



# WASHTENAW COUNTY

## OFFICE OF THE PROSECUTING ATTORNEY

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### POLICY DIRECTIVE 2021-09: POLICY REGARDING PRETEXT STOPS

#### I. Introduction and Background

Racial inequity is endemic in our criminal justice system. According to a recent report by Citizens for Racial Equity in Washtenaw (CREW), people of color are between 3 and 29 times more likely to be charged with certain felonies than white people in Washtenaw County.<sup>1</sup> That disparity has helped fuel a system in which over 50% of the prisoners in Michigan state prisons are Black—despite Black people making up just 15% of Michigan’s population.<sup>2</sup>

It is the mission of the Washtenaw County Prosecutor’s Office to ensure that justice is dispensed evenhandedly, irrespective of a defendant’s sex, race, gender, sexual orientation, gender identity, religion, national origin, or immigration status. As noted in the CREW report, more research is needed to identify the points in the system in which racial equity is most pronounced, and to root out racially disparate practices in the Prosecutor’s Office.<sup>3</sup>

The available data, however, strongly indicates that “pretext stops” are one driver of racial inequity in our justice system. Pretext stops are made by police officers, purportedly as a result of an observed traffic or ordinance infraction—but where the officer is really seeking to uncover evidence that a civilian possessed drugs or other contraband. “[I]t is no secret that people of color are disproportionate victims of this type of scrutiny.”<sup>4</sup> A nationwide study of over 200 million traffic stop records indicates that Black motorists are significantly more likely than white motorists to be stopped for a traffic infraction.<sup>5</sup> Once motorists are pulled over, Black and Hispanic drivers are significantly more likely to be searched for contraband.<sup>6</sup> And “police require less suspicion to search [B]lack and Hispanic drivers than white drivers.”<sup>7</sup>

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<sup>1</sup> Citizens for Racial Equity in Washtenaw (CREW), *Race to Justice* (Aug. 2020) at 20, *available at* <https://www.citizensforracialequitywashtenaw.org/crew-s-report>.

<sup>2</sup> Vera Institute, *Incarceration Trends in Michigan*, *available at* <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-michigan.pdf>.

<sup>3</sup> See CREW, *Race to Justice*, at 36 (recommending a “third-party evaluator to study prosecutors’ files, policies and procedures and make recommendations for data driven, evidence-based improvements to rectify racial disparities and determine whether the tools and practices employed by the Washtenaw County prosecutor’s office are applied in way that is not racially discriminatory and does reflect the fair administration of justice.”).

<sup>4</sup> *Utah v. Strieff*, 136 S. Ct. 2056, 2070, 195 L. Ed. 2d 400 (2016) (Sotomayor, J., dissenting) (citing Michelle Alexander, *The New Jim Crow* 95–136 (2010)).

<sup>5</sup> Stanford Open Policing Project, *Findings*, *available at* <https://openpolicing.stanford.edu/findings/>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

Washtenaw County is not immune from these national trends. The data suggests that people of color (and Black people in particular) are significantly more likely to be stopped by the police than white people in Washtenaw County. According to Michigan State Police data, Black motorists regularly account for upwards of 25% of traffic stops in Washtenaw County.<sup>8</sup> Black people, however, make up just 12% of Washtenaw County’s population.<sup>9</sup>

Pretext stops are thus inextricably intertwined with racial profiling. And that leads to racial inequity in our broader criminal justice system. More, pretext stops are humiliating, traumatizing, and can lead to broad distrust of law enforcement in communities of color. As Justice Sonia Sotomayor has explained, “many Americans have been stopped for speeding or jaywalking.”<sup>10</sup> But “few may realize how degrading a stop can be when the officer is looking for more.”<sup>11</sup>

Under United States Supreme Court caselaw, the subjective motive of an officer who stops a civilian is generally irrelevant to whether that officer complied with the Fourth Amendment’s prohibition against unreasonable seizures.<sup>12</sup> Thus, an officer may, consistent with the Fourth Amendment, stop a motorist for speeding, for a broken tail light, for failing to properly use a turn signal, or even for driving for too long in the left lane on a highway.<sup>13</sup> Importantly, the officer may effect such a stop *even if the officer’s subjective motivation is to search the civilian for contraband, and even if the officer has no reason to suspect that the civilian actually possesses contraband.*

In other word, an officer can “stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact.”<sup>14</sup> When making the stop, an “officer does not even need to know which law you might have broken, so long as he can later point to any possible infraction—even one that is minor, unrelated, or ambiguous.”<sup>15</sup>

But it does not need to be so. Pretext stops are prohibited under the state constitutions of New Mexico and Washington—and there is no evidence that those jurisdictions suffer from increased criminal activity as a result of these added constitutional protections.<sup>16</sup> The San Francisco District Attorney’s Office has declined to charge contraband cases that arise from pretextual police stops.<sup>17</sup> And in one of her final separate opinions, the late Justice Ruth Bader

<sup>8</sup> Michigan State Police, *2017 – 2019 MSP Traffic Stop Data by County and Race of Driver*, available at [https://www.michigan.gov/documents/msp/Traffic\\_Stop\\_by\\_Race\\_2017-2019\\_by\\_County\\_699449\\_7.pdf](https://www.michigan.gov/documents/msp/Traffic_Stop_by_Race_2017-2019_by_County_699449_7.pdf).

