STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

CASE NO. 2020AP001157 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRY L. HIBBARD,

Defendant-Appellant.

Appeal from a judgment of conviction and an order denying postconviction relief entered in the Ozaukee County Circuit Court, the Honorable Paul V. Malloy, presiding.

BRIEF OF DEFENDANT-APPELLANT

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CASES CITED

WISCONSIN STATUTES CITED

OTHER AUTHORITIES CITED

ISSUES PRESENTED

Over the course of a weekend, Terry Hibbard and his daughter, Tara,[1] texted about getting heroin. Tara eventually arranged to buy some.

Towards the end of the weekend, a friend dropped Tara off at a gas station, where Hibbard was waiting. Hibbard then drove Tara to her dealer, and Tara used her own money to buy heroin. Once they'd returned home, Tara gave Hibbard some of the heroin she'd bought, keeping the rest for herself. By morning she had died of an overdose.

For his role in Tara's death, a jury found Hibbard guilty of first-degree reckless homicide as an aider and abettor. The statute he was convicted under, Wis. Stat. § 940.02(2)(a), is known as the Len Bias law.

Two issues are presented:

1. **Was the evidence sufficient to prove that Hibbard aided and abetted Tara's dealer (as opposed to Tara) in the drug deal that led to her death?**

The jury answered "yes," and the postconviction court upheld its verdict. This Court should reverse.

2. **Is the Len Bias law void for vagueness as applied to aiders and abettors?**

The postconviction court answered "no." This Court should reverse.

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[1] This brief refers to the victim by her nickname.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

In Wisconsin, opioid users increasingly face prosecution for reckless homicide when their co-users overdose and die. Whether the Len Bias law permits this draconian charging practice, however, remains a hotly contested issue—one with sweeping implications for overdose victims and their families, for defendants' futures, and for Wisconsin's battle against a persistent public health threat. A binding appellate decision clarifying the reach of the Len Bias law is therefore critical. This case is an opportunity to provide that decision, and Hibbard urges the Court to publish its opinion. *See* Wis. Stat. § 809.23(1)(a)1., 5. He does not, however, seek oral argument; the questions presented are purely legal, and the briefs should develop them in full. *See* Wis. Stat. § 809.22(2)(b).

STATEMENT OF THE CASE AND FACTS

Although Hibbard took his case to trial, the relevant facts were, and remain, undisputed.

In July 2017, Hibbard's daughter Tara spent the weekend with her ex-boyfriend in the Village of Sullivan. (113:145-48). While there, Tara texted with Hibbard about getting drugs. (113:143-47). Tara also communicated with her dealer, Davion Poe. (*See* 50:3; 113:148). Poe agreed to sell her some heroin when she returned from Sullivan on Sunday. (*See* 50:3; 113:148).

On Sunday morning, Tara's ex drove her to a gas station in Milwaukee, where Hibbard was waiting for her. (113:149). Hibbard then drove Tara to Poe's

location, and Tara got out of Hibbard's car and into Poe's. (*Id.*). After she bought the drugs she'd come for, Tara got back into Hibbard's car and they headed home. (*Id.*).

Back home, Tara gave Hibbard a small amount of heroin and kept the rest for herself. (*Id.*). Overnight, she died of an overdose. (39:1-2).

In the aftermath of his daughter's death, Hibbard worked with the sheriff's department to identify Poe and engage him in controlled buys. (21:1-2; 23:2; 50:4; 113:153). Due in significant part to Hibbard's cooperation, Poe was ultimately convicted of first-degree reckless homicide for selling Tara the heroin that killed her. (*See* 23:2; 114:9-10). He was sentenced for that crime to 18 years of imprisonment.[2] (*See* 114:9-10).

The same day Poe was sent to prison, the State filed a criminal complaint against Hibbard, alleging he too was liable for Tara's death—and charging him with the same crime Poe had been convicted of. (1:1-2; 21:2). The State later clarified that it was charging Hibbard as a party to Poe's crime. (22:1). Even later, it clarified that intended to prove Hibbard aided and abetted Poe (not that the two were co-conspirators). (113:7).

