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June 17, 2019

Honorable Judge John Zakowski  
Brown County Circuit Court  
Via E-File System

**Re: SENTENCING MEMORANDUM for SHAWN GRAY, 17-CF-1570**

Dear Judge Zakowski,

Please accept the following Sentencing Memorandum for the above case set for sentencing before the Court.

Your sentencing decision in this case will be one of the most important decisions made about my client's life in his entire life. Given the gravity of your decision, we ask you to consider the defense's recommendation as provided and justified below:

**Mr. Gray's Recommendation:**

- Count 1:
  - 60 months of initial confinement and 60 months of extended supervision.
- Counts 4, 5, 8, 10, 14:
  - 36 months of initial confinement and 60 months of extended supervision.
- Terms and conditions consistent with drug supervision.
- 617 days of credit for time served (October 10, 2017 to June 19, 2019).

**The Troubling Nature of Len Bias Homicide Cases**

Wisconsin leads the nation in using the Len Bias / Drug Overdose Homicide law. As in this case, the State is routinely misapplying the law to pursue addicts for their fellow addicts' deaths. The following statistics show the misapplication of the law.

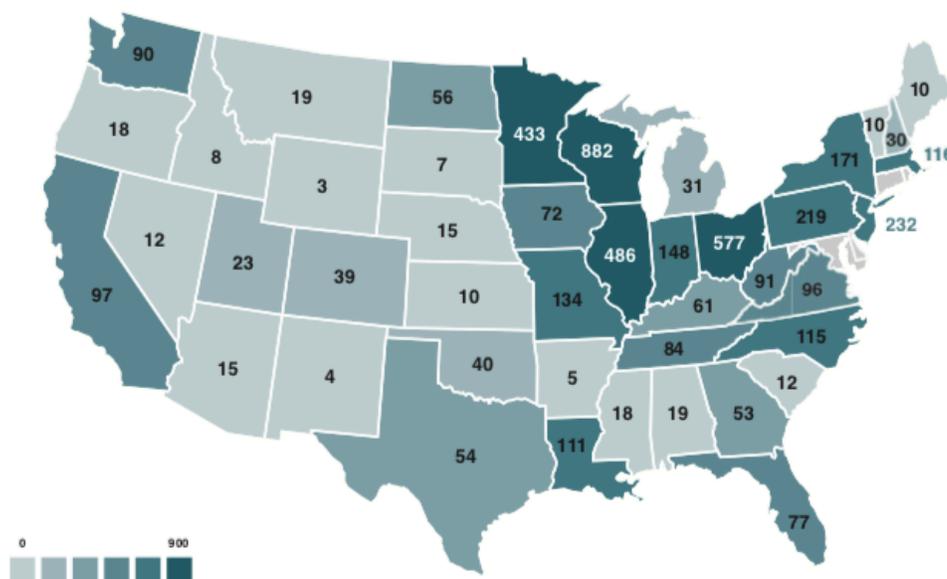
In 2017, there were 1,171 reported overdose drug deaths in Wisconsin. Over 78% are attributed to opioid use. (Wisconsin Department of Health and Human Services WISH database). Assuming the vast majority of these cases were the result of illegal narcotics (heroin and fentanyl) overdoses, modestly estimating – there were a thousand drug transactions where a delivery of narcotics resulted in an overdose death – and therefore, create liability for homicide.

In comparison, over a fifteen-year period from 2000-2014, the average number of prison admissions for all homicide charges was just under 112. There is a disconnect then between historical homicide convictions – and the enormous increase in potential homicide liability stemming from the opioid epidemic.

This vast increase in the potential for homicide liability due to the opioid epidemic compared to the historical averages of homicide offenders is an untenable policy position. The potential of increasing homicide prosecutions and imprisonments ten-fold displays a absence of a reasoned approach to the opioid epidemic. Wisconsin's overuse of the Len Bias law is not only an academic possibility – in fact, it has already occurred.

Wisconsin is already the epicenter for the use of the Len Bias law. In a study performed by the Drug Policy Alliance Wisconsin is the clear leader in media mentions of Len Bias prosecutions from 2011 to 2016.

**Map 2.** New Mentions of Drug-Induced Homicide Prosecutions by State (2011-2016)



[https://www.drugpolicy.org/sites/default/files/dpa\\_drug\\_induced\\_homicide\\_report\\_0.pdf](https://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf) (last accessed 11/25/2018).

If the policy of pursuing drug addicts with homicide charges is effective as a general deterrent, Wisconsin's policy should result in a bending of the curve of opioid overdoses. However, Wisconsin's DHS statistics do not support a conclusion that law enforcement is effectively dealing with our opioid crisis.

### **Flawed Premise: The Inherent Shared Culpability of Len Bias Charges**

In most criminal cases there is a strong and unmistakable line between the offender and the victim. For instance, in a bank robbery, the robber is clearly the offender. The bank, employees and customers are clearly the victims. That is not the case in Len Bias cases.

