Office to review *all* relevant materials—including body-camera, dashboard cameras, and any other photographic, video, or audio materials that exist—prior to authorizing a resisting-and-obstructing charge.

In enacting this Policy, the Washtenaw County Prosecutor’s Office is following in the footsteps of prosecutors across country.⁷ Closest to home, the Prosecuting Attorney in Ingham County, Michigan no longer issues “charges for resisting and obstructing police without reviewing body camera footage.”⁸ The Washtenaw County Prosecutor’s Office will henceforth do the same—and will do all necessary diligence to ensure, at the outset, that any resisting-and-obstructing charges are supported by the evidence and in the interest of justice.

II. Policy Directive

1. “Resisting-and-Obstructing Charge” Defined: For purposes of this Policy, a “resisting-and-obstructing” charge means:

- A. any charge under MCL 750.81d (“Assaulting, Battering, Wounding, Resisting, Obstructing, Opposing, or Endangering a Person Performing His Or Her Duties”);
- B. any charge under MCL 750.479 (“Assaulting, Battering, Obstructing, or Endangering an Officer Performing His or Her Duties”);
- C. any charge under MCL 750.197c involving assault on an employee of a jail, prison, or “other place of confinement”; and
- D. any charge for an attempt to commit the foregoing, under MCL 750.92.

For ease of reference, this Policy generally refers to the complainant/alleged victim of such charges as a “law enforcement officer.” That term, however, should be interpreted to encompass (1) any “person” as that term is defined in MCL 750.81d,⁹ (2) a public official covered under MCL

⁷ See, e.g., San Francisco District Attorney’s Office, *Policy Directive: Violence or Resistance Against Law Enforcement* (June 1, 2020), available at <https://sfdistrictattorney.org/wp-content/uploads/2020/11/Violence-or-Resistance-Against-Law-Enforcement.pdf>.

⁸ Kara Berg, *Ingham County Prosecutor Will Review Body Cam Footage In Resisting Arrest Cases*, The Lansing State Journal (Aug. 17, 2020), available at <https://www.lansingstatejournal.com/story/news/2020/08/17/ingham-county-revamps-resisting-arrest-policy-after-force-complaint/3362687001/>. This Policy liberally borrows, with permission, from the parallel policy that is in effect in Ingham County. The Washtenaw County Prosecutor’s Office would like to thank Ingham County Prosecutor Carol Siemon and her staff for their helpful counsel and input into this Policy.

⁹ 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

750.479,¹⁰ or (3) “an employee of the place of confinement or other custodian” under MCL 750.197.

2. Requirement to View All Materials Prior to Resisting-and-Obstructing Charging: Prior to authorizing a resisting-and-obstructing charge, Assistant Prosecuting Attorneys (APAs) *must* review all relevant videotaped materials, including but not limited to body-camera and dashboard camera recordings, as well as any relevant videotaped materials from a custodial setting, if the alleged resisting-and-obstructing charge took place in a custodial setting.

If recordings are not submitted with a request for charges, APAs must—before authorizing charges—“further” the request, and ask the referring law-enforcement agency to submit such recordings. If an APA is aware of additional recordings of the incident (for example, cell-phone camera recordings), the APA must also review those recordings prior to deciding whether to authorize charges. An APA should review those portions of the recordings that are relevant to the interaction, and need not view duplicative recordings if it is abundantly clear from one recording what transpired.

3. Materials to Be Requested and Reviewed: APAs should obtain as deep and nuanced an understanding of the situation as possible prior to deciding whether to authorize a resisting-and-obstructing charge. APAs should request the following from any law-enforcement agency that has submitted a resisting-and-obstructing charge to the Prosecutor’s Office:

- A. Warrant request form.
- B. Witness list with contact information for all witnesses.
- C. Police report, including complainant officer narratives and witness statements. Narratives should include a description of any deescalating techniques used by law-enforcement officers or others during interactions with the suspect.
- D. Any supplemental police report, or formal or informal complaint regarding use of force by an officer, to the extent that those complaints are available to the Prosecutor’s Office under law.
- E. Medical records documenting any injuries (either to the law-enforcement officer or to the would-be defendant), if available. Such documentation may not be readily available for a would-be defendant, but if the would-be defendant has already been charged with a separate offense, an APA may contact the would-be defendant’s defense attorney regarding those medical records, if one is known.

