STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case Nos. 2013-AP-1753CR; 2013-AP-1754CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROGELIO GUARNERO

Defendant-Appellant.

ON APPEAL FROM JUDGMENTS OF CONVICTION AND FROM ORDERS DENYING POST-CONVICTION RELIEF ENTERED IN THE CIRCUIT COURT OF MILWUAKEE COUNTY, THE HONORABLE TIMOTHY DUGAN PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. Did the trial court err in convicting Rogelio Guarnero of possession of cocaine as a felony "second or subsequent offense" under Wis. Stat. § 961.41(3g)(c), where the only relevant prior conviction arose under the federal RICO anti-conspiracy statute which is a statute relating to racketeering, not drugs; which on its face says nothing about controlled substances; and which requires no proof that anyone (let alone the defendant) has committed any controlled substance violation?

The trial court answered no.

II. Do notions of Due Process and the Rule Of Lenity preclude application of Wis. Stat. § 961.41(3g)(c) against Mr. Guarnero where neither the text of the relevant statute nor any prior relevant judicial decision fairly disclose that a conviction for racketeering conspiracy could support a "second or subsequent offense" charge?

Although argued below, the trial court did not address this argument.

III. Should Mr. Guarnero's bail jumping conviction have been at most a misdemeanor, rather than a felony, given that his conviction for possession of cocaine should have been at most a misdemeanor first offense?

The trial court did not address this argument, given that it held that Mr. Guarnero's conviction for possession of cocaine was properly a felony second or subsequent offense.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The central issue raised by this appeal involves a question of law that appears to be an issue of first impression in Wisconsin and which, following a decision by this Court, may establish precedent. Therefore, publication is requested. However, the issues raised in this appeal are likely to be adequately addressed in the briefs submitted by the parties to this action. Therefore, oral argument is not requested.

STATEMENT OF THE CASE

A. Mr. Guarnero's prior 2009 federal racketeering conspiracy conviction

On January 8, 2013, Rogelio Guarnero was found guilty following a court trial in the Milwaukee County Circuit Court (Hon. Judge Timothy Dugan, presiding) of possession of cocaine as a second or subsequent offense under Wis. Stat. § 961.41(3g)(c). (Judgment of Conviction, R.24[1], App. 101[2]). Mr. Guarnero was also convicted in the same court on January 25, 2013 of felony bail jumping under Wis. Stat. § 946.49(1)(b). (Judgment of Conviction, R-1754.18, App. 103) The "second or subsequent offense" possession charge and conviction was based on a prior conviction of Mr. Guarnero in federal court for racketeering conspiracy under 18 U.S.C. § 1962(d). (Criminal Complaint, R.2)

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[1] On August 20, 2013, this Court ordered that the appeals in 2013-AP-1753CR and 2013-AP-1754CR be consolidated (R.30). Because most of the relevant material is found in the record of *both* cases, for the convenience of the Court, references herein to the record ("R.") relate to the record in case 2013-AP-1753. However, any references specifically to the record in case 2013-AP-1754 are designated herein as "**R-1754**".

[2] All references to the Appendix are designated herein as "App."

In 2005, Mr. Guarnero was named as one of 49 defendants in a lengthy, multi-count indictment in the U.S. District Court for the Eastern District of Wisconsin, alleging numerous violations of federal criminal law. (Postconviction Motion & Exhibits, R.27, Ex. C; App. 118). Among the many counts of the indictment, there were only five allegations against Mr. Guarnero: Conspiracy To Commit Racketeering (Count 2), Unlawful Possession Of A Firearm (Counts 20 & 24), Possession Of Marijuana With Intent To Distribute (Count 25), Possession Of A Firearm In Furtherance Of A Drug Trafficking Crime (Count 26). (*Id.* at 120, 123-26.)

Count Two of the federal indictment (the only count of which Mr. Guarnero was actually convicted) alleged that 49 defendants were "members and associates of the Latin Kings, a criminal organization whose members and associates engaged in acts of violence, including murder, attempted murder, robbery, extortion and distribution of controlled substances, and which operated principally on the south side of Milwaukee." (Postconviction Motion & Exhibits, R.27, Ex. C, ¶ 15; App. 120). This racketeering conspiracy charge did not specify *which* defendant allegedly committed *which* acts, nor did Count Two specify that Mr. Guarnero himself had committed any particular violation of any controlled substance law. (*Id*. at ¶¶ 14-18, App. 120-21).

Mr. Guarnero ultimately entered into an agreement with the United States to plead guilty to the single count of racketeering conspiracy contained in Count Two. (Postconviction Motion & Exhibits, R.27, Ex. D ¶ 4, App. 129.) In a 19-page plea agreement, the parties outlined the factual basis for the plea to the racketeering conspiracy charge. (*Id*.)

In a lengthy 2 ½-page paragraph detailing the factual basis for the plea, Mr. Guarnero acknowledged "that he conspired with other Latin King gang members to commit at least two qualifying criminal acts in furtherance of the

criminal enterprise." (*Id*.) However, the agreement contained no indication or admission regarding *which* acts Mr. Guarnero purportedly committed. More importantly, there is there no admission in the plea agreement that the defendant himself committed *any* violation of *any* narcotics statute. (*Id*.)