Every Len Bias case includes an overdose victim who voluntarily ingested the narcotic that resulted in their own death. In any other situation where a person voluntarily ingests

an illegal narcotic, that voluntary act is not a defense for any subsequent action taken by that person. (including possession of the drug or paraphernalia itself). *See Wis. Stat. 939.42.*

But, to show action in combatting the opioid epidemic, State prosecutors are rushing to convert otherwise criminal behavior (obtaining and ingesting illegal narcotics) into victimization.

In fact, the State prosecuted the victim in this case, Ms. Skeen for felony drug possession in 2015. After her addiction caused her to not be able to fulfil her obligations in the heroin court, the State of Wisconsin incarcerated Ms. Skeen up until just days before her overdose death.

Consider if on June 1, 2017 Ms. Skeen had not died of the overdose, but her unborn child had been lost. The defense presumes the State would have charged her with causing that death under the same law. It is simply unjustifiable to treat the same people as either offender or victim simply based on the occurrence of their accidental death not the acts that precipitated their death. Status under the law should not be akin to a game of Russian Roulette where the spun pistol is a particular person's physiological response to a particular ingestion of narcotics.

Last year, undersigned counsel conducted a survey of all of Wisconsin's 2015 Len Bias cases by reviewing the criminal complaints in each case. Of the 81 charges issued, only 19 were commercial drug dealers (deliveries that were performed solely for financial benefit – not by another addict/middleman/connection for joint use or to otherwise support their own addiction). Therefore, the Len Bias law is being applied largely against other addicts – not those who are financially benefiting from the drug trade.

### **Facts on Addiction and Criminal Behavior**

Even those who work in the criminal justice system struggle to understand addiction and its relationship to crime. This misunderstanding is present in the instant case's PSI report by Shelley Hockers wherein she states:

It is clear Mr. Gray has an AODA issue to address. However, it is unlikely this is the driving force behind his ongoing criminal activities. It is plausible his criminal cognition was a contributing factor to his involvement in this offense. He made conscious decisions to perpetuate his addiction by selling not only his Suboxone, but also heroin he knew was making others sick.

(Gray PSI, Document 68 at Page 31).

It is unclear how Agent Hockers came to make this statement. The statement has no grounding in the case's discovery materials or from any interview conducted by the agent.

In fact, every aspect of Mr. Gray and Ms. Nygren's existence in 2017 related to their persistent, uncontrollable addictions - especially their criminal endeavors. The State would agree the limited drug and Suboxone sales performed by the couple were solely to maintain their ability to buy drugs to feed their addictions. They were not commercial dealers and did not "profit" from their actions.

Each person in the transaction – Gray, Nygren, or Skeen were irrational actors who could not recognize the true recklessness of engaging in their addiction. In fact, it is the neurochemical and functional changes in the brain associated with severe substance use disorders that helps to explain why an addicted person would ever purchase heroin for another addicted heroin user. In other words, in the defense's view, no person who truly contemplates the recklessness of shooting an unknown narcotic substance straight into their bloodstream can be thought of as a rational actor. Only an unstoppable addiction could cause this loss of capability. This view is supported academic and government research.

Medical and clinical experts define substance use disorder as "an underlying change in brain circuits," leading to "a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems." Am. Psychiatric Ass'n, Diagnostic and Statistical Manual or Mental Disorders 483 (5<sup>th</sup> ed. 2013) (DSM-5).

Thus, while addiction was "once viewed largely as a moral failing or character flaw,"<sup>1</sup> it is now recognized internationally as "a disorder of the brain," similar to "any other neurological or psychiatric illness," and is considered a chronic, but treatable disease.<sup>2 3</sup>

When a person is ill with severe substance use disorder, the brain's neural circuitry changes, resulting in a behavioral disorder. (Surgeon General's Report, at 2-5.) These disruptions in the brain impair executive function, triggering dysfunction in a person's "ability to organize thoughts and activities, prioritize tasks, manage time, make decisions, and regulate one's own actions, emotions, and impulses." (*Id.* at 2-16.)

Additionally, a hallmark of the illness is the development of a tolerance "where higher doses of the drug are needed to produce the same effect."<sup>4</sup>

In response to the body's tolerance, drug use escalates, and abstention leads to withdrawal, which can occur as soon as a few hours after last use. *Id.* In addition to causing extreme "physical symptoms, such as bodily discomfort, pain, sweating, and

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<sup>1</sup> U.S. Department of Health and Human Services, Office of the Surgeon General, Facing Addiction in America: The Surgeon General's Report on Alcohol, Drugs, and Health, ch. 2. (2016).

<sup>2</sup> World Health Organization, Neuroscience of Psychoactive Substance Use and Dependence Summary 14 (2004).

<sup>3</sup> See generally Drug Facts: Treatment Approaches for Drug Addiction, National Institute of Drug Abuse (Jan. 2018). <sup>8</sup> See also AMA Applauds Surgeon General Report on Substance Use Disorders (Nov. 16, 2016) ("addiction is a chronic disease and must be treated as such").