750.81d(7)(b).

¹⁰ Specifically: “a medical examiner, township treasurer, judge, magistrate, probation officer, parole officer, prosecutor, city attorney, court employee, court officer, or other officer or duly authorized person serving or attempting to serve or execute any process, rule, or order made or issued by lawful authority or otherwise acting in the performance of his or her duties,” or “an officer enforcing an ordinance, law, rule, order, or resolution of the common council of a city board of trustees, the common council or village council of an incorporated village, or a township board of a township.” MCL 750.479(1)(a)-(b).

- F. Photographs of any injuries to the law-enforcement officer or the would-be defendant.
- G. Body camera and/or dashboard camera recordings, if they exist.
- H. Any other recordings of the incident, if recordings exist.

APAs should further any potential charges (i.e., not make a decision on charges) until all such materials have been submitted and reviewed.

4. Considerations For Charging: When reviewing requests for a resisting-and-obstructing charge, APAs should consider the **totality of the circumstances**. APAs should authorize charges only where they are supported by the evidence, and are in the interests of justice. No single factor in the totality of the circumstances should be considered dispositive, but specific factors to be considered include:

A. Sufficiency of the Evidence: Whether there is sufficient evidence of each element of the crime. The APA should have an honest and reasonable belief that the People could meet their burden of proof for each element if the case proceeded to trial.

B. Nature of Contact: The nature of the original contact between the law-enforcement officer and the would-be defendant, including whether the initial contact was in accordance with the policy agency's departmental policies or necessary based on public safety considerations.

C. Behavior of Both Parties: The would-be defendant's behavior and the law-enforcement officer's response during the course of the interaction.

D. Severity of the Alleged Obstruction: Whether the would-be defendant's actions included (1) assaulting, battering, wounding, or endangering; *or* (2) resisting, obstructing, or opposing. In general, assaulting, battering, wounding, and endangering is more serious conduct—and accordingly more likely to warrant criminal charges—than resisting, obstructing, or opposing. That is true even though any of these actions may constitute behavior that can sustain a resisting-and-obstructing charge.

E. De-Escalation: The law-enforcement officer's use of de-escalation techniques, if appropriate for the interaction. De-escalation techniques include:

1. Gathering as much information possible about the incident;
- 2) Attempting to isolate and contain the subject;
- 3) Creating time and distance from the subject by establishing a buffer zone, and utilizing cover to avoid creating an immediate threat which may require the use of force;
- 4) Requesting additional resources, such as Crisis Intervention Team (CIT) trained employees, or a Crisis Negotiation Team (CNT), or identifying employees who may have a rapport with the subject;

- 5) Designating an officer to establish rapport and engage in communication with the subject;
- 6) Tactically re-positioning as often as necessary to maintain the reactionary gap, protect the public, and preserve officer safety;
- 7) Continuing de-escalation techniques, such as advisements, warnings, verbal persuasion, other alternatives, and take as much time as reasonably necessary to resolve the incident, without having to use force if possible.
- 8) Declining to use force once control of a combative person is obtained and there is no longer an objectively reasonable threat. A degree of force which may have been justified earlier in an encounter does not remain justified indefinitely. Force should be de-escalated proportionately and immediately as any resistance decreases.

For further background regarding de-escalation considerations, see the Washtenaw County Sheriff's guidance regarding *De-Escalation Techniques and Considerations*, attached as an appendix.

F. Self-Defense/Excessive Force: Whether the interaction involved resistance to excessive force, and whether that resistance raises an issue of self-defense.

G. Legality of Officer's Conduct: The legality of the law-enforcement officer's conduct. If the law-enforcement officer's conduct was unlawful, the would-be defendant has a viable affirmative defense. *People v Moreno*, 491 Mich 38, 814 (2012).