The overwhelming majority of the specific acts detailed in the plea agreement concerning Mr. Guarnero pertain to activities unrelated to narcotics. For example, the parties acknowledge that Mr. Guarnero had been identified as being at a tavern prior to a shooting; that he was found in possession of a short barrel shotgun during a firearms search; that he was found in a closet which contained the sawed off shotgun; and that Latin King street gang documents were found within his residence. (*Id.* at 130)

The only mention of narcotics in the narrative relating to Mr. Guarnero is a single sentence that reads: "[a]lso found within the residence was a package containing four clear plastic sandwich bags containing about an ounce of marijuana each, with a total marijuana weight of an excess of 100 grams." (*Id*.) There is no mention in the plea agreement that the bags were found on or near Mr. Guarnero's person, that they belonged to Mr. Guarnero, or that he had any knowledge that they were in his residence. (*Id*.)

As part of the plea agreement, the United States moved to dismiss the three firearms counts and the single count of possession of marijuana. (*Id*. at 131). The district court dismissed these remaining four counts, including the count for possession of marijuana, and convicted Mr. Guarnero of a single racketeering conspiracy charge. (Postconviction Motion & Exhibits, R.27, Ex. E; App. 148).

B. Mr. Guarnero's charges and convictions in the cases at bar

On August 13, 2012, Mr. Guarnero was charged with one count of possession of cocaine as a second or subsequent

offense, contrary to Wis. Stat. § 961.41(3g)(c). (Criminal Complaint, R.2). The State charged this offense as a "second or subsequent offense" based on Mr. Guarnero's prior RICO conspiracy conviction. (*Id.* at R.2:3). The State also charged Mr. Guarnero in this same case with one count of concealing stolen property. (*Id.*) While this first case was pending, Mr. Guarnero was charged in another case with one count of felony bail jumping under Wis. Stat. § 946.49(1)(b) and one count of receiving stolen property under Wis. Stat. § 943.34(1)(a). (Criminal Complaint, R-1754.2).

Mr. Guarnero filed a motion to dismiss on September 11, 2012, challenging the sufficiency of the preliminary hearings and criminal complaints in these matters, arguing that the earlier racketeering conspiracy conviction was insufficient to support a charge of a second or subsequent offense under Wis. Stat. § 961.41(3g)(c). (Motion To Dismiss, R.7). Mr. Guarnero further argued that because the possession offense should at most be a misdemeanor *first* offense, the bail jumping charge should have been charged, if at all, as a misdemeanor rather than as a felony. (*Id.*)

The trial court heard arguments on the motion to dismiss on October 26, 2012. At the hearing, the trial court reasoned, *inter alia*, that although the RICO statute could encompass non-drug activity, the second or subsequent charge was appropriate in the present case because drug activity "may underpin a RICO indictment." (Transcript Of Motion Hearing, R.37:13, App. 113). The trial court further reasoned that a prior RICO conviction can give rise to a second or subsequent offense under Wis. Stat. § 961.41(3g)(c) if "[t]he underlying charges for the RICO…include some controlled substances…The charges must relate to controlled substances." (*Id.*)

The trial court entered an order denying the motion to dismiss on November 5, 2012, finding that "the Defendant's undisputed prior convictions are sufficient to support a charge under Wis. Stat. § 961.41(3g)(c)." (Decision And Order

dated November 5, 2012, R.11, App. 105). On November 20, 2012, Mr. Guarnero filed a petition in this Court for leave to appeal the trial court's non-final order denying the motion to dismiss and to consolidate both circuit court cases for purposes of appeal. (Petition and Memorandum to Leave to Appeal a Nonfinal Order, R.12). By order dated December 28, 2012, this Court denied Mr. Guarnero's petition for leave to appeal and also denied the motion to consolidate. (Court of Appeals Order, R.16).

Ultimately, Mr. Guarnero waived his right to a jury trial and agreed to a bench trial on stipulated facts with respect to the possession charge. (Waiver Of Right To Testify, Waiver Of Trial By Jury, R.18-19). The trial court found Mr. Guarnero guilty and dismissed the count of concealing stolen property on the State's motion. (Judgment Of Conviction, R.24, App. 101, Transcript of Motion Hearing/Court Trial dated Jan. 8, 2013, R.40:17). On January 25, 2013, Mr. Guarnero pleaded guilty in the bail jumping case to the bail jumping charge, and the court dismissed the charge of Receiving Stolen Property on the State's motion. (Judgment Of Conviction, R-1754.18, App. 103, Transcript of Plea/Sentencing Hearing, R.42:4).

The trial court imposed concurrent sentences of nine months of incarceration in the Milwaukee County House of Correction in each case, but consecutive to any other sentence. (Judgments of Conviction, R.24, App. 101; R-1754.18, App. 103)

Mr. Guarnero filed a timely Notice Of Intent To Pursue Postconviction Relief in each case on January 25, 2013 (R.23, R-1754.17). On July 17, 2013, Mr. Guarnero filed a Postconviction Motion For Reconsideration Of Order Denying Motion To Dismiss And To Vacate Judgments Of Conviction (R.27, R-1754.21). In the postconviction motion, Mr. Guarnero again argued that the prior racketeering conspiracy conviction was insufficient to support a "second or subsequent offense" charge under Wis. Stat. §

961.41(3g)(c). Additionally, Mr. Guarnero argued that Due Process and the Rule of Lenity preclude application of Wis. Stat. § 961.41(3g)(c) against him under the circumstances at bar. Finally, because the possession charge should have been at most a misdemeanor first offense, Mr. Guarnero again argued that he was improperly charged with and convicted of *felony* bail jumping. (*Id.*)