The case went to trial. (113; 114). After the State rested, defense counsel moved to dismiss, asserting

[2] After evidence had closed at trial, the circuit court took judicial notice of Poe's conviction, as no one was sure whether a witness had testified to it. (114:9-10). There was no objection. (*See id.*). Poe's conviction and sentence were also undisputed during postconviction proceedings. (*See* 86:5).

that the State had not "made a prima facie case." (113:197-98). While defense counsel framed his motion in a few different ways, he eventually zeroed in on the State's aiding-and-abetting theory. If "Hibbard aided anyone in this particular transaction," counsel explained, it was Tara "in her desire to acquire the drugs," not Poe in his desire to sell them. (113:205). The State disagreed. (113:201-05).

The circuit court held off on deciding the motion, saying it would look at the relevant jury instruction that night and consider the parties' arguments. (113:209). It noted, however, that while "a lot of people feel that this is not the type of case that the Len Bias law is designed to reach," its "inclination [was that] this case goes to the jury … and we'll see where we end up." (*Id.*).

While the parties and court discussed the jury instructions at length the next morning, there was no further mention of the motion to dismiss. (114:3-19). Thus, on the record at least, the court never explicitly ruled on it.

After closing arguments and instructions, the jury deliberated for just over half an hour before returning a guilty verdict. (46; 114:60, 62; App. 12). Hibbard was later sentenced to 10 years of imprisonment—six years of initial confinement and four years of extended supervision. (64:1-2; 115:43; App. 10-11).

At the postconviction stage, Hibbard raised three claims. (86:2-3). He first moved the court to reverse his conviction because there was insufficient

evidence to show he aided and abetted Poe, rather than Tara. (86:7-13). Alternatively, he moved the court to reverse his conviction on the grounds that the Len Bias law is void for vagueness if interpreted to encompass his conduct. (86:13-16). And finally, he moved for modification of his sentence based on a new factor: the correction of inaccurate information. (86:16-23). The postconviction motion explained that the State mischaracterized both his conduct and his heroin addiction at sentencing, leading the sentencing court astray. (*See id.*).

After multiple rounds of briefing and a hearing, the postconviction court denied all three of Hibbard's claims. (85; 86; 87; 88; 89; 90; 91; 92; 96; 99; 116; App. 3-9). It first emphasized that Hibbard made the drug deal possible by giving Tara a ride to Poe's location, holding that driving Tara to buy drugs was enough to aid and abet her dealer:

> Why Mr. Poe did not just simply drive … over to where [Tara] got dropped off … I don't know…. But the reality is that [Tara] did not feel she had the ability to get to where Mr. Poe was going to be, and she needed her father's assistance.
>
> …. The distance from that service station … to Highway 60 is I bet 14 miles. It's in the area of 12, 14 miles. So she had to have some way to get back from the transaction as well.
>
> …. [I]f this were both of them sitting at home … and [Tara] says … let's go get some heroin, and they kind of have a mutual plan … to get down there, but maybe she had other ways of doing it and he could have opted out, that probably would not enter into the aiding and abetting.

> Here, she did not have the ability to purchase that heroin, because for whatever reason they set up a place that was a couple miles from her….
>
> And that's where [Hibbard] came in. He provided the vehicle. He is the one that drove down there, and he is the one that kind of put the wheels to further this transaction in process…. [H]e knew that Poe was going to be committing a criminal act, and he acted in furtherance of that conduct. He was aware of the fact that a crime was being committed, and participated in its perpetration by driving [Tara].
>
> ….
>
> ….[Hibbard] did things that put this deal, that enabled Poe to deliver the drugs. Without [his] participation and assistance to [Tara] to getting there, she wouldn't get the heroin. And his payment for that assistance was essentially a line of highly potent heroin….
>
> …. I think there is enough evidence here for a question of fact to submit to the jury and let a jury decide. That's what I did. And I stand on that decision.