<sup>4</sup> National Institute of Drug Abuse Impacts of Drugs on Transmission (March 9, 2017).

intestinal distress, and in the most severe cases, seizures,” withdrawal also triggers severe anxiety and excruciating negative emotions. (Surgeon General’s Report, at 2-19 to 2-20).

The acute mental and physical agony experienced during withdrawal triggers intense cravings and obsessive thinking about the drug that will provide relief. (*Id.* at 2-19 to 2-20. Indeed, “active recruitment of stress systems” causes a person suffering from addiction to endure “intolerable distress when without the drug.”<sup>5</sup> Consequently, “addicted individuals, for whom (the brain’s) motivational system is dysregulated, are driven to escape intolerable stress... (such that) the drug is often not even experienced as pleasurable, (but) merely as relief.” *Id.*

**The opiate epidemic pre-dates Mr. Gray’s involvement and will continue unabated.**

This Court is no stranger to Brown County’s own local struggle within the national opiate epidemic. The defense would like to place the instant offense into a larger context. Our federal government answers the question of “how did this epidemic happen?” with the following statement:

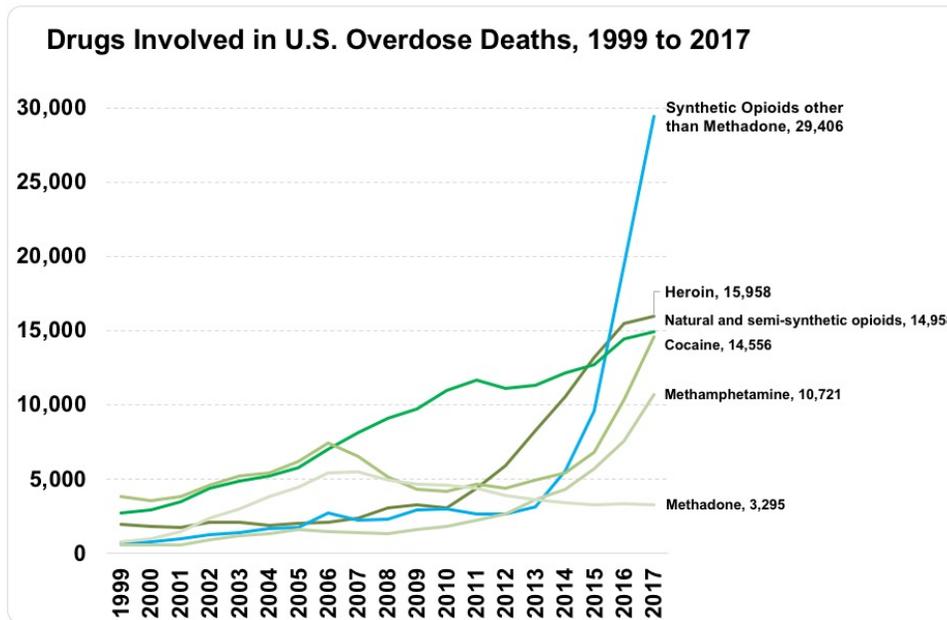
In the late 1990s, pharmaceutical companies reassured the medical community that patients would not become addicted to prescription opioid pain relievers, and healthcare providers began to prescribe them at greater rates. This subsequently led to widespread diversion and misuse of these medications before it became clear that these medications could indeed be highly addictive. Opioid overdose rates began to increase. In 2015, more than 33,000 Americans died as a result of an opioid overdose, including prescription opioids, heroin, and illicitly manufactured fentanyl, a powerful synthetic opioid. That same year, an estimated 2 million people in the United States suffered from substance use disorders related to prescription opioid pain relievers, and 591,000 suffered from a heroin use disorder (not mutually exclusive).<sup>6</sup>

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<sup>5</sup> From Reward to Relief: The Complex Neuroadaptations Underlying Addiction, 31 American Academy of Addiction Psychiatry News 5 (Summer 2015).

<sup>6</sup> Opioid Overdose Crisis. National Institute on Drug Abuse. (March 2018). <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis>.

Placed in graphic form, the extent of the epidemic is incredible:



The defense offers the above to place this case within the larger national context and to pose the rhetorical question of “how does imposing *fifteen years* of initial confinement on an indigent, drug addict defendant aid the end of this nation-wide epidemic?” The defense believes the question to be rhetorical as it appears clear that Mr. Gray’s involvement in this national crisis is statistically insignificant.

The defense asks that this Court focus its sentencing powers on fashioning an appropriate sentence for Mr. Gray and our community – that would set up Mr. Gray to join the legitimate workforce, provide for a future family, and to be specifically deterred from further criminal conduct, while providing enough incarceration time as to display to Mr. Gray and the community that his conduct will not be tolerated.

Mr. Gray, Ms. Nygren and Ms. Skeen all suffered from a terrible addiction. The defense asks this Court to fashion a sentence that fairly addresses the conduct that led to this tragedy – but to not lose sight of the entirety of the dynamics at issue in this matter.

Thank you,

*Daniel Adams*

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Attorney Daniel M. Adams  
for Mr. Gray