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STATE OF WISCONSIN
C O U R T O F A P P E A L S

DISTRICT I

Case Nos. 2013AP1753-CR and 2013AP1754-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROGELIO GUARNERO,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF
CONVICTION AND ORDER DENYING
POSTCONVICTION RELIEF, ENTERED IN
MILWAUKEE COUNTY CIRCUIT COURT, THE
HONORABLE TIMOTHY DUGAN PRESIDING

RESPONSE BRIEF AND SUPPLEMENTAL
APPENDIX OF PLAINTIFF-RESPONDENT

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The State rephrases the issues on appeal as follows:

1. Guarnero's conviction of possession of cocaine as a felony second or subsequent offense was proper because his prior conviction under RICO (18 U.S.C. § 1961 et seq.) is a statute that "relates to" controlled substances.
2. There is no "doubt as to the meaning" of the RICO statute, and therefore the rule of lenity is in applicable.
3. Guarnero's second or subsequent possession offense was a felony. Consequently, his bail jumping conviction was also a felony.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either publication or oral argument, as it believes that the issues raised are adequately addressed in the briefs submitted by the parties.

FACTS AND PROCEDURAL BACKGROUND

On August 13, 2012, the State charged Guarnero with one count of possession of cocaine as a second or subsequent offense, contrary to Wis. Stat. § 961.41(3g)(c) (2)¹. Guarnero filed a motion to dismiss (7). In his motion, he acknowledged that "drug activity is one of the many activities that may underpin a RICO indictment" (7:3). However, Guarnero argued that his 2009 federal

¹ All citations to the record are from case no. 2013AP1753-CR.

RICO² conviction was insufficient to support a charge of second or subsequent offence because his RICO conviction did not constitute a drug conviction (7).

Guarnero's 2009 RICO Conviction:

In 2005, Guarnero was one of several defendants in a federal indictment in the United States District Court Eastern District facing five counts: Conspiracy to Commit Racketeering, Unlawful Possession of a Firearm, Possession of Marijuana with Intent to Distribute, and Possession of a Firearm in furtherance of a drug trafficking Crime (27:Ex. C; A-Ap. 118-126; R-Ap. 101-09

In 2009, Guarnero pled guilty to Count Two, Conspiracy to Commit [Racketeering] (27:Ex. C:3, A-Ap. 120; R-Ap. 103). In the plea agreement, Guarnero *admitted* that the following facts “establish his guilt beyond a reasonable doubt” (27:Ex. D:2; A-Ap. 129; R-Ap. 117):

- He is a member of the Sawyer Kings, which is the Milwaukee chapter of the Latin Kings street gang (27:Ex. D:2; A-Ap. 129; R-Ap. 117);
- Latin Kings is “a criminal organization whose members and associates engaged in acts of violence” (27:Ex. C:3, Ex. D:2; A-Ap. 120, 129; R-Ap. 103, 117);

² RICO is an acronym for the Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C. § 1961 et seq.

- Those acts include “extortion and distribution of controlled substances” (27:Ex. C:3, Ex. D:2; A-Ap. 120, 129; R-Ap. 103, 117);
- While executing a search warrant at Guarnero’s residence, police officers “found within the residence . . . 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” (27:Ex. D:3; A-Ap. 130; R-Ap. 118).

The plea agreement provided that of the five counts charged in the indictment, Guarnero allegedly violated 18 U.S.C. “Sections 1961 and 1962(d)” (27:Ex. D:1; A-Ap. 128; R-Ap. 116).

Of further importance, in Count 2, Guarnero pled guilty of conspiring to conduct and participate through “a pattern of racketeering activity. . . multiple acts involving the distribution of controlled substances, including cocaine, cocaine base in the form of ‘crack’ cocaine and marijuana” (27:Ex. C, Ex. D:19; A-Ap. 121, 146; R-Ap. 104, 134).

The Circuit Court and Postconviction Court Decisions:

The circuit court held a hearing on Guarnero’s motion to dismiss (37). At the hearing, the court noted that it “looked at any statute relating to controlled substances” (37:12; A-Ap. 112; R-Ap. 113). It found that “the [RICO] statute does relate to controlled substances” (37:13; A-Ap. 113; R-Ap. 114). It also found that “before a

conviction under a RICO charge can constitute a second or subsequent offense,” the underlying charges “must relate to controlled substances” (*id.*). The circuit court found that “the interpretation of the [Wis. Stat. § 961.41(3g)(c)] properly applies to a RICO charge, first the statute, but specifically the charge that relates to drug-related activities or offenses” (*id.*).