<sup>9</sup> United States Census, *QuickFacts, Washtenaw County, MI*, available at <https://www.census.gov/quickfacts/washtenawcountymichigan>.

<sup>10</sup> *Strieff*, 136 S. Ct. at 2069 (Sotomayor, J., dissenting).

<sup>11</sup> *Id.*

<sup>12</sup> *Whren v. United States*, 517 U.S. 806, 813(1996) (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis”).

<sup>13</sup> See MCL 257.634 (requiring “the driver of a vehicle [to] drive the vehicle upon the right half of the roadway” except under specific circumstances).

<sup>14</sup> *Strieff*, 136 S. Ct. at 2069 (Sotomayor, J., dissenting)

<sup>15</sup> *Id.*

<sup>16</sup> *State v. Ochoa*, 206 P.3d 143 (N.M. Ct. App. 2008); *State v. Ladson*, 979 P.2d 833, 842 (Wash. 1999).

<sup>17</sup> San Francisco District Attorney’s Office, *Policy Directive: Declination of Contraband Charges Based on Pretextual Stops*, available at <https://sfdistrictattorney.org/wp-content/uploads/2020/11/Declination-of-Contraband->

Ginsburg indicated that she would consider re-examining “whether a police officer’s reason for acting, at least in some circumstances, should factor into a Fourth Amendment inquiry.”<sup>18</sup>

Accordingly—given the harm that pretext stops cause, and given racial inequities they perpetuate—it shall be the policy of the Prosecutor’s Office to decline to charge contraband crimes that arise when there is significant reason to believe they those charges arose from a pretext stop. Specifically, the Prosecutor’s Office will decline to authorize charges where (1) a civilian was stopped by a law-enforcement officer for a traffic or ordinance violation, (2) the officer subsequently obtains “consent” to search the civilian or their vehicle without any independent legal justification for the search, and (3) as a result of that search, the officer discovers contraband such as drugs or weapons.

The Prosecutor’s Office will, however, continue to charge contraband crimes where evidence was uncovered as a result of (1) an investigatory stop, or (2) a search that was supported by probable cause or another independent legal justification. In addition, this Policy does not preclude, for any reason, the charging of more serious, non-contraband crimes such as murder, sexual assault, or other crimes against persons or property.

An illustrative list of examples is included as an appendix to this document.

## II. Policy Directive

**1. Possession of Contraband Charges Arising From Infraction-Related Stops:** The Washtenaw County Prosecutor’s Office will not file a possession of contraband charge in the following circumstances:

- (A) The search that uncovered the contraband stemmed from an infraction-related stop; and
- (B) The search that uncovered the contraband was obtained via the consent of the target of the search, and no other independent probable cause (such as observed contraband in plain view) or other legal justification exists to justify the search.

It should be emphasized that police officers will often obtain consent to search, even when they had legal justification to search without consent. That is an appropriate, and desirable, technique. Obtaining a civilian’s consent to perform a search (even when a search could otherwise be lawfully performed) can help de-escalate a tense encounter between civilians and law enforcement. Accordingly, the mere fact that consent was given does not prohibit Assistant Prosecuting Attorneys (APAs) from filing contraband charges under this Policy. This Policy applies only where an officer obtained consent to search, *and* there was no independent legal justification to justify the search.

**2. “Infraction-Related Stop” Defined:** For purposes of this Policy, an “infraction-related stop” means any stop effected by law enforcement officers as a result of an observed traffic infraction, including, but not limited to, vehicular, cycling, motorcycling, skateboarding, skating, and

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Charges-Based-on-Pretextual-Stops.pdf.

<sup>18</sup> *District of Columbia v. Wesby*, 138 S. Ct. 577, 594 (2018) (Ginsburg, J., dissenting).

pedestrian-related infractions. An “infraction-related stop” also means any stop effected by law enforcement officers as a result of an observed violation of a city or township ordinance that is not an offense against persons or property.

APAs reviewing a request for criminal charges may also decide, in their discretion, that a stop for another observed minor criminal offense qualifies as an “infraction-related stop,” and may decline to bring contraband charges consistent with the spirit of this Policy.