On July 23, 2013, the trial court denied the Postconviction motion without a hearing. The court explained in its written order that "[a] RICO conviction can deal with drug-related activity or not be related to drugs or drug activity…" (Decision And Order dated July 23, 2013, R.28:2, App. 107). The trial court noted that "count two of the federal indictment related to distribution of controlled substances, including cocaine and other drugs." (*Id.*) Thus, the court below reasoned that "[i]n cases where the conviction is related to drugs or drug activity, a broad brush can be applied as evidenced by the *Moline*[3] court." (*Id.*) The trial court did not address Mr. Guarnero's arguments relating to Due Process, the Rule Of Lenity. Having concluded that the racketeering conspiracy conviction supported a "second or subsequent offense" charge, the court below did not address felony bail jumping charge.

Mr. Guarnero filed a timely Notice of Appeal in each case on August 5, 2013 (R.31, R-1754.25), and this Court consolidated the cases for purposes of appeal. (R.30, R-1754.24).

STATUTES CONSTRUED

Wisconsin Statutes, § 961.41(3g)(c), § 946.49(1)(b)

961.41(3g). Possession.

[3] *State v. Moline*, 229 Wis. 2d 38, 598 N.W.2d 929 (Ct. App.), *rev. denied* 230 Wis. 2d 274 (1999) (discussed *infra*)

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(c) Cocaine and cocaine base. If a person possess or attempts to possess cocaine or cocaine base, or a controlled substance analog of cocaine or cocaine base, the person shall be fined not more than 5,000 and may be imprisoned for not more than one year in the county jail upon a first conviction and is guilty of a Class I felony for a 2nd or subsequent offense. For purposes of this paragraph, an offense is considered a 2nd or subsequent offense if, prior to the offenders conviction of the offense, the offender has at any time been convicted of any felony or misdemeanor under this chapter or under any statute of the United States or of any state relating to controlled substances, controlled substance analogs, narcotic drugs, marijuana, or depressant, stimulant, or hallucinogenic drugs.

946.49. Bail Jumping.

(1) Whoever, having been released from custody under ch. 969, intentionally fails to comply with the terms of his or her bond is:

(a) If the offense with which the person is charged is a misdemeanor, guilty of a Class A misdemeanor.

(b) If the offense with which the person is charged is a felony, guilty of a Class H felony.

ARGUMENT

I. Rogelio Guarnero's Prior Racketeering Conspiracy Conviction Did Not Arise Under a Statute "Relating To Controlled Substances" and Therefore Cannot Support A Second Or Subsequent Offense Under Wis. Stat. § 961.41(3g)(c).

A. Standard of Review

The construction of a statute and its application to a set of facts is a question of law that this Court reviews *de novo*. *State v. Curiel*, 227 Wis. 2d 389, 404, 597 N.W.2d 697 (1999). Such questions of law are reviewed "without deference to the trial court." *State v. Vanmanivong*, 2003 WI 41, ¶ 17, 261 Wis. 2d 202, 661 N.W.2d 76, *quoting State v. Littrup*, 164 Wis. 2d 120, 126, 473 N.W.2d 164 (Ct. App. 1991). Absent a conflict with federal or statute constitutional authorities, this Court must accept legislative policy and apply the statute as the legislature intended, as the purpose of statutory construction is to ascertain the intent of the legislature and to give effect to that intent. *County of Columbia v. Bylewski*, 94 Wis. 2d 153, 164, 288 N.W.2d 129 (1980).

Where the language of a statute clearly and unambiguously sets forth the legislative intent, the court need "not look beyond the statutory language to ascertain its meaning." *Curiel*, 227 Wis. 2d at 404. However, to the extent there is any doubt about the meaning of a penal statute, the Court should "interpret the statute in favor of the accused." *State v. Cole*, 2003 WI 59, ¶ 13, 262 Wis. 2d 167, 663 N.W.2d 700, *citing State v. Morris*, 108 Wis. 2d 282, 289, 322 N.W.2d 264 (1982). Nor will a court construe a statute in a way that leads to an absurd result. *State v. Jennings*, 2003 WI 10, ¶ 21, 259 Wis. 2d 523, 657 N.W.2d 393; *State v. Yellow Freight System, Inc.*, 101 Wis. 2d 142, 153, 303 N.W.2d 834 (1981).

B. Wis. Stat. § 961.41(3g)(c) requires the court to consider the text and elements of the statute of the prior conviction, not the underlying conduct.

The trial court concluded that Mr. Guarnero's previous federal racketeering conspiracy conviction could give rise to a "second or subsequent offense" charge in this case because "[t]he underlying charges for the RICO…include[d] some controlled substances." (R.37:13, App. 113). The trial court further reasoned that the second or subsequent offense was appropriate because the allegations of "count two of the federal indictment related to distribution of controlled substances…" (R.28:2, App. 107)

This conclusion was in error and led to Mr. Guarnero's wrongful felony conviction because it ignored the statutory language of Wis. Stat. § 961.41(3g)(c), which required the trial court to consider the *statute* under which Mr. Guarnero was previously convicted, and not the allegations of the indictment, dismissed charges, or other underlying conduct.