(116:21-23).

The postconviction court also rejected Hibbard's request for sentence modification, holding that he failed to establish a new factor.[3] (116:23-26). It concluded its oral ruling with a cursory denial of Hibbard's void-for-vagueness claim: "I don't think that the statute is unconstitutional in terms of what it

[3] Hibbard does not appeal this ruling.

allows a reasonable person to discern about their conduct approaching criminal conduct," the court explained. (116:26). "[Y]ou have to look at [the] presumption of constitutionality when you construe a statute. And when you read that, it's clear what is prohibited." (*Id.*).

This appeal follows.

ARGUMENT

I. There is insufficient evidence to prove that Hibbard aided and abetted Poe, rather than Tara, in the heroin sale that led to Tara's overdose death.

A. Introduction.

Wisconsin's drug laws, codified in Chapter 961, draw a line between users and dealers. *See* Wis. Stats. §§ 961.001(1r), (2). The legislature deemed the latter group more culpable and a greater "menace to the public health and safety." § 961.001(1r). Thus, it enacted statutes that treat those who "illicitly traffic" drugs more harshly than those "addicted to or dependent on" them. *See* §§ 961.001(1r), (2).

Case law rooted in this distinction holds that a person who participated solely in the buying side of a drug deal cannot be held liable for the seller's crimes as a party to a crime. *See generally State v. Hecht*, 116 Wis. 2d 605, 342 N.W.2d 721 (1984); *State v. Smith*, 189 Wis. 2d 496, 525 N.W.2d 264 (1995). To hold otherwise, the Wisconsin Supreme Court has explained, would enable "the unfortunate individuals

who are the ultimate users of drugs" to "be punished as severely as the distributors"—defying the basic aims of Chapter 961. *Smith*, 189 Wis. 2d at 502-03.

Here, as defense counsel argued in moving to dismiss this case mid-trial, the State proved that Hibbard aided and abetted Tara in buying drugs, not—under any rational view of the evidence—Poe in selling them. The evidence was therefore insufficient to support the jury's guilty verdict, and this Court should reverse.

B. Standard of review.

Whether the evidence is sufficient to support the jury's guilty verdict is a question of law subject to de novo review. *State v. Smith*, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410. This Court will uphold the verdict unless the evidence "is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Id.* (quoting *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)).

As noted above, there is no dispute about the historical facts in this case; it's their legal significance on which the parties disagree. The sufficiency issue is thus, at bottom, an issue of statutory construction: under the Len Bias and party-to-a-crime (PTAC) statutes, did Hibbard's buyer-side conduct aid and abet Poe's seller-side commission of first-degree reckless homicide? Put more simply, whom did Hibbard aid and abet: Poe or Tara? This Court will review these questions de novo, as the interpretation of a statute and its application to undisputed facts are

questions of law. *State v. Pinkard*, 2005 WI App 226, ¶6, 287 Wis. 2d 592, 706 N.W.2d 157.

C. Governing law.

A handful of statutes and cases govern. First is the statute Hibbard was convicted of violating: § 940.02(2)(a), or the Len Bias law.[4] Under this provision, delivering illicit drugs to a person who uses them "and dies as a result" constitutes first-degree reckless homicide. *Id.* The purpose of the law has been framed as "deter[ring] drug traffickers"—a laudable and uncontroversial goal.[5] It has gained notoriety, however, for leading to harsh penalties for "the lowest people in the drug supply chain," rather than "upper echelon drug manufacturers and distributors."[6]

The other statute that enabled Hibbard's prosecution is Wis. Stat. § 939.05, which establishes PTAC liability. Relevant here is the subsection providing that a person who "[i]ntentionally aids and abets the commission" of a crime "is a principal and

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[4] Len Bias was a rising basketball star whose overdose death spawned numerous "homicide by delivery of a controlled substance" statutes, including Wisconsin's. *State v. Patterson*, 2010 WI 130, ¶37, 329 Wis. 2d 599, 790 N.W.2d 909.