H. Use of Force Complaint: Whether there is a known (informal or formal) use of force complaint at the time the warrant request is submitted. If an APA becomes aware of a use of force complaint made after a warrant has been authorized, the assigned APA for that hearing/docket should review any additional information and request a supplemental police report, if necessary.

I. Video Recordings, Physical Evidence, and Witness Statements: Whether video recordings and physical evidence are consistent with witness narratives and statements.

J. Interference with Video Recordings: Whether it appears that an officer turned off, disabled, or otherwise interfered with body-camera or other recording devices. Where the evidence suggests that an officer may have intentionally interfered with recordings, it should counsel against authorizing charges.

J. Injuries and Endangerment: Whether the law-enforcement officer or the would-be defendant was injured, and, if so, the nature of the injuries. In addition, APAs should consider whether the law-enforcement officer or the would-be defendant was excessively endangered. Spitting, for example—particularly where the “spitter” knows or believes they have a communicable disease—could in some instances seriously endanger a person.

K. Officer History: Whether the officer involved has a demonstrated history of filing unsubstantiated resisting & obstructing charges, or whether the officer involved has a demonstrated history of initiating violence. In a close case, that an officer has such a history may weigh against filing charges.

L. Would-Be Defendant History: Whether the would-be defendant had a history of violence, particularly violence against police officers, and/or sustained resisting and obstructing charges. It should be emphasized that the fact a would-be defendant was previously charged or convicted of a crime—in and of itself—should not weigh in favor of concluding that a new crime occurred. That said, when analyzing the reasonableness of an officer’s actions during an encounter, it is appropriate to consider whether the officer knew the person with whom they were interacting had a history of violence against police officers.

L. Interests of Justice: Whether the interests of justice would be best served by (1) charging felony resisting-and-obstructing, (2) charging misdemeanor resisting-and-obstructing¹¹, or (3) declining to charge a crime. For example, though a would-be defendant may be charged with resisting and obstructing for “failure to comply with a lawful command,” some failures to comply with a lawful command (e.g., arguing with an officer when being asked to vacate a crime scene) do not meaningfully implicate broader public-safety concerns, and should result in a declination of a charge.

M. Mental Health/Social Services Referral: Whether the situation is one where social services or community engagement might more appropriate to address the would-be defendant’s issues or conduct than charging the would-be defendant with a crime.

N. Any Additional Factors: Any other factor relevant to the determination of whether the interests of justice and fairness would be furthered by charging a crime. These factors include, but are not limited to, the age of the would-be defendant. In general, younger persons may have more of a “flight” instinct, which should be taken into account when determining an appropriate charge.

At *any* stage in the case, APAs should file resisting-and-obstructing or attempted resisting-and-obstructing charges only if they are supported by the evidence and in the interests of justice. APAs are strictly prohibited from authorizing—or threatening—resisting-and-obstructing or attempted resisting-and-obstructing charges to gain leverage in plea bargaining negotiations.

5. Application to Currently Pending Cases: This Policy applies to all cases that are currently being prosecuted by the Washtenaw County Prosecutor’s Office, and for which a judgment has not yet been entered. APAs should seek to resolve their current cases in accordance with this Policy—not in accordance with any formal or informal policies that were previously maintained by the Prosecutor’s Office.

6. Other Charges Not Covered By This Policy: Nothing in this Policy shall be interpreted to prohibit or discourage the filing of charges that are not covered by this Policy. Specifically, nothing

¹¹ More precisely, “attempted resisting-and-obstructing” would be a misdemeanor crime under MCL 750.92.

in this Policy prevents or discourages an APA from filing underlying charges for which an arrest was effectuated. Nor should this Policy be interpreted to mean that an APA should delay filing the underlying charges.

For example, if a police officer is arresting a suspect in a home-invasion incident, and the suspect engages in a physical altercation with the officer during the course of the arrest, the APA should proceed to file charges relating to the home-invasion incident as soon as the APA is satisfied that they are supported by the facts and in the interest of justice.