Wis. Stat. § 961.41(3g)(c) provides in pertinent part (emphases added):

> For purposes of this paragraph, an offense is considered a 2nd or subsequent offense if, prior to the offenders conviction of the offense, the offender has at any time been convicted of any felony or misdemeanor under this chapter or under any *statute* of the United States or of any state *relating to controlled substances*…[4]

[4] The "2nd or subsequent offense" language at issue in this case first became law as § 161.48(2) as part of Wisconsin's enactment in 1971 of the Uniform Controlled Substances Act. *See* 1971 Wis. Act. 219. In 1995, § 161.48(2) was renumbered as § 961.48(3). *See* 1995 Wis. Act 448, § 288. And, most recently, in 2001, the same language was included in § 961.41(3g)(c), effective February 1, 2003. The pertinent language at issue in this case has remained substantively unchanged, notwithstanding renumbering and recodification.

As the Wisconsin legislature has made clear, Mr. Guarnero's 2009 racketeering conspiracy conviction cannot qualify as a relevant prior offense unless that conviction arose under a *statute* that itself "relates to" controlled substances. Section 961.41(3g)(c) on its face does not permit the trial court to delve beyond the statutory language and elements to consider other alleged but unproven conduct or circumstances, or whether the charges allegedly arose out of drug-related activity. Rather, § 961.41(3g)(c) requires on its face three conditions as a prerequisite to a "second or subsequent offense" charge: (1) a prior *conviction*, (2) which conviction arose under a *statute*, (3) and which statute relates to *controlled substances*. As such, the trial court's focus on allegations of narcotics violations (which charges were ultimately dismissed) was erroneous because the language of § 961.41(3g)(c) directs the court to consider the *statute* of the conviction and not alleged circumstances surrounding the charges.

Two cases from this Court that have interpreted the "second or subsequent offense" language further support Mr. Guarnero's position. In *State v. Moline*, 229 Wis. 2d 38, 598 N.W.2d 929 (Ct. App.), *rev. denied* 230 Wis. 2d 274 (1999), this Court considered whether a defendant's prior conviction for possession of drug paraphernalia arose under a statute relating to controlled substances.

In holding that Dawn Moline's prior conviction *was* sufficient to support a second or subsequent offense, this Court explained that "the statute is meant to include all prior convictions, either under ch. 961, Stats., the federal statutes, or any other state statute that is 'related to' controlled substances and the like." *Id*. at 42. The *Moline* court concluded that the drug paraphernalia statute was "related to" controlled substances because "the legislature very specifically linked, *by definition*, the term 'drug paraphernalia' with the activities related to controlled substances." *Id*. (emphasis added) Thus, it was important to

the *Moline* court that the legislature's specific *statutory definition* of the offense in question referenced controlled substances. Indeed, that court's conclusion was "bolstered by the drug paraphernalia statute itself." *Id.*

The *Moline* court also relied on and cited with approval *State v. Robertson*, 174 Wis. 2d 36, 496 N.W.2d 221 (Ct. App. 1993). In *Robertson*, the Court of Appeals clarified that the second or subsequent offense language meant that any federal or state law "*regulating* controlled substances, may serve as the underlying offense." *Id*. at 45 (emphasis added).

In both *Moline* and *Robertson*, this Court confined its examination to statutory language, definitions, and elements. Importantly, this Court did *not* examine—as the trial court did below—the underlying conduct, or other unproven allegations or circumstances surrounding the charges. As such, the trial court erred by failing to consider exclusively the *statutory language* of the prior offense in question. *See, e.g., Moline*, 229 Wis. 2d at 42 (court's conclusion "bolstered by the drug paraphernalia *statute* itself").

It is equally important to note what the statute *does not say*. This statute does *not* provide that a prior conviction for a mere "crime" relating to controlled substances will support a second or subsequent offense. This distinction is critical because cases from this Court suggest that a trial court *may* examine the conduct underlying the charges when the legislature uses the word "crime" in a statute. *See, e.g., State v. Collins*, 2002 WI App 177, 256 Wis. 2d 697, 649 N.W.2d 325, *rev. denied*, 2002 WI 121, 257 Wis. 2d 119, 653 N.W.2d 891.

For instance, in *Collins*, this Court clarified whether an out-of-state conviction for second-degree murder was comparable to a serious felony in Wisconsin. In analyzing this question, the Court held that when a statute refers to an out-of-state conviction for a *crime*, "it was the underlying

conduct that controlled whether the out-of-state conviction would be considered a felony in Wisconsin." *Id*. at ¶ 15 n.6, *citing State v. Campbell*, 2002 WI App 20, ¶ 10, 250 Wis. 2d 238, 642 N.W.2d 230, *rev. denied* 2002 WI 48, 252 Wis. 2d 150, 644 N.W.2d 686. This Court then discussed various other statutes that referred to out-of-state convictions for a "crime" or "violation." *Id*.

By contrast, the *Collins* court specifically noted Wis. Stat. § 961.48(3)—a statute containing the very language under consideration here—and emphasized that the legislature specifically used the term "statute," rather than "crime" or "violation". *Id.* Although this was a passing observation by the Court, it is nonetheless significant and relevant to the case at bar because it evidences the legislative intent to restrict the court's inquiry to the *statute* (and not the underlying conduct or unproven charges) of the prior conviction.

