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Honorable Judge Joseph Wall  
Milwaukee County Circuit Court  
Via Electronic Filing

## **Re: Sentencing Memorandum for Devon Words.**

Dear Judge Wall,

Please accept the following Sentencing Memorandum for the above case set for sentencing before the Court. The sentencing decision in this case may be the most important decision made about Mr. Word's life in his entire life. We respectfully submit the following recommendation:

### **Mr. Words' Sentencing Recommendation:**

- 6 years of probation.
- Stayed prison - 5 years of initial confinement and 5 years of extended supervision.
- No contact with the victim's family, their residences, and places of work.
- Order the Department of Corrections to impose electronic monitoring for the first 12 months of probation.
- 235 days credit for time served.

The defense believes this sentence recommendation results in the "minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." *McCleary v. State*, 49 Wis.2d 263 at 276. (1971).

### **2<sup>nd</sup> Degree Intentional Homicide Convictions are Extraordinarily Rare**

Every case is unique. ("[N]o two convicted felons stand before the sentencing court on identical footing...and no two cases will present identical factors.") *State v. Lechner*, 217 Wis. 2d 392, 427, 576 N.W.2d 912 (1998). However, this case is especially so. The usual guideposts of appropriate penalties for homicide convictions are not helpful. The appropriate penalty should be closely tailored to the actual conduct and background of the defendant, which in this case, create significant mitigating factors.

The defense asked the research firm Court Data Technologies, to analyze how many 2<sup>nd</sup> Degree Intentional Homicide trial convictions have occurred in Wisconsin since 2010. The results of the research are notable: during this almost 10-year period there have been only 4 jury convictions for 2<sup>nd</sup> Degree Intentional Homicide.

When considered against the great number of homicide-based entries into the Wisconsin Prison System (averaging 112 annually)<sup>1</sup>, 2<sup>nd</sup> Degree Intentional Homicide convictions by

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<sup>1</sup> Intake average is derived from a March 1, 2019 email exchange between Attorney Adams and UW-Madison Professor Emerita of Sociology Pamela Oliver. Professor Oliver specializes in criminal justice system data.

juries account for 1/3 of 1% of all homicide offenders entering our state's prisons. Simply put, 2<sup>nd</sup> Degree Intentional Homicide trial convictions are as scarce as hen's teeth.

Prior to the overhaul of all homicide laws in 1988, Mr. Words' conduct would have been categorized as Manslaughter, then codified at Wis. Stat. 940.05 which stated in part:

Whoever causes the death of another human being under any of the following circumstances is guilty of a Class C felony:

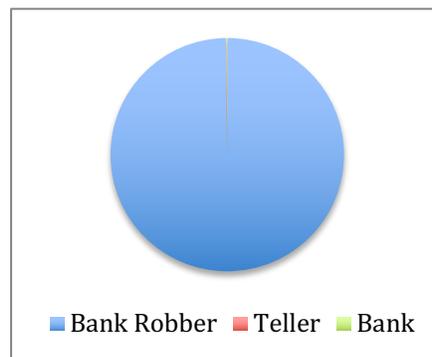
- (1) Without intent to kill and while in the heat of passion, or
- (2) Unnecessarily, in the exercise of his privilege of self-defense or defense of other or the privilege to prevent or terminate the commission of a felony.

Both of these theories of liability are consistent with the jury verdict in this case.

Notably, Manslaughter was punishable at the time with a then-Class C felony with a maximum term of imprisonment of 10 years (and further subject to the old parole system).

#### **About the Relative Culpability of Mr. Words Vis-à-Vis the Victim.**

In most criminal cases, there is little dispute over the relative culpability of the offender versus the victim. A classic example would be a bank robbery: a Bank Teller and Bank that are robbed bear zero culpability in the decision of the robber to commit his crime.



Here, the jury has found Mr. Words culpable for the convicted crimes. However, as was clear from the trial, the context and lead up to the firing of the single gunshot was the culmination of a chain of poor behavior of others, including the victim.

Below is a list of events preceding the single shot that bear upon each actors' culpability.

- Deondra Brown, Michelle Brooks, victim Byron Burrows, and Devon Words all trade jibes on Facebook. Burrows comments to Words that "you'll get that smoke." Words understands this to mean Burrows would shoot him.
- Brown decides to block Words and Brooks from doing a real estate walk through her lower unit.
- Brown asks Burrows to come to her home to block the viewing or intimidate Brown and Words during the viewing.
- Brown left work early and made sure her child was at a different location in anticipation of trouble during the real estate viewing.

- Burrows, a CCW permit holder, brings a pistol to the house in anticipation of trouble during the real estate viewing.
- Brown and Brooks engage in yelling – and then physical altercation.
- Words arrives after the start of the viewing – while on the telephone with one of his insurance clients.
- According to Jeffrey Bartowicz, the realtor, Words was acting as a “peacemaker” attempting to calm the scene.
- According to home seller Hansi Zimmerman, Words asks her to “call 911.”
- Words asked Zimmerman to call 911 after seeing Burrows’ gun in his waistband.
- Given the physical nature of the fight between Burrows, Brown and Brooks, it was unrealistic that Words could have left the scene without involving himself.
- Again, according to Bartowicz, the physical fight between Words and Burrows was mutual. He testified it was a “death struggle,” “they meant business,” “trading blows,” “slugging,” and “grabbing necks.”
- Only one shot was fired. No witness saw Words brandishing the pistol before or after the shot.