**3. “Possession of Contraband Charge” Defined:** For purposes of this Policy, a “possession of contraband charge” means possession of a controlled substance,<sup>19</sup> possession of stolen, embezzled, or converted property,<sup>20</sup> minor in possession of alcohol,<sup>21</sup> as well as certain possession of weapons offenses.<sup>22</sup>

**4. Law Enforcement Stops Not Covered By This Policy:** This Policy does not apply to non infraction-related stops—including situations in which a law enforcement agency has conducted a valid and legal stop to facilitate investigation of a crime such as homicide, sexual assault, or driving under the influence of alcohol or drugs. Nor does this Policy apply to charges that are not possession of contraband charges within the meaning of this Policy.<sup>23</sup>

**5. Forensic Processing and Confiscation:** Nothing in this Policy shall be interpreted to prohibit or discourage the forensic processing, or confiscation and destruction, of any contraband seized as a result of any law enforcement action.

**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.

For example: if, following a traffic stop, an officer obtains consent to search a vehicle and discovers a weapon that links a suspect to a homicide, the Prosecutor’s Office may, consistent with this Policy, file homicide charges if the evidence dictates.

**7. Charges Should Be Supported by Evidence and in the Interests of Justice:** Nothing in this Policy shall be interpreted to mandate or encourage the filing of charges that are not covered by this Policy. If an APA believes that filing charges other than those covered by this Policy are not supported by the evidence, or are not in the interest of justice, the APA should not file those charges.

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<sup>19</sup> MCL 333.7403

<sup>20</sup> MCL 750.535

<sup>21</sup> MCL 436.1703

<sup>22</sup> The possession of weapons cases covered by this Policy are: carrying a concealed weapon, MCL 750.227, possession of a “blackjack, slungshot, billy, metallic knuckles, sand club, sand bag, or bludgeon,” MCL 750.224(1)(d), possession or transportation of a firearm or pneumatic gun in a vehicle, MCL 750.227c-d, possession of a boat or aircraft signaling device, MCL 750.231c, possession of a portable device directing electrical current, MCL 750.224a, and possession by minors of firearms in public, MCL 750.234f.

<sup>23</sup> At times, police may conduct a valid investigatory stop but—to protect the identity of a confidential informant—may do so under the guise of an infraction-related stop. Such stops, if indeed supportable as a valid investigatory stop, should be treated as an investigatory stop under this Policy. See Example 6 in the Appendix to this Policy.

**8. 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.

**9. 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. A deviation from this Policy will be granted only in exceptional circumstances, and where public safety requires that deviation.



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## Appendix: Examples of Factual Situations Covered by this Policy

This appendix provides a list of illustrative examples for when a charge should or should not be filed under this Policy. These examples are illustrative only, and this appendix should not be interpreted to cover the full array of circumstances in which this Policy might operate.

### Example 1: Traffic Stop Followed by Consent Search – Contraband Charge

Alan was pulled over by a police officer for failing to properly signal before changing lanes. After asking for Alan’s license and registration, the following exchange occurred:

Officer: “You don’t have any guns or drugs or anything like that in the car, do you?”

Alan: “No, sir.”

Officer: “So you wouldn’t mind if I looked around the car just to make sure?”

Alan: “No, sir, I don’t mind.”

The officer then proceeded to search the car, pursuant to Alan’s consent. During the search, the officer found a handgun in Alan’s glovebox. Alan’s license to carry a concealed weapon had lapsed 2 months prior. The police thus seek charges against Alan for carrying a concealed weapon.

The Prosecutor’s Office should **decline to authorize the charge**. The stop was an “infraction-related stop” under this Policy; there was no cause for the search other than Alan’s consent; and the charge sought is a contraband charge as defined by this Policy.

### Example 2: Traffic Stop Followed by Consent Search – Non-Contraband Crime

Same facts as above, except that after seizing the gun, it is forensically linked to an unsolved homicide in the area. Following an investigation, police uncover further evidence that Alan committed the unsolved homicide. The police thus seek murder charges against Alan.

The Prosecutor’s Office should **authorize the murder charge**, assuming it is supported by the evidence and in the interests of justice. That charge is not a contraband charge, and accordingly is not covered by this Policy.

### Example 3: Investigatory Stop Followed by Consent Search

Following a non-fatal drive-by shooting, witnesses reported a silver BMW speeding away from the scene. Just 20 minutes later, officers see a silver BMW matching the description driving 3 miles away from where the shooting occurred. Bob was the driver of the silver BMW. The officers order Bob out of the car and handcuff him. The following exchange then takes place:

Officer: “Have any weapons in the vehicle?”

Bob: “No.”