As such, the statutory language of § 961.41(3g)(c), as reinforced by decisions from this Court in *Moline*, *Robertson*, and *Collins*, confirms that the trial court's analysis—which focused on unproven allegations of narcotics violations, rather than the text and elements of the racketeering conspiracy statute under which Mr. Guarnero was actually convicted—simply cannot stand.

As we show below, Mr. Guarnero's conviction under the RICO conspiracy statute simply does not satisfy the requirements of § 961.41(3g)(c) because RICO relates to racketeering, and *not* controlled substances. Importantly, unlike "paraphernalia [which] is not illegal unless it is 'related to' drugs", *see Moline*, 229 Wis. 2d at 42, a conspiracy to commit racketeering *is* illegal *whether or not there is any connection whatsoever* to drugs.

C. The statute under which Mr. Guarnero was convicted relates to preventing racketeering conspiracies, not controlled substances.

Mr. Guarnero was convicted of conspiracy to commit racketeering under 18 U.S.C. § 1962(d)[5] (R.27, Ex. E, App. 148). The elements of a charge of racketeering conspiracy are straightforward, and do not require *any* proof of *any* controlled substance violations by *anyone*. To sustain a conviction under § 1962(d), the government must prove:

> 1. That the defendant knowingly conspired to conduct or participate in the conduct of the affairs of [a given organization], an enterprise, through a pattern of racketeering activity…;
>
> 2. That [the organization in question was] an enterprise,
>
> 3. That the activities of [the defendant] would affect interstate commerce.

See Pattern Criminal Jury Instructions Of The Seventh Circuit (2012) at 527. (R.27, Ex. D at ¶ 9, App. 132). *See also United States v. Tello*, 687 F.3d 785, 794 (7th Cir. 2012).

18 U.S.C. § 1962(d) is part of the sweeping Racketeer Influenced And Corrupt Organizations Act (RICO), Pub. L. 91-452, Title IX, 84 Stat. 941, 18 U.S.C. §§ 1961-1968. This statute is a powerful federal law that "takes aim at 'racketeering activity'…." *Sedima v. Irmex Co.*, 473 U.S. 479, 481 (1985). The U.S. Supreme Court has long held that "the primary purpose of RICO is to cope with the infiltration of legitimate businesses" by organized crime. *United States v. Turkette*, 452 U.S. 576, 591 (1981). *See also SK Hand Tool Corp. v. Dresser Industries, Inc.*, 852 F.2d 936, 941 (7th Cir. 1988), *cert. den.*, 492 U.S. 918 (1989) ("the primary purpose of RICO is to reach those who ultimately profit from racketeering") (internal quotation omitted), *citing Haroco,*

[5] For the convenience of the Court, the text of 18 U.S.C. § 1962 is set forth in the Appendix at page 154.

Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 702 (7th Cir. 1984), *aff'd* 473 U.S. 606 (1985).

Importantly for purposes of this appeal, the RICO statute makes a distinction between a *substantive* racketeering violation under 18 U.S.C. § 1962(a), § 1962(b), or § 1962(c), which requires proof that the defendant committed at least two qualifying "predicate acts" of racketeering activity,[6] and *conspiracy* to commit RICO under 18 U.S.C. § 1962(d), which punishes the agreement itself and requires *no proof* that anyone actually committed *any* predicate acts. *See, e.g., Salinas v. United States*, 522 U.S. 52 (1997); *Tello*, 687 F.3d at 792.

As relevant here, Mr. Guarnero was *not* convicted of a substantive RICO violation under § 1962(a)-(c), nor of any predicate act relating to controlled substances, but rather of *conspiracy* to commit racketeering under § 1962(d). (R.27, Ex. E, App. 148). This distinction is critical because, unlike a substantive RICO charge which requires proof of at least two "predicate acts," a conspiracy charge requires no such proof whatsoever. The Seventh Circuit recently emphasized the importance of this distinction:

> In order to establish [the defendant's] guilt [for conspiracy], it was not necessary to show that he actually conducted the affairs of the Latin Kings, or participated in the conduct of those affairs, through a pattern of racketeering activity comprising at least two

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[6] 18 U.S.C. § 1961(1) defines these so-called "predicate acts" arising under federal or state law. As the trial court acknowledged below (*See* R.37:13, App. 113), while a controlled substance violation *may* serve as a predicate act for purposes of a substantive RICO violation, see 18 U.S.C. § 1961(1)(D), so can scores of federal and state criminal violations wholly unrelated to drugs, including offenses as wide-ranging as gambling, money laundering, criminal copyright infringement, and even the unlawful use of a chemical weapon, see 18 U.S.C. § 1961(1)(B).

> predicate acts of racketeering….A *section 1962(d)* conspiracy charge thus does not require proof that the defendant committed two predicate acts of racketeering,…that he agreed to commit two predicate acts,…or, for that matter, that any such acts were ultimately committed by anyone.

Tello, 687 F.3d at 792 (emphasis in original).

Thus, Mr. Guarnero's liability for conspiracy to commit racketeering was completely unrelated to whether he—or anyone else—committed *any* narcotics violations at all, or whether he or anyone else participated in the conduct of the affairs of the Latin Kings. *Id. See also Salinas*, 522 U.S. at 63 (under RICO conspiracy statute there is "no requirement of some overt act or specific act").