In its November 5, 2012 Order denying the motion, the court found Guarnero’s “undisputed prior [RICO] convictions are sufficient to support a charge under Wis. Stat. § 961.41(3g)(c)” (11; A-App. 105).

Guarnero proceeded with a court trial, and he was found guilty (18; 19; 24; A-App. 101).

Guarnero filed a Postconviction Motion for Reconsideration of the Order Denying Motion to Dismiss and to Vacate Judgments of Conviction (27). The court denied the motion without a hearing (28; A-App. 106-08). In its decision, the court found that a “RICO conviction can deal with drug-related activity or not be related to drugs or drug activity” (28:2; A-App. 107). The court found that “count two of the federal indictment related to distribution of controlled substances, including cocaine and other drugs” (*id.*). The court 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.*).

Guarnero appeals.

³ *State v. Moline*, 229 Wis. 2d 38, 598 N.W. 2d 929 (Ct. App. 1999).

STANDARD OF REVIEW

The interpretation of a statute, in this case Wis. Stat. § 961.41(3g)(c) and 18 U.S.C. § 1961 et seq. (hereinafter “RICO”), is a question of law that this court reviews de novo. *State v. Cole*, 2000 WI App 52, ¶ 3, 233 Wis. 2d 577, 608 N.W.2d 432 (statutory construction presents a question of law which is subject to a de novo review).

ARGUMENT

I. GUARNERO’S CONVICTION OF POSSESSION OF COCAINE AS A FELONY SECOND OR SUBSEQUENT OFFENSE WAS PROPER BECAUSE HIS PRIOR CONVICTION UNDER RICO (18 U.S.C. 1961 ET SEQ) IS A STATUTE THAT “RELATES TO” CONTROLLED SUBSTANCES.

A. RICO Is a Statute That – On Its Face – Relates to Controlled Substances.

As recognized by the United State Supreme Court, “RICO takes aim at ‘racketeering activity,’ which it defines as any act ‘chargeable’ under several generically described state criminal laws, any act ‘indictable’ under numerous specific federal criminal provisions, including . . . any ‘offense’ *involving . . . drug-related activities* that is ‘punishable’ under federal law.” *Sedima, S.P.R.L., v. IMREX Company, Inc.*, 473 U.S. 479, 481-82 (1985) (emphasis added) (quoting 18 U.S.C. § 1961(1)). “Section 1962, entitled ‘Prohibited Activities,’ outlaws the use of income derived from

a ‘pattern of racketeering activity’ to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce; the acquisition or maintenance of any interest in an enterprise ‘through’ a pattern of racketeering activity; conducting or participating in the conduct of an enterprise through a pattern of racketeering activity; and conspiring to violate any of these provisions” *Id.* at 482-83 (quoting 18 U.S.C. § 1962) (footnote omitted).

Of importance to this case, Congress provided the definition of “racketeering activity” to include:

(A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, *or dealing in a controlled substance* or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year;

....

(D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, *or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance* or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States.

18 U.S.C. § 1961(1)(A) and (D) (emphasis added).
See also Sedima, 473 U.S. at 482 n.3.⁴

⁴ In relevant part, 18 U.S.C. § 1962 provides:

Continued on next page.

**B. Guarnero's Conviction as a
Second or Subsequent Offense
Under Wis. Stat. § 961.41(3g)(c)
Was Proper Because RICO
Relates to Controlled
Substances.**

In this case, Guarnero was convicted of possession of cocaine as a felony “second or subsequent” offense under Wis. Stat. § 961.41(3g)(c). That statute provides in relevant part: “an offense is considered a 2nd or subsequent

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of *racketeering activity* or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

(b) It shall be unlawful for any person through a pattern of *racketeering activity* or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of *racketeering activity* or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

(Emphasis added).

offense if, prior to the offender's conviction of the offense, the offender has at any time been convicted of . . . *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." Wis. Stat. § 961.41(3g)(c) (emphasis added). "[T]he 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." *State v. Moline*, 229 Wis. 2d 38, 42, 598 N.W.2d 929 (Ct. App. 1999). "If it is found to be related to drugs, it is very clearly an offense which may serve as the basis for an enhanced penalty[.]" *Id.*

As demonstrated above, RICO relates to controlled substances. Section 1961 *defines* "racketeering activity" to include:

(A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, *or dealing in a controlled substance* . . . which is chargeable under State law and punishable by imprisonment for more than one year;

. . .