[5] Stephanie Grady, "'It's Been Used More and More,' But Is Wisconsin's Len Bias Law an Effective Deterrent to Opioid Abuse?" *Fox 6 Now* (Nov. 21, 2016, 9:14 PM), http://fox6now.com/2016/11/21/its-been-used-more-and-more-but-is-wisconsins-len-bias-law-an-effective-deterrent-to-opioid-abuse/.

[6] Drug Policy All., "An Overdose Death Is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane," 3 (Nov. 2017), https://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf.

may be charged with and convicted of" that crime as if he committed it directly. §§ 939.05(1), (2)(b).

Determining which crimes the participants in a drug deal are liable for, either because they committed the crimes directly or because they played a role within the purview of the PTAC statute, can be difficult. The first logical challenge is that buyers and sellers necessarily cooperate to make drug deals happen; does their cooperation implicate them in each other's crimes? The second is that many users sell drugs to support their habit, and many dealers end up with substance abuse problems—undermining efforts at meaningful line-drawing.

Two Wisconsin Supreme Court cases offer helpful guidance in navigating these complexities.

The first, *Hecht*, 116 Wis. 2d at 607, considered whether a person who wasn't quite a buyer *or* a dealer in the cocaine deal at issue was nevertheless liable for possession with intent.

The relevant facts were as follows. After buying cocaine from Steven Hecht, an undercover agent told him he had a friend who wanted to make a larger purchase. *Id.* The agent said he would pay Hecht for contacting a supplier. *Id.* Hecht didn't know a supplier, so he called his friend Virgil Vollmer, who did. *Id.* Some days later, a deal was arranged. *Id.* at 608-09. Hecht and Vollmer met up with the agent and his drug-seeking friend (actually another agent). *Id.* at 609. Then Hecht left, as the seller did not want extra people around for the transaction itself. *Id.* The others

drove to a prearranged location and found the seller, cocaine in hand. *Id.*

For his role in arranging the deal, Hecht was convicted of possession of cocaine with intent to deliver as a party to a crime. *Id.* at 610. On appeal, he argued that the evidence was insufficient to support his conviction since he'd merely connected the buyer and seller. *Id.* at 618. The supreme court was not persuaded. It held that Hecht's conduct met the criteria for aiding and abetting the seller in his commission of possession with intent, as Hecht "put into motion the wheels of a mechanism that would ultimately lead to a sale," then kept "kept those wheels turning." *Id.* at 624. For the same reason, it also concluded that Hecht was liable as the seller's co-conspirator. *Id.* at 625.

A decade later, in *Smith*, 189 Wis. 2d at 498, a different question of drug crime liability arose that again implicated the PTAC statute: is a drug deal a conspiracy between the buyer and seller?

The facts were simple. Thomas Smith was a seller who agreed to deliver a small amount of cocaine to a buyer for her personal use. *Id.* at 499-500. Before the deal could occur, however, the buyer called the police. *Id.* at 500. Smith was arrested and eventually pleaded guilty to conspiracy to deliver cocaine. *Id.*

On appeal, Smith argued that a standard "buy-sell agreement" cannot be a conspiracy and thus that his guilty plea was invalid. *Id.* The supreme court agreed. It explained that a conspiracy involves "at least two people, with each member subject to *the*

same penalty." *Id.* at 501 (emphasis added). But the legislature has prescribed very different penalties for the crimes that buyers and sellers commit. *Id.* at 501-02. Thus, when a seller delivers drugs to a buyer for her personal use, the two cannot be prosecuted as co-conspirators without flouting the legislature's expressed intent to treat them differently. *Id.* at 502.

Smith did not address whether classifying a buyer and seller as aiders and abettors of each other's crimes would similarly defy legislative intent. Still, it made clear that lawmakers distinguished dealers from users, that the former are more blameworthy and dangerous, and thus that separate penal statutes with disparate penalties apply to the two groups. *Id.* It follows that aider-and-abettor liability creates the same problems as conspiracy liability when used to punish a buyer for a seller's wrongdoing.