Moreover, even if Mr. Guarnero had been convicted of a *substantive* RICO violation (which he was not), it is well-settled that liability for the predicate act is separate and distinct from liability for the RICO violation. Indeed, "a RICO offense is not in any sense the 'same' offense as the predicate offense." *United States v. Doyle*, 121 F.3d 1078, 1091 (7th Cir. 1997). Thus, any exposure Mr. Guarnero would have had to an underlying narcotics offense would have nothing to do with his RICO liability. In fact, "[t]he two groups of offenses are set in distinct chapters of the United States Code and are intended to deter two different kinds of activity: racketeering on the one hand and narcotics violations on the other." *United States v. Boldin*, 772 F.2d 719, 729 (11th Cir. 1985), *citing United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985).

This conclusion is even more compelling in this case given that the non-conspiracy charges against Mr. Guarnero (for possession of marijuana and various firearms violations) were *dismissed*. (R.27, Ex. E, App. 148). Thus, Mr. Guarnero's only relevant prior conviction—racketeering conspiracy—is not in any sense the same thing as a charge under a statute regulating controlled substances, *see Boldin*,

772 F.2d at 729, nor does it require proof of any controlled substance violation at all, *see Tello*, 687 F.3d at 792.

The conclusion that a racketeering conspiracy conviction does not arise under a statute relating to controlled substances is reinforced by *Lara-Chacon v. Ashcroft*, 345 F.3d 1148 (9th Cir. 2003), in which a federal appeals court reached the same conclusion under a state racketeering statute. At issue in *Lara-Chacon* was a federal immigration statute that made an alien subject to deportation if convicted of certain crimes, including violation of a law relating to controlled substances.[7] The petitioner in that case had been convicted of violating a state racketeering statute. *Id*. Like the case at bar, although the state statute did not specifically mention controlled substances on its face, it could be violated from proceeds derived from many sources including (but not limited to) prohibited drugs. *Id*.

In reasoning highly applicable to the present appeal, the Ninth Circuit explained:

> The facts of this case exceed the limits of the "relating to" language. Arizona's money laundering offense is *a distinct crime from the underlying crime and does not require proof of the underlying crime*….In addition, because of the breadth of the Arizona statute, Lara-Chacon's money-laundering conviction could have concerned proceeds from a number of illegal activities unrelated to controlled substances. Thus, *nothing about the fact of Lara-Chacon's conviction demonstrates violation of a law related to a controlled substance.*

Id. at 1155 (emphases added). Like *Lara-Chacon*, Mr. Guarnero's racketeering conspiracy conviction does not require proof of any underlying crime relating to controlled substances, nor does anything "about the fact of [Mr. Guarnero's] conviction demonstrate[] violation of a law related to a controlled substance." *Id*.

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[7] 8 U.S.C. § 1227(a)(2)(B)(i)

This conclusion is fatal to the trial court's reasoning. The trial court opined below that RICO "does apply to drug activity" and that the underlying charges "must relate to controlled substances." (R.37, 13:1-17, App. 113). However, as is clear from Part I.B, *supra*, the question is not whether RICO can be "applied" to drug activity, but whether the *specific statute* under which the defendant was convicted (racketeering conspiracy under § 1962(d)), itself relates to controlled substances. As shown above, it simply does not because nothing about a conviction for racketeering conspiracy requires that the defendant (or anyone else) have committed any controlled substance violation.

The trial court appeared to conclude that a racketeering conspiracy conviction "relates to" controlled substances *only* when there is an underlying allegation involving narcotics, but does *not* relate to controlled substances when there are no such drug allegations. Yet, neither the text nor the purpose of the RICO statute changes based on the type of underlying conduct alleged.

RICO is not *sometimes* a statute "relating to controlled substances" and sometimes not. The RICO statute itself never changes. RICO has always been and continues to be a federal statute that "takes aim at racketeering activity," *Sedima v. Irmex Co.*, 473 U.S. 479, 481 (1985), in order to "cope with the infiltration of legitimate businesses" by organized crime. *United States v. Turkette*, 452 U.S. 576, 591 (1981). Mr. Guarnero's prior conviction for conspiracy to commit racketeering cannot and does not constitute a conviction "under a statute of the United States…relating to controlled substances." Wis. Stat. § 961.41(3g)(c).

D. Even if RICO could qualify as a statute relating to controlled substances in some cases, this not such a case.

Even if a racketeering conspiracy conviction could qualify under certain circumstances as a prior offense under a "statute…relating to controlled substances" (which it does not for the reasons explained above), the circumstances of this case clearly demonstrate that such a conclusion is inappropriate here for at least two reasons.

First, and most importantly, the charge against Mr. Guarnero for a controlled substance violation (possession of marijuana with intent to distribute) was dismissed and therefore remains unproven. (R.27, Ex. D, ¶ 8 & Ex. E, App. 131, 148).