It would be foolish to attempt to create any graph depicting the level of culpability for Words in relation to Brown, Brooks, and Burrows. However, unlike other crimes, the context of the offense clearly displays the shooting was the culmination of many bad acts – the ultimate result was the tragedy of Burrows’ death.

### **Considering the Victim’s Conduct is a Well-Established Mitigating Factor**

Undersigned counsel is always wary of being accused of “blaming the victim,” and incurring the disfavor of a sentencing court for pointing out victim conduct at sentencing. However, victim conduct is a well-established mitigating factor for determining sentence length. No less of an authority than the United States Sentencing Commission has formally adopted this factor. Section 5K2.10 states the following:

If the victim’s wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding whether a sentence reduction is warranted, and the extent of such reduction, the court should consider the following:

- (1) The size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant.
- (2) The persistence of the victim’s conduct and any efforts by the defendant to prevent confrontation.
- (3) The danger reasonably perceived by the defendant, including the victim’s reputation for violence.
- (4) The danger actually presented to the defendant by the victim.
- (5) Any other relevant conduct by the victim that substantially contributed to the danger presented.

(6) The proportionality and reasonableness of the defendant's response to the victim's provocation.

The trial presented evidence relevant to each of the above six factors. (1) The victim was a large, stockily-built man. At the time of the incident, Mr. Words was recuperating from a significant shoulder injury. (2) The victim brought the firearm to the residence and was the first of the men to begin physically fighting. Mr. Words actively tried to calm the conflict, call 911, and act as the "peacemaker. (3) Mr. Words knew the victim meant him harm through his previous Facebook statements (i.e. "get that smoke"), the possession of the pistol and physically fighting him. (4) The fight and the presence of the pistol created actual danger to Mr. Words. (5) The entirety of the context of the single shot give rise to this factor. (6) Mr. Words at most (the defense does not concede he pulled the trigger) fired a single shot. Even considering the State's view of the evidence, Words did not have the time or opportunity to aim a shot. The time between Zimmerman's call to 911 and the shot is less than 20 seconds. Mr. Words did not shoot multiple times. The defense views all six factors as being extremely mitigating and persuasive.

### **Origin of the Weapon**

One fact of consequence, who brought the pistol to the argument, was contested at trial. The State presented one, speculative item to support the idea that Mr. Words obtained the pistol from Brooks' upstairs unit – there was an unloaded, 9mm magazine in a bag in the upstairs living room closet. The State speculated that this was part of a matching couplet of magazines. However, this theory is falls under its own weight.

- First, Burrows, not Words, had the incentive to bring a pistol to the home. Words was not anticipating "drama" during the showing. In contrast, Burrows was asked by Brown to come to the house specifically to cause a scene and/or intimidate Brooks and Words.
- As he was acting as a "peacemaker" and asking to "call 911" it is odd that Words would then arm himself.
- If Words had intentionally armed himself to protect himself or Brooks – he would have brandished the pistol openly, displaying the pistol to Burrows in an attempt to back Burrows off and end the physicality of the dispute. It does not follow that he was hide the pistol until after he was rolling around on the front lawn in a mutual, physical fight.
- To arm himself with a pistol (assuming the State's argument regarding its location), Words would have had to run upstairs (not witnessed by Brown, Bartowicz, or Zimmerman) traverse through the entire apartment to the living room, past Brooks' daughter and his infant son who were in the residence, open the closet, unzip the firearm bag, re-zip the firearm bag and place it back into the closet (this is how the bag was found by police), and go back downstairs – again without any of the witnesses seeing him brandish or possess the pistol.
- Due to a Motion in Limine – the jury was not presented with other facts regarding the firearm bag. Brooks did own a MAC10-styled 9mm gun that was found in the bag with the unloaded 9mm magazine. Brooks purchased the gun from an acquaintance because she was being threatened and stalked by a former boyfriend and wanted a threatening looking gun to protect herself. However, she never used the gun and never so much as took the gun to a shooting range. The unloaded 9mm magazine must have been included during the purchase. No 9mm pistol paraphernalia was

found. Moreover, no DNA or fingerprints were found on any firearm related items in Brooks' apartment.

- Also due to a Motion in Limine – the jury was not presented with Burrows' pistol ownership. As previously stated, Burrows was a valid CCW permit holder and was known to carry a pistol for protection. However, upon search of his residence, there was only one pistol found and it was inoperable. It is illogical that a CCW permit holder would regularly carry an inoperable pistol. What is likely, is that Burrows brought his operable pistol to the house in anticipation of trouble and it was this pistol that was fired.

### **Mr. Words' Actions After the Shooting**

Multiple witnesses testified that after the single gunshot, Words appeared shocked. Words was not continuing to point the pistol or attempt to fire more shots as would be expected if he were firing in a fit of rage.

