CRIMINAL JUSTICE REFORM TASK FORCE

TO: **Members of the MBAWNY**
FROM: **J. Miles Gresham, Samantha White, & John Elmore**
The Task Force Co-Chairs
DATE: **8/24/20**
RE: **Reforms for Consideration**

The murders of George Floyd and Breonna Taylor highlighted a policing problem in Black and Brown communities across the nation that has existed for decades. In Buffalo, we have seen a pattern of mistreatment of citizens of color at the hands of law enforcement officers. From police beatings at traffic stops to being called vile slurs by police management, the frequent mistreatment of Black and Brown people by Buffalo Police points to a dangerous culture of discrimination. We, the members of the Minority Bar Association of Western New York and its task force, say that it is past time for that culture to change. To that end, we are proposing the following reforms be implemented immediately:

1. Ban Body Camera Interference.

Body cameras create a clearer record of police-civilian interactions, but only when used properly. The Police Commissioner should implement a rule requiring that all police officers wear and activate body cameras when responding to a call for service or during any interaction with the public. The Police Commissioner should deem any violation to the rule requiring that the police officers wear and activate body cameras when responding to a call for service or during any interaction with the public as a major violation/ non-technical infraction of buffalo police department policy and procedures.

The Buffalo Common Council should codify the above requirement into local law and this Committee should support efforts to enact similar legislation on the state-wide level.

The State of Colorado just passed the Enhance Law Enforcement Integrity Act which instituted the body camera rules and inference of misconduct on which this proposal is modeled. Colorado's legislation (SB 20-217) provides that when a peace officer fails to activate a body-worn camera or dash camera as required by this new law or tampers with body-worn- or dash-camera footage or operation when required to activate the camera, there is a permissive inference in any investigation or legal proceeding, excluding criminal proceedings against the peace officer, that the missing

footage would have reflected misconduct by the peace officer.[1] The law also allows victims of police violence ability to sue under state law.[2]

Legislation requiring the use of body cameras when interacting with the public must include language concerning the permissive inference against the peace officer that the missing footage would have reflected misconduct by the peace officer.

2. Cut Court Overtime.

Section 2.8 of the Police Benevolent Association Contract provides:

"Police Officers who are required to appear in court before any regulatory or administrative agency for the purpose of testifying at any time other than during their own regularly scheduled work period shall be paid at their regular hourly rate for all time so spent and they shall be guaranteed at least four (4) hour of pay at their regular hourly rate for such time."[3]

Upon resumption of contract negotiations with the Police Benevolent Association, the City of Buffalo should take and maintain a position that Section 2.8 of the PBA contract be amended to change the amount of overtime given to police officers for court appearances and remove the financial incentive for frivolous arrests and charges.

The Buffalo Common Council should also pass a resolution making this change a requirement for the ratification of any future agreement between the City of Buffalo and the PBA.

3. Enhance Civilian Review Powers.

Oversight of the Buffalo Police Department is not in the hands of the taxpayers and citizens of Buffalo. Oversight of BPD has been described as "toothless."[4] Three oversight bodies exist in Buffalo: (1) Police Advisory Board; (2) Common Council's Police Oversight Committee; and (3) Commission of Citizen's Rights and Community Relations. The Advisory Board has no authority. The Police Oversight Committee, previously noted to meet rarely, does not investigate police misconduct.[5] The final body has been described as politically compromised given its conflicts of interest.[6]

1 2020 Colorado Senate Bill SB 20-217.

2 *Id.*; *see also* Russell Berman, *The State Where Protests Have Already Forced Major Police Reform*, The Atlantic, July 17, 2020.

3 PBA Contract

4 Geoff Kelly, *Buffalo's police watchdogs are toothless*, Investigative Post, June 11, 2020.

5 *Id.*

6 *Id.*

The Buffalo Police Internal Affairs Department clears officers of wrongdoing in 94% of cases.[7] Meanwhile, the Police Advisory Board doesn't even have the power to subpoena police records. As a result, the Buffalo Common Council should vote for and allow a referendum on a City Charter amendment that would allow for public disciplinary hearings and effective civilian oversight of the police.

The MBAWNY recommends that the City of Buffalo implement meaningful independent civilian oversight of the Buffalo Police Department by adopting all of the recommendations made by the Buffalo Police Advisory Board (BPAB) in June 2020. Specifically, the MBAWNY supports the passage of the proposed BPAB oversight law, which would overhaul the current oversight system and create two oversight entities with the following powers:

- An enhanced Buffalo Police Advisory Board, composed of 11 community members, with the new powers allowing the Board to: subpoena, approve or reject new BPD policies, set new BPD policy with Common Council approval, select candidates for Police Commissioner, review and hold hearings on police budgets, and require annual reports from the Police Commissioner.