In sum, *Hecht* shows that ongoing involvement with a buyer and seller in the run-up to a drug deal can render a person liable for the seller's crimes, while *Smith* shows that a person involved exclusively with the buyer's side of a drug deal *cannot* be liable for the seller's crimes. This is a *Smith* case.

D. The evidence shows Hibbard was involved only with the buyer side of the drug deal at issue. It is therefore insufficient to support the jury's determination that he aided and abetted the seller.

Although Hibbard was convicted of aiding and abetting a dealer, he was, as a practical matter and a matter of law, just a buyer. Since that is all the trial

evidence shows, that evidence is insufficient to support Hibbard's conviction under the Len Bias law.

While roles shift and blend in the drug world, three aspects of Hibbard's conduct show he remained firmly on the buying side. First, he helped Tara, not Poe, effectuate the drug deal that led to her overdose: he urged her to set it up and then drove her to Poe's location once the deal was arranged—nothing more. Second, Hibbard's sole aim was to get heroin for his own use. And third, after Tara gave him some of the heroin she'd bought, he used it; unlike Tara, he did not hand off any of the drugs he acquired. In sum, Hibbard did everything he could to *get* drugs, but he did not deliver them, conspire to deliver them, or aid or abet their delivery. Like the buyer in *Smith*, not the intermediary in *Hecht*, Hibbard was solely on the buying side of the transaction in question. He cannot be held liable for the dealer's crimes.

Read in light of Chapter 961, which shows that the legislature intends to treat buyers and sellers differently, and in light of *Smith*, which says PTAC liability cannot collapse the distinction between the two groups, it is plain that Hibbard's buyer-side conduct did not violate the Len Bias law. *See Smith,* 189 Wis. 2d at 501-04. But should any uncertainty remain—should this court find the interplay between the Len Bias and PTAC statutes unclear—then the rule of lenity dictates the same result. *See State v. Kittilstad*, 231 Wis. 2d 245, 266-67, 603 N.W.2d 732 (1999). Resolving statutory ambiguity "in favor of the accused" means holding that the Len Bias law does not penalize buyer-side conduct that leads to an overdose death; it is the delivery side alone with which the law

is concerned. *See State v. Cole*, 2003 WI 59, ¶13, 262 Wis. 2d 167, 663 N.W.2d 700.

The postconviction court rejected Hibbard's sufficiency claim in part by ignoring the rule of lenity and in part by failing to heed the legislative line between buyers and sellers. Its analysis unfolded in three steps:

(1) Poe could not have sold drugs to Tara unless someone brought Tara to Poe's location.

(2) Hibbard was the only one who could bring Tara to Poe's location, and he did so.

(3) Thus, Hibbard aided and abetted Poe.

As this line of reasoning demonstrates, the postconviction court adopted a but-for causation approach to the aiding-and-abetting question. And it did so at the State's urging: "[I]t was only … but for Terry Hibbard that [Tara got] the drugs that cause[d] her death," the State argued," so "he aided and abetted the delivery of the drugs." (116:15-16).

But this but-for analysis defies the basic, binding holding in *Smith*: although a drug deal cannot occur but for a buyer's participation, such participation does not render the buyer a party to the seller's crimes. *Smith*, 189 Wis. 2d at 501-04. Something more than but-for causation is required, and that something is involvement with the seller side of the deal. That involvement may be ongoing communication with a seller and buyer in an effort to facilitate their transaction, as in *Hecht*. Or it may be direct commission of the drug delivery, as in Poe's

case. The specifics will vary, but liability for a Len Bias violation always requires involvement in the selling side, not just the buying side, of a fatal drug delivery. Because Hibbard was involved only in the buying side of the drug deal at issue, he aided and abetted only the buyer—Tara, not Poe.