Any resisting-and-obstructing charges, however, should be authorized (or declined) only after the steps outlined in this Policy are followed.

7. 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: All cases are different, and this Policy accordingly provides guidance that is presumptive only. 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. A deviation from this Policy will be granted only in exceptional circumstances, and where public safety requires that deviation.



Eli Savit
Prosecuting Attorney, Washtenaw County

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Appendix: WCSO De-Escalation Memo



Washtenaw County Sheriff's Office

De-escalation Techniques and Considerations

Jerry L. Clayton, Sheriff

The mission of the Sheriff's Office is to create public safety, provide quality service, and build strong and sustainable communities. In accordance with our mission and the law enforcement officer code of ethics, employees are expected to treat all whom they are sworn to serve with courtesy, professionalism, dignity, and respect while providing the highest quality of service in their daily interactions with the community. Understanding the fluidity of situations and circumstances they may be facing as an incident occurs, employees will seek voluntary compliance and operate with minimal reliance on the use of force by using rapport building communication and crisis intervention and de-escalation tactics before resorting to physical means of control. These are key factors in safeguarding the public's trust and maintaining legitimacy with the community.

Sheriff's Office employees shall employ de-escalation techniques throughout the encounter and provide repeated verbal warnings in order to decrease the likelihood of the need to use force and to increase the likelihood of voluntary compliance in situations where they can do so safely, without increasing risk to themselves or another person. Moreover, Sheriff's Office employees shall attempt to understand and consider the possible reasons why a subject may be noncompliant or resisting attempts to gain compliance.

A subject may not be capable of understanding the situation because of 1) Environmental factors 2) Medical condition(s) i.e. mental, physical, or hearing impairment 3) Language barrier 4) Drug interaction 5) Emotional crisis 6) Those who have no criminal intent. These situations may not make the person less dangerous but understanding a subject's condition may enable employees to calm them and to allow for the use of de-escalation techniques while maintaining the safety of the public and the employee(s). Employees who act to de-escalate an incident, which can reasonably delay taking a subject into custody, while keeping the public and employees safe, will not be found to have neglected their duty. This act helps to fulfill a service priority of the agency.

When encountering a non-compliant subject, employees shall use the following de-escalation tactics in an effort to reduce the need or degree of force:

- 1) Gather as much information possible about the incident.
- 2) Attempt to isolate and contain the subject.
- 3) Create time and distance from the subject by establishing a buffer zone (reactionary gap) and utilize cover to avoid creating an immediate threat which may require the use of force.
- 4) Request additional resources, such as Crisis Intervention Team (CIT) trained employees, or Crisis Negotiation Team (CNT). Identify employees who may have a rapport with the subject.
- 5) Designate an officer to establish rapport and engage in communication with the subject.
- 6) Tactically re-position as often as necessary to maintain the reactionary gap, protect the public, and preserve officer safety.
- 7) Continue de-escalation techniques, such as advisements, warnings, verbal persuasion, other alternatives, and take as much time as reasonably necessary to resolve the incident, without having to use force if possible.

Washtenaw County Sheriff's Office

De-escalation Techniques and Considerations



Jerry L. Clayton, Sheriff

8) Employees will assess each incident to determine, based on policy, training, and experience, which option is best to achieve a legal outcome and bring the situation under control in a safe and prudent manner.

9) In general, once control of a combative subject is gained and there is no longer an objectively reasonable threat, further use of force is prohibited. A degree of force which may have been justified earlier in an encounter does not remain justified indefinitely. Force shall be de-escalated proportionately and immediately as resistance decreases.

Supervisors who become aware of a situation where an employee is using de-escalation techniques shall monitor the radio communications and evaluate the need to respond to the scene. Incidents where de-escalation techniques were attempted shall be documented in the employee's report, as applicable. Such a report will include a disposition of the incident, i.e. the officer/supervisor will indicate if the de-escalation techniques attempted were successful.