- A Commission on Community Police Oversight, composed of 5 community members elected at-large, 5 community members appointed by the Buffalo Police Advisory Board, and a chairperson elected by the other 10 members, with the power to: receive complaints about police, fully investigate complaints using subpoena power, and make disciplinary recommendations.

This "auditor-monitor" model of independent oversight has been found to be the most effective model to establish community control of its police. This model is already being used in Oakland, Syracuse, and New York City, and should be implemented in Buffalo immediately.

At the state level, the Legislature should pass SB 7527, (a bill to repeal chapter 834 of the laws of 1940, which require disciplinary proceedings to take place within police department structures).[8]

The stated justification for SB 7527, in relevant part, is as follows:

"Unlike other public employees, whose disciplinary and removal proceedings are governed by section 75 of the Civil Service Law, chapter 834 imposes unique restrictions on removal procedures for police officers. While Civil Service Law § 75 allows agency heads to designate a 'deputy or other person' responsible for holding disciplinary proceedings, chapter 834 provides that the authority to conduct removal hearings for police officers can only be designated to a 'deputy or other employee' of the police agency head. Courts have interpreted this difference in terminology to mean that police disciplinary proceedings must take place entirely within police department structures."[9]

7 Daniela Porat, *Scant Oversight of Buffalo Police*, Investigative Post, February 15, 2017 ("Internal Affairs cleared officers of wrongdoing in 58 of the 62 completed investigations into excessive force complaints filed between Jan. 1, 2014, and mid-September 2016.").

8 2019-2020 NY Senate Bill 7527.

9 Id.

4. Make Police Disciplinary Hearings Public.

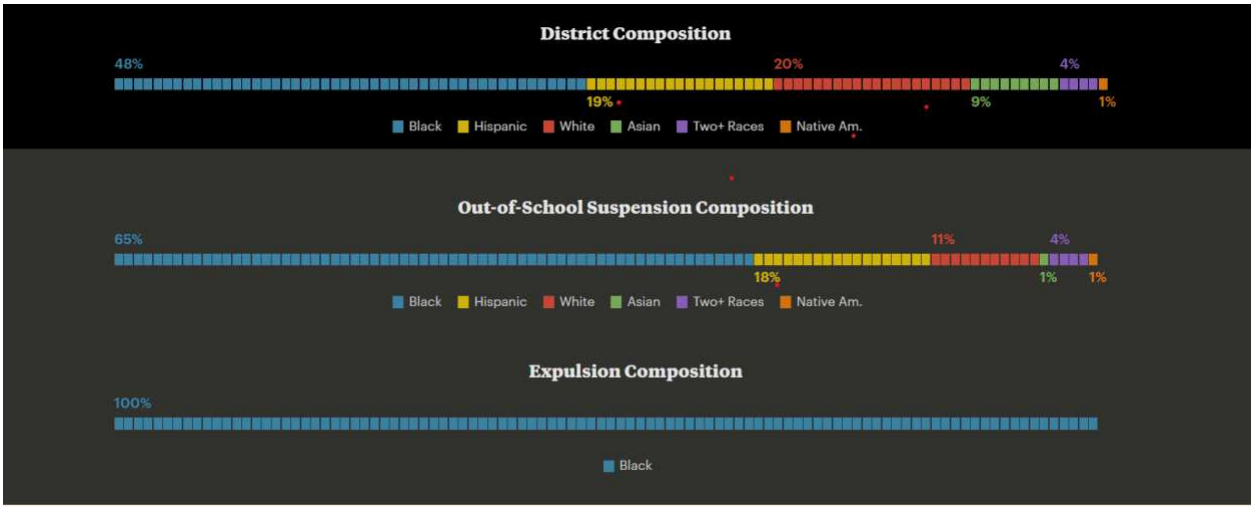
All police disciplinary hearings should be recorded and held in public. Members of our community have a right to know how our officers are disciplined, and why officers who commit misconduct against members of the public (sometimes with clear video footage) are allowed to keep their jobs.

The Buffalo Common Council should pass a local law requiring that all police disciplinary hearings be held in public and be made a matter of public record.