Hibbard's conviction is thus grounded in a faulty reading of the Len Bias and PTAC statutes. The evidence presented at trial proved he behaved badly—that he used illicit drugs, participated in their purchase, and enabled his daughter to do the same—but it did not prove him a party to the crime of first-degree reckless homicide. Even viewing "the evidence in the light most favorable to the conviction," as this Court must, no reasonable factfinder could have found Hibbard guilty beyond a reasonable doubt. *See State v. Jensen*, 2000 WI 84, ¶23, 236 Wis. 2d 521, 613 N.W.2d 170. His conviction should therefore be vacated, and a judgment of acquittal should be entered. *See State v. Miller*, 2009 WI 111, ¶44, 320 Wis. 2d 724, 772 N.W.2d 188.

II. If Hibbard's buyer-side actions rendered him a party to the crime of first-degree reckless homicide, then the Len Bias law is void for vagueness as applied to aiders and abettors.

A. Introduction.

If this Court holds that Hibbard aided and abetted Poe rather than Tara, it should further hold that the Len Bias statute is unconstitutionally vague. There is undoubtedly some aiding-and-abetting

conduct that falls squarely within the proscriptions of the Len Bias law; imagine, for example, that Hibbard urged Poe to engage in a drug deal with Tara and then drove Poe to Tara's location (instead of vice versa). But if what Hibbard *actually did* was enough to violate the Len Bias law, then there is a broad range of buyer-side behavior about which reasonable laypeople—as well as police, prosecutors, judges, and juries—will have to guess. Due process requires far greater clarity.

B. Standard of review.

Statutes are presumed constitutional, and a party claiming otherwise must prove the challenged statute's unconstitutionality beyond a reasonable doubt. *State v. Jensen*, 2004 WI App 89, ¶12, 272 Wis. 2d 707, 681 N.W.2d 230. Whether Hibbard has met that burden is a question of law this Court will review de novo. *Id.*, ¶13.

C. Governing law.

Both the state and federal constitutions require that criminal statutes give "'fair notice" of the conduct they prohibit and "provide an objective standard for enforcement." *State v. Smith*, 215 Wis. 2d 84, 91, 572 N.W.2d 496 (Ct. App. 1997); *see also Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964). A law that falls short of these imperatives is unconstitutionally vague, even if "there is some conduct that clearly falls within the provision's grasp." *Johnson v. United States*, 576 U.S. 591, 602-03 (2015).

The void-for-vagueness doctrine tackles two problems. *See id.* First is the notice problem: unduly vague penal statutes do not reasonably convey

their proscriptions so that people "of ordinary intelligence … may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Second is the delegation problem: a law without "explicit standards" for its enforcement "delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Id.*

Due process has long required that criminal statutes avoid these quandaries with reasonable clarity and specificity. "A criminal statute is not vague if 'by the ordinary process of construction, a practical or sensible meaning may be given to [it]." *State v. Jensen*, 2004 WI App 89, ¶13, 272 Wis. 2d 707, 681 N.W.2d 230. If, however, that ordinary process reveals "hopeless indeterminacy," then the statute cannot be the basis for a conviction or sentence. *See Johnson*, 576 U.S. at 598.

D. If Hibbard's buyer-side involvement in the drug deal between Poe and Tara was sufficient to render him a party to Poe's violation of the Len Bias law, then that law is void for vagueness as applied to aiders and abettors.

If this Court determines that Hibbard aided and abetted Poe in selling Tara the drugs that killed her, then the Len Bias and PTAC statutes fall prey to both of the problems the void-for-vagueness doctrine tackles—insufficient notice and insufficient enforcement standards.

Notice. The Len Bias statute bars the "manufacture, distribution or delivery" of drugs that

cause an overdose death—not their purchase or receipt. § 940.02(2)(a). The relevant part of the PTAC statute expands Len Bias liability by making those who aid and abet the "manufacture, distribution or delivery" of drugs just as liable for a resulting overdose death as the manufacturer, distributor, or deliverer himself. But the State would have these provisions ensnare someone solely on the *receiving* end of a drug deal—making a drug *recipient* liable for first-degree reckless homicide if the deal leads to another recipient's overdose death. That means an ordinary person could reasonably believe he's committing simple possession (a nonviolent misdemeanor or low-level felony) when in fact he's committing reckless homicide (one of the most serious crimes on the books).

