

STATE ATTORNEY, NINTH JUDICIAL CIRCUIT
§843 DIVERSION POLICY
RESISTING OFFICER WITHOUT VIOLENCE

OVERVIEW

At the national level as well as locally, over the past four months people have been demanding massive change to a system of policing and mass incarceration that has always been infected by racism and abuse. Many are engaging in peaceful protests and demanding an end to the police violence that has disproportionately harmed Black communities, and also to racially discriminatory practices like stop and frisk that target communities of color. There are simply too many police and prosecutorial practices that treat communities of color without the human dignity and the respect warranted. These and other similar practices create tremendous psychological trauma and lead to perpetual distrust and long-term economic loss. People in the streets are demanding that elected officials not only acknowledge these problems, but also do something to change them.

This office takes those demands seriously, and we are taking a hard look at the cases we prosecute and the way we prosecute, asking whether we are enabling the disproportionate targeting of certain communities or enacting policies that fail to advance safety.

One way we are enabling disproportionate policing is by routinely prosecuting those charged with resisting an officer without violence. That misdemeanor charge¹ punishes those who *in any way* “resist, obstruct, or oppose any officer (in the lawful execution of a legal duty)” but do not either threaten, mention, or use violence.² The statute can lead to the arrest of those who, for example, fail to immediately stop when ordered to do so by law enforcement, flex their arms to in response to pain associated with handcuffing, tasing or other uses of force. It can include a person failing to immediately provide their name when asked during a stop, a stop which the citizen feels is unjustified and the citizen is asking questions before answering questions. It can also lead to the arrest of those who question or draw attention to the way law enforcement is treating them or another person during a stop or arrest. Police officers can make arrests in resisting cases, even though the individual is not engaged in any other criminal activity. A disproportionate majority of these stops and corresponding arrests involve people of color.³ Studies in other jurisdictions have confirmed this office’s findings.⁴

¹ Resisting Officer Without Violence is a first-degree misdemeanor, punishable by up to one year in jail, one year of probation, and \$1,000 in fines.

² § 843.02, Fla. Stat.

³ A review of SAO9 case management system revealed 63% of the ROWOV cases submitted to our office by law enforcement in the last 12 months were for Black people. This is significant considering Orange County’s Black population is 22.8%.

⁴ Robert Lewis and Noah Veltman, *Race and “Resisting Arrest” Charges*, WNYC News (Dec. 12, 2014) (available at <https://www.wnyc.org/story/resisting-arrest-black-white/>); Scott Holmes, *Resisting Arrest and Racism -- the Crime of “Disrespect,”* 85 UMKC L. Rev. 625 (2017); Mari Payton and Dorian Hargrove, *African-Americans Arrested for Resisting Arrest at a Larger Rate in San Diego*, NBC San Diego (Feb. 9, 2020) (available at <https://www.nbcsandiego.com/news/local/african-americans-arrested-for->

Prosecuting these cases, which have little to no nexus to future criminality, both enables disproportionate policing and is also a poor investment of this office's limited resources. Prosecuting stand-alone resisting cases detracts from our staff's ability to investigate and prosecute serious crimes. That is true in the best of times, as we must always prioritize resources, and we are not in the best of times with COVID-19 stretching the staff and office budget.

Prosecuting these cases may also increase crime. People must spend money on lawyers, miss work to go to court, may lose their jobs along the way, and end up saddled with unnecessary criminal records. The destabilizing effect of these prosecutions has long-term negative consequences to these individuals, our community, and to public safety as a whole.

This office is concerned about mistrust these routine prosecutions could create between the citizens and the criminal justice system itself.⁵ A person charged today with Resisting Officer Without Violence could be next month's potential witness or victim, whose cooperation we would need in court on serious crimes. To what degree are people prosecuted for something minor, and will that person later be less likely to call the police, cooperate with the prosecutors, or show up in court to testify?⁶ And how would that apprehension about participating in the criminal justice system impact the community's safety on a larger scale?⁷

Finally, we recognize that many of the cases submitted to our office by the police during recent uprisings, racial unrest, and non-violent protests are resisting cases. As prosecutors, we must acknowledge the profound and legitimate anger, grief, and frustration that has motivated these demonstrations and recognize that we will undermine public safety, not promote it, if we bring the force of our criminal justice system to bear against nonviolent citizens who are simply promoting the change our society so desperately needs. The use of our discretion must be goal oriented, not a reckless or arbitrary show of authority. We should not use the law this way, in prosecuting resisting cases, simply because we can. We can instead be intentional on the resisting cases we prioritize as the most serious, warranting litigation.