Second, in a 19-page agreement, the parties outline the factual basis for the plea. (R.27, Ex. D at ¶ 5, App. 129-31). In so doing, Mr. Guarnero acknowledges "that he conspired with other Latin King gang members to commit at least two qualifying criminal acts in furtherance of the criminal enterprise." (*Id*. at 129). But there is no indication or admission in the plea agreement concerning *which* criminal acts Mr. Guarnero committed. And, there is certainly no admission in the plea agreement that the defendant himself committed *any* violation of a narcotics statute.[8]

Indeed, the specific statements concerning Mr. Guarnero are overwhelmingly *unrelated* to narcotics. For example, the parties state that (1) Mr. Guarnero had been identified as being at a tavern prior to a shooting; *id.* at 130, (2) Mr. Guarnero was found in possession of a short barrel shotgun during a firearms search; *id.*, (3) Mr. Guarnero was found in a closet which contained the sawed off shotgun; *id.*

[8] Nor was any such admission required under controlling federal RICO law, as explained above in Part I.C. *See Salinas*, 522 U.S. 52 (1997); *Tello*, 687 F.3d at 792.

and (4) Latin King street gang documents were found within Mr. Guarnero's residence. (*Id.*)

The only mention of narcotics in the narrative relating to Mr. Guarnero is a single sentence that reads: "[a]lso found *within the residence* was a package containing four clear plastic sandwich bags containing about an ounce of marijuana each, with a total marijuana weight of an excess of 100 grams." *Id*. (emphasis added). Yet, there is no indication that the bags were found on (or even near) Mr. Guarnero's person, that they belonged to Mr. Guarnero, or that he even had any knowledge that they were in his residence. *See, e.g.*, *Schwartz v. State*, 192 Wis. 414, 212 N.W. 664 (1927) (mere presence of prohibited substance insufficient to constitute unlawful "possession" without evidence of knowledge of the presence of substance).

Indeed, there are no statements in the plea agreement or otherwise in the record that Mr. Guarnero *himself* actually committed any acts that would constitute a narcotics violation, nor would any such admissions even be required under controlling precedent as discussed above in Part I.C. And, most importantly, Count 25 which contained the sole allegation of a narcotics violation against Mr. Guarnero was dismissed by the federal district court. (R.27, Ex. E, App. 148).

For these reasons, even if a racketeering conspiracy conviction could in an appropriate case be a prior offense under a "statute…relating to controlled substances" (which it is not for the reasons discussed above), under the circumstances of this case, where there is no conviction establishing that the defendant *actually himself committed* a narcotics violation, it was plainly error for the trial court to conclude that Mr. Guarnero's prior conviction arose under a statute "relating to controlled substances" for purposes of Wis. Stat. § 961.41(3g)(c).

E. The trial court's erroneous reasoning would lead to the absurd result of including potentially thousands of prior offenses under § 961.41(3g)(c) having nothing to do on their face with controlled substances.

It is well-settled that an interpretation of a statute that "is absurd and unreasonable…must be rejected…." *State v. Yellow Freight System, Inc.*, 101 Wis. 2d 142, 153, 303 N.W.2d 834 (1981). *See also State v. Jennings*, 2003 WI 10, ¶ 21, 259 Wis. 2d 523, 657 N.W.2d 393 ("we cannot accept this proposition when it renders an absurd result, as in this case"). The trial court's interpretation of § 961.41(3g)(c) which encompassed a prior conviction for racketeering conspiracy when the relevant statute required no connection to controlled substances could lead to absurd results if not corrected by this Court.

As explained above, the trial court opined that Mr. Guarnero's prior conviction satisfied § 961.41(3g)(c) because that statute could be applied to drug activity (R.37:13, App. 113), and that the allegations of the racketeering conspiracy charge "related to distribution of controlled substances" (R.28:2, App. 107). This reasoning—which is untethered from the statutory language of § 961.41(3g)(c)—would expose defendants to "second or subsequent" possession convictions based on potentially thousands of prior offenses that on their face have nothing to do with controlled substances, so long as alleged drug activities played some part in the circumstances leading to the charges.

For example, one could easily imagine a defendant facing prosecution for simple larceny, having stolen money or other property to support a controlled substance addiction. *See, e.g.,* Wis. Stat. § 943.20(1)(a). Similarly, a defendant could face prosecution for prostitution, *see, e.g.*, Wis. Stat. § 944.30, or robbery, *see, e.g.*, Wis. Stat. § 943.32—all as part of an effort to support an addiction to drugs. There are likely

thousands of similar non-drug offenses that could arise out of circumstances relating to substance abuse.

Yet, although these non-drug statutes do not speak of controlled substances on their face, under the trial court's flawed reasoning, such convictions could support a "second or subsequent" charge under § 961.41(3g)(c) so long as the "underlying charges.…include some controlled substances", (R.37:13, App.113), the "conviction is related to drugs or drug activity" (R.28:2, App. 107), or if the allegations in any count of the indictment "related to…controlled substances." (R.28:2, App. 107). Such a conclusion could make virtually *any* crime a qualifying prior offense, so long as somewhere in the charging document a reference were made to controlled substances. Such a result is clearly at odds with the statutory language of Wis. Stat. § 961.41(3g)(c). This Court must therefore reject such an interpretation "when it renders an absurd result, as in this case." *Jennings*, 2003 WI 10, at ¶ 21

II. Due Process and the Rule Of Lenity Preclude Application Of Wis. Stat. § 961.41(3g)(c) Against Mr. Guarnero To Include His Federal Racketeering Conspiracy Conviction As A Prior Offense.

It is beyond dispute that both the United States and Wisconsin Constitutions afford Mr. Guarnero the protections of due process of law. U.S. CONST. amend. XIV, § 1, WIS. CONST. art. I, § 8. The United States Supreme Court has made clear that "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997). *See also Marks v. United States*, 430 U.S. 188 (1977) (judicial expansion of criminal liability cannot be applied retroactively because due process requires fair notice).