This distinction matters from a notice standpoint: users whose addiction regularly leads them to possess illicit drugs may nevertheless try hard to avoid endangering their loved ones or exposing themselves to a serious felony conviction. Deeming such users just as guilty of reckless homicide as the dealers profiting from their addiction is thus an unconstitutionally unforeseeable—and profoundly unfair—result.

Enforcement standards. Beyond providing inadequate notice, the State's construction of the Len Bias and PTAC statutes undermines objective enforcement by relying on a broad, ill-defined notion of what constitutes aiding and abetting a delivery. If a person need not deliver drugs to violate the Len Bias law, and need not have any connection to the delivery except by receiving the drugs or rendering aid to a fellow recipient, then what other kinds of buyer-side

involvement will incur Len Bias liability? How will a factfinder know where to draw the line? If urging a fellow user to buy drugs and giving that user a ride to her dealer makes a drug seeker a deliverer in the eyes of the law, will lending a user money, knowing she intends to spend it on drugs, do the same? If so, how many parents, spouses, roommates, and friends will unwittingly violate the Len Bias law? And what about a bus driver who lets an addict on, knowing he's headed to a drug deal—must he refuse such a rider?

Letting police, prosecutors, judges, and juries draw these difficult lines—without explicit statutory guidance—means impermissibly delegating critical policy decisions. Thus, if this Court holds that the Len Bias and PTAC statutes mean what the State contends—that they encompass Hibbard's buyer-side conduct—then the statute lacks the objective enforcement standards due process requires.

One final point. The void-for-vagueness issue in this case is admittedly unusual for its connection to two separate statutes. Hibbard does not assert that the aiding-and-abetting provision of the PTAC statute is flatly unconstitutional, nor does he claim that the Len Bias statute is flatly unconstitutional. Rather, should this Court follow the State's strained interpretation of this pair of laws, then a vagueness problem arises in their interplay. The Len Bias and PTAC statutes are impermissibly imprecise about what conduct qualifies as aiding and abetting a fatal drug delivery, and about how those enforcing the statutes should decide whether a particular actor ran afoul of the statutes' proscriptions. Given the parameters of the problem, Hibbard asks this Court to

hold the Len Bias statute void for vagueness only as applied to aiders and abettors—not across the board.

* * * *

It is a "cardinal rule of statutory interpretation" that courts will avoid reading a legislative enactment in a way that renders it unconstitutional if another reasonable reading wouldn't. *American Fam. Mut. Ins. Co. v. Wisconsin Dep't Rev.*, 222 Wis. 2d 650, 667, 586 N.W.2d 872 (1998). The simplest, most logical reading of the statutes at issue confines Len Bias liability to those who directly manufacture, distribute, or deliver drugs, and to those involved with such activity. The simplest, most logical reading of the statutes *precludes* Len Bias liability for individuals involved solely with the buyer side of a drug deal—like Hibbard. This is the reading that honor the statutes' text, adheres to legislative intent, and follows precedent—and it is the one this Court should adopt. If it instead accepts the State's expansive view of who in the drug world qualifies as a party to first-degree reckless homicide, then the Len Bias law is void for vagueness as applied to aiders and abettors. Either way, Hibbard's conviction must fall.

CONCLUSION

Terry Hibbard respectfully requests that this Court reverse the order denying postconviction relief and remand the case to the circuit court with instructions to vacate the judgment of conviction and either enter a judgment of acquittal (based on insufficient evidence) or an order of dismissal (because the Len Bias statute is void for vagueness as applied to aiders and abettors).

Dated this 2nd day of September, 2021.

Respectfully submitted,

Electronically Signed by Megan Sanders-Drazen

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. the length of this brief is 4,521 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 2nd day of September, 2021.

Signed:

Electronically signed by
Megan Sanders-Drazen

MEGAN SANDERS-DRAZEN
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