Certainly, in retrospect removing the pistol from the scene was not Words' best course of action. However, as this Court is aware, the effects of trauma often result in ill-advised behavior caused by confusion, depersonalization, and panic. Words did attempt to gain counsel regarding what to do – his telephone records indicate several calls to Attorney William Sulton's cellphone immediately after the incident. They were only able to connect after Words discarded the pistol.

### **Body Positions During at the Moment of Shot**

The State's theory, that Burrows was turned from Words and in a crouched or kneeling position while Words was in a standing position does not match the physical evidence on scene. As the bullet path shows a straight trajectory and Burrows was instantaneously, immobilized, the bullet would have struck the soil under his head. It would be expected that the bullet would have been found in the area of the blood stains. However, even after using metal detectors, the police did not find the bullet.

Words' recollection, consistent with that of Bartowicz, was that the men were wrestling on the ground. Words grabbed Burrows wrist and the pistol was discharged in an upward direction. Words recollection is more consistent with the physical evidence.

### **This Court Should Reject a Trial Penalty in the Guise of Arguments Regarding Acceptance of Responsibility**

The instant case was always to be a "trial case," meaning the controversy over criminal liability was apparent and required a formal fact finding by a jury. The contradictory witness statements, biases of the witnesses, lack of corroborating physical evidence, and context of the fight proceeding the single gunshot created the necessity for a trial.

Unfortunately, it is undersigned counsel's experience that the decision to exercise one's rights to a jury trial are often met with the State's later sentencing argument that a more severe penalty should result due to a defendant "not accepting responsibility." Simply put, this argument is a thinly disguised argument asking for defendants to be punished for exercising their 6<sup>th</sup> Amendment right.

Moreover, while "acceptance of responsibility," is often cited as a rationale for leniency for cases that resolve via plea negotiations, this term is not found in *State v. Gallion*, 270 Wis.2d 535 or *McCleary v. State*, 182 NW 2d 512, the seminal cases on Wisconsin sentencing law.

### **Mr. Words' Professional Background**

As the Court contemplates Mr. Words' rehabilitative needs, it should be noted he has proven himself a successful businessman and self-starter. His background should alleviate any concerns about his need for vocational or housing risk mitigation.

Mr. Words started his work history like many in Milwaukee – working concessions at Miller Park and the Bradley Center. However, in his early-20s he began working for the Heiser Automotive Group where he applied to wash cars, but was hired as a salesman. He moved up the ranks to sales floor manager. On the side, Mr. Words started his own snow plowing business which he operated from 2006 until 2012.

In 2012, Mr. Words began working in real estate and purchased a dilapidated house. With a credit union loan and his own hard work, Mr. Words rehabilitated the house into a nice single-family home. Mr. Words taught himself carpentry through “How-To” books and YouTube videos. He would go on to rehabilitate many houses around Wisconsin.

Around this time, Mr. Words started his own branch of Farmer's Insurance. He later sold his entire book of business (with over 800 clients) to start an independent insurance agency, Words Insurance Agency. From scratch, he built a book of nearly 1100 clients.

Prior to the instant case being filed in 2018, Mr. Words and Ms. Brooks formed their own construction company. The company was providing full service contracting and employed 5 workers and subcontractors.

### **Mr. Words' Personal Background**

Mr. Words has not had an easy life and it is marked with personal tragedy. He knows firsthand about the impact the death of a loved one can have on an individual. He has drawn on these experiences to empathize with the victim's family in the instant case.

Mr. Words was raised by his mother who suffered from drug addiction. After a stroke and bad fall, she passed away. Despite the hardship, Mr. Words still refers to his mother as his “queen” and “angel.”

Mr. Words' father was present in his youth – and taught him about cars and snowplowing, however he was in and out of prison.

Mr. Words has several siblings. The closest, Derwin Jr., passed away in September of 2018 due to sickle cell anemia. Mr. Words and Derwin were best friends and confidants. Mr. Words continues to be devastated by Derwin's death.

Mr. Words' closest mentor and father figure was his grandfather Robert E. Words. Robert Words taught Mr. Words about life and real estate. He passed away shortly after Mr. Words' mother. The impact of these deaths in close proximity was extremely difficult for him.

### **Protection of the Public / Lack of Threat to the Community**

Mr. Words is not a criminal, unable to conform his conduct to the community's standards – and he is not a reckless or impulsive person who is susceptible to crimes of opportunity. For nearly four months, (April to July of 2018) the State had only charged this incident as a Possession of a Firearm, Adjudicated Delinquent. The homicide charge was only added later. During this time Mr. Words was largely out of custody. After the homicide charge was

issued, Mr. Words made bail and was in the community from August 21, 2018 until the end of the jury trial. No incidents of law breaking or inability to follow conditions of bond occurred. The period on electronic monitoring was nearly 17 months in total.

Not only did Mr. Words comply with pretrial supervision, but he also was able to continue servicing some of his contracting company clients.

For these stated reasons, the defense believes its sentencing recommendation to this Court is reasonable and will best serve justice in this case.

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