The U.S. Supreme Court has held that the touchstone of this fair warning requirement is "whether the statute, either

standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id*. This concept has been incorporated by Wisconsin courts, which have long held that "when there is doubt as to the meaning of a criminal statute, a court should apply the rule of lenity and interpret the statute in favor of the accused." *State v. Cole*, 2003 WI 59, ¶ 13, 262 Wis. 2d 167, 663 N.W.2d 700, *citing State v. Morris*, 108 Wis. 2d 282, 289, 322 N.W.2d 264 (1982). Even if this Court were inclined to adopt the trial court's position (which it should not for the reasons set forth above), due process and the rule of lenity require that any ruling construing a federal racketeering conspiracy conviction as arising under a "statute…relating to controlled substances" be applied prospectively only, and not retroactively to Mr. Guarnero.

First, this case appears to raise a question of first impression that has never been considered by any Wisconsin court—namely, whether the RICO conspiracy statute (18 U.S.C. § 1962(d)) "relates to" controlled substances for purposes of Wis. Stat. § 961.41(3g)(c). For the reasons described above in Part I, the RICO conspiracy statute on its face neither speaks of controlled substances nor otherwise provides any fair warning that a prior conviction for racketeering conspiracy—which itself requires *no proof whatsoever* that the defendant or anyone else committed *any* controlled substance violation—could qualify as a prior offense that would expose Mr. Guarnero to a second or subsequent offense charge. As such, "neither the statute nor any prior judicial decision has fairly disclosed" Mr. Guarnero's previous racketeering conspiracy conviction "to be within [the] scope" of § 961.41(3g)(c). *Lanier*, 520 U.S. at 266. Applying such a construction in this case, when such an interpretation is neither apparent from the text of the statute nor fairly disclosed by prior judicial decisions, violates Mr. Guarnero's state and federal due process rights.

Second, even were this Court inclined to hold that a racketeering conspiracy conviction arises under a statute relating to controlled substances, at the very least this Court should conclude that there is an ambiguity in the statute relating to its scope.[9] Indeed, the Wisconsin Supreme Court has held that a "statute is ambiguous if reasonable, well-informed persons may differ as to its meaning." *State v. Floyd*, 2000 WI 14 at ¶ 12, 232 Wis. 2d 767, 606 N.W.2d 155. Even if this Court were not persuaded by Mr. Guarnero's position on appeal, the arguments set forth in Part I should, at a bare minimum, raise a reasonable alternative interpretation showing that the RICO conspiracy statute is not "related to" controlled substances.

And, our research to date has disclosed no relevant legislative history to elucidate the "second or subsequent offense" statutory language, which has remained substantively unchanged since its introduction as part of the Uniform Controlled Substances Act in 1971. *See* 1971 Wis. Act 219. Under these circumstances the "court should apply the rule of lenity and interpret the statute in favor of" Mr. Guarnero. *Cole*, 2003 WI 59 at ¶ 13.

III. Because Mr. Guarnero's Possession Charge Should Have Been At Most A Misdemeanor, Mr. Guarnero's Bail Jumping Conviction Should Also Have Been At Most A Misdemeanor.

Wisconsin's bail jumping statute, Wis. Stat. § 946.49, provides that the severity of the underlying crime determines whether a subsequent bail jumping charge constitutes a

[9] For the sake of clarity, it is Mr. Guarnero's position that § 961.41(3g)(c) unambiguously compels the conclusion that the RICO conspiracy statute is *not* "related to controlled substances." However, should this Court reach an opposite conclusion, we contend in the alternative that at very least there is an ambiguity relating to the breadth of the statute that requires application of the rule of lenity in Mr. Guarnero's favor.

misdemeanor or a felony. This statute provides in pertinent part:

> (1) Whoever, having been released from custody under ch. 969, intentionally fails to comply with the terms of his or her bond is:
>
> (a) If the offense with which the person is charged is a misdemeanor, guilty of a Class A misdemeanor.
>
> (b) If the offense with which the person is charged is a felony, guilty of a Class H felony.

Wis. Stat. § 946.49(1).

When the underlying charge is a misdemeanor, a related bail jumping charge constitutes a Class A misdemeanor. Wis. Stat. § 946.49(1)(a). Conversely, when the underlying charge is a felony, a related bail jumping charge constitutes a Class H felony. Wis. Stat. § 946.49(1)(b). *See also* Wis. J.I.—Criminal 1795 n.3 (2013) ("[t]he nature of the underlying crime for which the defendant was in custody determines the penalty range…").

For the reasons described above in Part I, the defendant should not have been charged with or convicted of possession of cocaine as a second or subsequent offense—a Class I felony. Because Mr. Guarnero should have at most been charged with a misdemeanor *first* offense, the bail jumping charge should also have been charged, if at all, as a misdemeanor. Wis. Stat. § 946.49(1)(a). Accordingly, the trial court erred in convicting Mr. Guarnero of *felony* bail jumping under Wis. Stat. § 946.49(1)(b).

CONCLUSION

For all of the reasons herein, Mr. Guarnero respectfully requests that this Court reverse trial court's orders denying postconviction relief, reverse and vacate the judgments of conviction, and remand these matters, directing the trial court to enter a judgment of conviction for *misdemeanor* violations of Wis. Stat. § 961.41(3g)(c) and § 946.49(1)(a).

Dated this 8th day of November, 2013

Respectfully submitted,

_____

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,260 words.

Dated this 8th day of November, 2013

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of November, 2013

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