For these reasons, our Office will apply the presumptions detailed below to all stand-alone resisting arrest cases.⁸ As with all presumptions, where an individual case presents unusual, aggravating circumstances, (either a significant history of resisting cases and/or particularly egregious facts,

[resisting-arrest-at-a-larger-rate-in-san-diego/2260289/](https://www.bostonreview.net/race-law-justice/lisa-cacho-jodi-melamed-how-police-abuse-charge-resisting-arrest/)); Lisa Cacho and Jodi Melamed, *How Police Abuse the Charge of Resisting Arrest*, Boston Review (June 29, 2020) (available at <http://bostonreview.net/race-law-justice/lisa-cacho-jodi-melamed-how-police-abuse-charge-resisting-arrest>).

⁵ Tom R. Tyler and Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in their Communities?* 6 Ohio State J. of Crim. Law 231 (2008).

⁶ Id., at 236, 238.

⁷ Id. at 239. "While always a concern, in recent years the need to maintain legitimacy has been especially important to the police, the courts, and the legal system in seeking to leverage citizen trust and cooperation into the co-production of security."

⁸ Presumptions may also be applied when the resisting charge is coupled with another charge that could have either received a civil citation or should alternatively, be diverted as well. For example, Resisting Officer Without Violence and Possession of Drug Paraphernalia.

despite limited priors) Assistant State Attorneys may obtain supervisor approval to proceed with the case as a traditional prosecution in the courtroom.

1. Presumption of Dismissal/Declination:

While this policy does not include a presumptive dismissal of stand-alone misdemeanor resisting cases, or other cases with similar fact-patterns to those that could otherwise be filed as resisting arrest, Assistant State Attorneys are encouraged to be vigilant and may consider dismissal based on the underlying facts and circumstances of an individual case. Assistant State Attorneys are not instructed that there is a presumption of dismissal per se, yet Assistant State Attorneys should feel greater latitude to file a No Information or Nolle Pros in resisting cases than they have had in the past.

An Assistant State Attorney choosing to decline to prosecute a case is not legalizing the underlying conduct. Declining to prosecute cases in no way undermines the legality of an arrest or changes Florida law. A prosecutor's evidence-based decision to decline a case does not lead to an increase in criminal conduct. Because individuals will still be subject to arrest, the policy would only impact rates of offending if the prosecution itself, isolated from the underlying arrest, affects behavior. Numerous studies have shown that, while the degree to which criminal prosecution deters the general public from offending is influenced by the certainty of apprehension, it is largely unaffected by the severity of punishment that follows.⁹ Any criticism that even a broad declination policy is akin to legalization or encourages criminal activity is entirely unfounded.

2. When Resisting is Filed with Drug Possession

Any charge of resisting submitted to our office alongside a misdemeanor or third-degree felony drug possession charge, *see* § 893.13, Fla. Stat., should be subjected to a high level of scrutiny by Assistant State Attorneys before proceeding with prosecution of the ROWOV charge. There is little public safety benefit to prosecuting resisting charges in these cases – in contrast would be a fact pattern where the defendant resisted in order to avoid apprehension for a violent crime -- and the possession cases can proceed through SAO9's Level 1 or 2 Drug Diversion Program. Before seeking to litigate a resisting charge under these circumstances, Assistant State Attorneys should consider the proffered reasons for the initial stop, the underlying factual basis for the arrest, and whether there is any utility in litigation.

Under these facts, Assistant State Attorneys should err on the side of either declining to prosecute resisting cases or diverting them, unless there is an added public safety benefit to pursuing the charge.

⁹ Daniel S. Nagin, *Deterrence in the Twenty-First Century*, in Michael Tonry, ed., *CRIME AND JUSTICE IN AMERICA, 1975-2025*, v. 42 (2013), 201-202

3. Presumption of Diversion

Most resisting cases that are not dismissed will presumptively enter a specialized Diversion Program. If the defendant agrees to participate in the diversion, within 30 days of the charge being filed, the individual charged must watch an educational video. The video will cover both general and specific information about resisting police officers. The legal definition of resisting crimes and what kind of conduct could result in a person being charged with those crimes will be included in the video. Finally, the video will provide general information about the legal system and opportunities for civic engagement. Following completion of the program, the Assistant State Attorney will file a No Information or Nolle Pros of the case.

4. Frequency in Participation

A defendant may participate in the Resisting Officer Without Violence Diversion only once inside of a six-month period.

5. Litigating Resisting Cases:

Where an individual case presents unusual, aggravating circumstances, such as either a significant history of prior resisting cases, or egregious facts in the instant case regardless of criminal history, Assistant State Attorneys may obtain supervisor approval to proceed with prosecution of the case. An exception to this need for a supervisor's approval is if the defendant already has participated in the Resisting Officer Without Violence Diversion Program in the same six-month period; that second case would proceed to traditional litigation as a matter of course.