Officer: “Can I search the glove compartment and trunk just to be sure?”

Alan: “Sure, go ahead.”

Upon searching the glove compartment, officers discover a handgun that was later linked to the shooting. Officers also discover, in the trunk, two kilograms of heroin. Bob is arrested, and the police seek charges for assault with intent to murder, as well as possession with intent to distribute heroin.

The Prosecutor’s Office should **authorize both charges**, assuming that they are supported by the evidence and in the interests of justice. The stop was not an “infraction-related” stop; it was an investigatory stop supported by reasonable suspicion that the driver had been involved in a recent shooting. This Policy, accordingly, does not apply.

#### **Example 4: Traffic Stop Followed by Probable Cause to Support Search**

Chris is pulled over on the freeway for driving 15 minutes over the speed limit. Upon pulling Chris over, the officer notices what appears to be a pile of clothes with store security tags still attached under the passenger seat of the car. Some stores in the area have recently been the victims of break-ins in which merchandise was stolen. Accordingly, suspecting that the car contains evidence relating to those recent crimes, the officer effectuates a search of the vehicle. Though the officer believes she has probable cause to search the vehicle, the following exchange occurs:

Officer: “Would you have any objection to me searching your vehicle, sir?”

Chris: “Objections? No, I don’t have any objections.”

The officer’s suspicion was correct: the clothes were those stolen from one of the nearby stores. The police seek charges against Chris for receiving or concealing stolen property.

The Prosecutor’s Office should **authorize that charge**, assuming (1) it is supported by the evidence and in the interests of justice, and (2) the Prosecutor’s Office believes that the officer had probable cause to search the vehicle. Although the stop was an “infraction-related” stop, and the charge sought a “contraband charge,” the officer had **independent probable cause** to search the vehicle.

#### **Example 5: Infraction-Related Stop Followed by Contraband in Plain Sight**

Dale is detained by police for riding his bicycle on a highway, a civil infraction. *See* MCL 257.679a. Upon detaining Dale, the officer notices that he has, in the handbasket of his bicycle, a bag of pills that appear to be a designer fentanyl drug. Without obtaining consent, officers seize the fentanyl and arrest Dale. Officers perform a search incident to arrest and find more apparent fentanyl pills on his person, as well as an unlicensed handgun. The officer thus seeks charges for possession of a controlled substance, as well as carrying a concealed weapon.

The Prosecutor’s Office may **authorize those charges**, assuming that they are supported by the evidence and in the interests of justice. Though the cycling infraction qualifies as an “infraction-related stop” within the meaning of this Policy, and the charges are “contraband

charges” within the meaning of this Policy, the officers saw contraband in plain sight. It should be emphasized, however, that the Prosecutor’s Office maintains a policy of prioritizing deflection and diversion wherever possible. On these facts, there is a significant possibility that Dale is dealing with a substance-use issue. The Prosecutor’s Office may wish to consider either a pre-charge deflection program, or diversion into a problem-solving court

### **Example 6: Investigatory Stop Not Categorized As Such In Police Report**

A confidential informant has informed a local police agency that Ethan is a distributor of fentanyl. Police officers lawfully conduct surveillance on Ethan for three days, and observe him going back and forth to several locations in which drugs are known to be stored and distributed. On the fourth day, officers parked outside one such “drug house” witness Ethan loading several bags filled with plastic baggies that appear to be pills into the trunk of his car. Officers follow Ethan’s vehicle, and pull him over for going 5 miles over the speed limit. Upon stopping the vehicle, the following exchange occurs:

Officer: May I conduct a search of your vehicle, sir?

Ethan: Sure, I got nothing to hide.

Officers thereafter search the vehicle, and found hundreds of fentanyl pills in Ethan’s possession. The police accordingly seek charges for possession with intent to distribute fentanyl. In the police report, the officers do not disclose their investigation or the confidential informant. Instead, they describe the encounter as a traffic stop, so that the informant’s identity can be protected.

A police officer, however, reaches out to the Prosecutor’s Office and informs the office of the informant, the prior investigation, and the true reason for the stop. They also provide documentation related to the informant and their prior investigation.

If the Prosecutor’s Office is convinced that police had sufficient cause to conduct a valid investigatory stop, the Prosecutor’s Office should **authorize the charges**, assuming they are supported by the evidence and in the interests of justice. The police in this situation acted to protect the safety of an informant, and informed the Prosecutor’s Office of their prior investigation. The stop should not be considered an “infraction-related” stop within the meaning of this Policy, but rather a valid investigatory stop.

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Again, the foregoing examples are not in any way meant to be exhaustive. This Appendix is meant to be illustrative only, and to provide APAs with concrete examples of the factors they should be considering when seeking release to a “responsible member of the community.”



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