Should it be determined that public disciplinary hearings require a change in the PBA contract, the City of Buffalo should take and maintain a position that Article 12 of the PBA Contract be modified to allow for public disciplinary hearings.[10]

5. Get Police Out of Schools.

The criminalization of young people in schools is a trend that must be addressed. Racism, and its pervasiveness in our society, oftentimes makes criminalization inescapable for young students of color. For example, the graphic below shows how Black students in the Buffalo City School District are more likely receive harsh consequences for conduct:



[11]

The current practice of School Resource Officers (SRO's) stations officers in certain public schools. While not all interactions between children and SROs are harmful, this arrangement allows for students to be interrogated by a police officer without a lawyer or a parent present when accused of breaking the rules. This practice also facilitates the arrest of students for minor offenses. These adverse interactions between school children and the police are traumatic, harmful, and unnecessary.

10 PBA Contract

11 ProPublica Project: Miseducation.

The Buffalo Public School Board should end the practice of hiring SROs immediately. This action would put Buffalo in line with other large school districts, such as Minneapolis, Portland, Denver, and Oakland, which recently ended contracts with their respective police departments.

6. Pass Cariol's Law.

"George Floyd would be alive today if a police officer like Cariol Horne was on the scene."[12] Police who stop police misconduct should be protected, not persecuted.

The Buffalo Common Council should codify the duty to intervene rule in the Buffalo Police Code of Conduct into a local law. This is currently being discussed, and it has been proposed. The legislation has been referred to the Legislative Committee, which met on July 28, 2020, at 1p.m. The draft as of July 24, 2020 includes two relevant sections:

> **Section 2. PUNISHMENTS FOR OFFICERS WHO NEGLECT THEIR DUTY TO INTERVENE**
> Sworn employees who fail to intervene in situations where an objectively reasonable officer would determine that physical force is unnecessary or being inappropriately applied and their negligence results in physical injury may be held criminally responsible for their failure to intervene. Upon investigation, an officer determined to have failed in their duty to intervene may be convicted of criminal negligence by a peace officer, a Class A Misdemeanor.
>
> **Section 3. PROTECTIONS FOR OFFICERS WHO INTERVENE** Any sworn employee who in the performance of their duties observes a fellow officer using inappropriate or unnecessary force against a civilian and intervenes as is required by Section 1 of this law will be held harmless by the Buffalo Police Department and will be protected from job-related disciplinary measures. Retaliation against whistleblowers or Good Samaritans who interrupt police misconduct will be grounds for termination of employment.

However, this agenda item was tabled by the Legislative Committee, which met on July 28, 2020, at 1p.m.[13]

7. End Car Searches Based on Marijuana

Black people in America are disproportionately targeted for crimes involving drugs despite statistical evidence indicating that white people in America are just as likely (and in some studies more likely) to use drugs.

12 *A Buffalo police officer says she stopped a fellow cop's chokehold on a black suspect. She was fired*, CBS News, June 19, 2020 ("[Neal] Mack, the suspect at the center of the nearly 14-year-old case, maintains to this day that Horne saved his life.").

13 *See* Common Council Agenda Item 20-948.

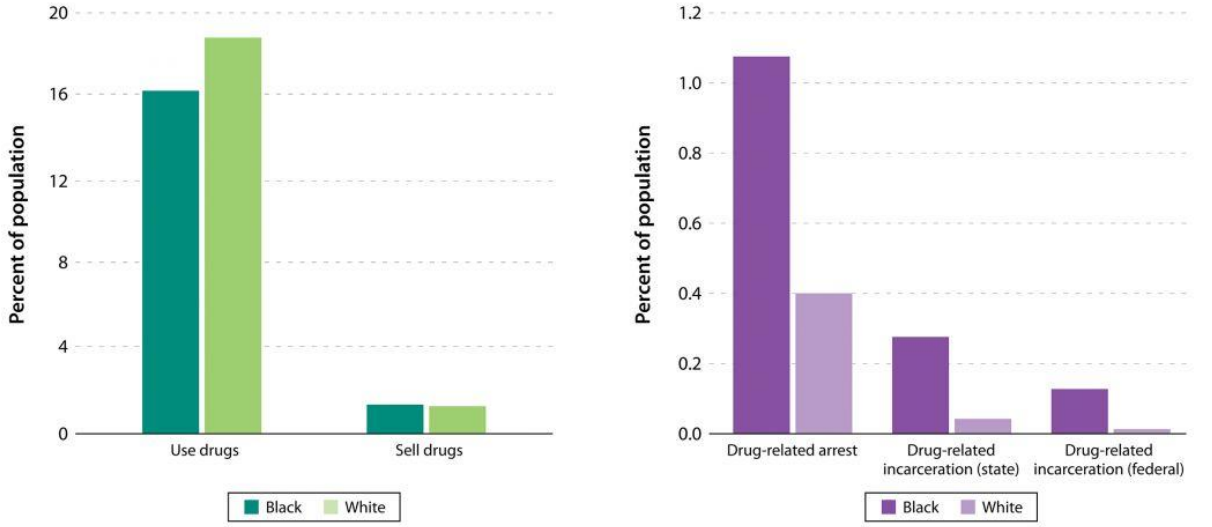
FIGURE 6A.

Rates of Drug Use and Sales, by Race

FIGURE 6B.

Rates of Drug-Related Criminal Justice Measures, by Race

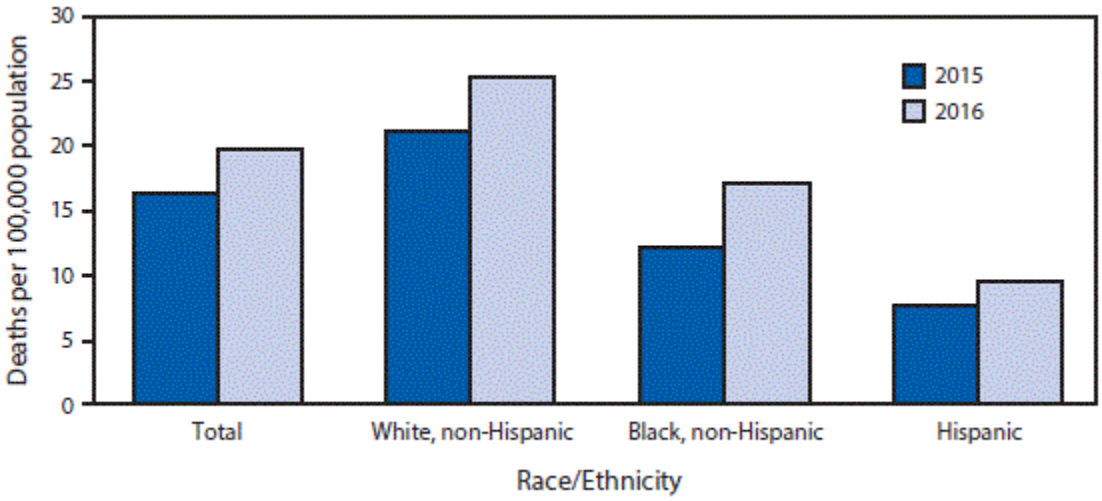
At the state level, blacks are about 6.5 times as likely as whites to be incarcerated for drug-related crimes.



Source: BLS n.d.c; Carson 2015; Census Bureau n.d.; FBI 2015; authors' calculations.

THE HAMILTON PROJECT BROOKINGS

Furthermore, data from 2015 and 2016, shows that white people in America are also more likely than any other demographic to have a cause of death associated with drug overdoses.[14] The graphic shows the age-adjusted death rates from drug overdoses in 2015 and 2016.[15]



14 QuickStats: Age-Adjusted Death Rates for Drug Overdose, by Race/Ethnicity — National Vital Statistics System, United States, 2015–2016. MMWR Morb Mortal Wkly Rep 2018;67:374.

15 *Id.*

The chronic dissemination of mistruths about drug use among Black Americans continues to perpetuate the criminalization of Black people in America.

Several states have already started reviewing the law concerning warrantless searches and marijuana. For example, "In a 4-3 ruling, the Colorado Supreme Court ruled that, under the state constitution, a dog trained to alert to marijuana cannot be used before an officer establishes probable cause that a crime had been committed."[16] "Massachusetts' highest court has said repeatedly that the smell of marijuana alone cannot justify a warrantless vehicle search. In Vermont, the state Supreme Court ruled in January [of 2019] that the 'faint odor of burnt marijuana' didn't give state police the right to impound and search a man's car."[17]

In light of the national discussion stemming from police conduct towards George Floyd--and on the local level Martin Gugino--Buffalo Mayor Byron Brown introduced Executive Order 2020-001.[18] Mayor Brown indicated that routine traffic stops and minor offenses should not be grounds for physical confrontation between citizens and police officers.[19]

In Executive Order 2020-001, the Mayor requested that "the Police Commissioner to ensure that the smell or possession of marijuana, on its own, no longer be just cause for the search of a person's residence or vehicle."[20] The Police Commissioner should issue a rule implementing this order immediately.

16 Elise Schmelzer, *Colorado Supreme Court rules police need probable cause before using pot-sniffing dogs to search for drugs*, Denver Post, May 20, 2019.

17 Michael Rubinkam, *In era of legal pot, can police search cars based on odor?*, Associated Press, September 13, 2019.

18 Executive Order 2020-001.

19 Executive Order 2020-001.

20 *Id.*