(D) . . . the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a *controlled substance*[.]

18 U.S.C. § 1961(1)(A) and (D) (emphasis added).

Guarnero's argument that the statute does not relate to controlled substances fails.

C. Guarnero's RICO Plea Agreement Included His Involvement in the Distribution of Controlled Substances.

Guarnero pled guilty to a RICO conspiracy charge. In his plea, he admitted he was a member of "Latin Kings," and that Latin Kings was "a criminal organization whose members and associates engaged in acts of violence" (27:Ex. C:3; A-Ap. 120, 144; R-Ap. 103). As detailed in the plea, those acts included "extortion and distribution of controlled substances" (*id.*). Those acts also included "multiple acts" involving the distribution of "cocaine, cocaine base in the form of 'crack' cocaine and marijuana" (27:Ex. C:4; A-Ap. 146; R-Ap. 134). Even more specific to Guarnero, the plea provided that, while executing a firearm search warrant at Guarnero's residence, Milwaukee police officers also "found within the residence . . . 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" (27:Ex. D:3; A-Ap. 130; R-Ap. 118).

D. The Trial Court Correctly and Specifically Held That the RICO Statute Relates to Controlled Substances.

Guarnero argues the court ignored Wis. Stat. § 961.41(3g)(c)'s language which provides that an offense is second or subsequent offense if the offender has been convicted of "any *statute* of the United States or of any state *relating to*

controlled substances, controlled substance analogs, narcotic drugs, marijuana[.]” Wis. Stat. § 961.41(3g)(c) (emphasis added). According to Guarnero, the trial court did not consider whether the *statute* (RICO) relates to controlled substances. He argues the trial court erroneously considered whether the “allegations of the indictment, dismissed charges, or other underlying conduct” relates to controlled substances (Guarnero’s Brief at 16). The express language of the trial court’s decision shows otherwise.

When the trial court made its oral decision at the October 26, 2012 motion hearing, it first acknowledged verbatim what Wis. Stat. § 961.41(3g)(c) provides (37:12; A-Ap. 112; R-Ap. 113). The court stated that for this case, it “looked at any *statute* relating to controlled substances” (*id.*) (emphasis added). The court then repeated itself, “the question is whether or not that *statute* relates to controlled substances” (37:13; A-Ap. 113; R-Ap. 114) (emphasis added). It found that “the [RICO] *statute* does relate to controlled substances” (*id.*) (emphasis added). The State therefore fails to see how Guarnero can argue that the trial court “ignored the statutory language of Wis. Stat § 961.41(3g)(c)” (Guarnero’s Brief at 16).

The trial court also found that “before a conviction under a RICO charge can constitute a second or subsequent offense,” the underlying charges “must relate to controlled substances” (37:13; A-Ap. 113; R-Ap. 114). It further found that “the interpretation of the [Wis. Stat. § 9641.41(3g)(c)] properly applies to a RICO charge, *first the statute*, but specifically the charge that relates to drug-related activities or offenses” (*id.*) (emphasis added). It additionally found that, in this particular case, “the second or subsequent

offense applies because of that conviction relating to count two of the federal indictment which relates to distribution of controlled substances including cocaine and other drugs” (37:14; A-Ap. 114; R-Ap. 115).

The trial court did not, however “focus on unproven allegations of narcotics violations, rather than the text and elements of [RICO] under which Mr. Guarnero was actually convicted” (Guarnero’s Brief at 19). Conversely, the trial court found – on more than one occasion – that the RICO *statute* relates to controlled substances. It additionally found that the second or subsequent offense applies in this case because Guarnero’s RICO conviction related to the distribution of controlled substances.

E. Guarnero’s Argument That RICO “Relates to Preventing Racketeering, Not Controlled Substances” Fails Because the Statute *Defines* “Racketeering Activity” to Include Acts Regarding Controlled Substances.

Guarnero argues that RICO does not relate to controlled substances, only to racketeering. He also argues that because he was convicted of *conspiracy* to commit racketeering under 18 U.S.C. 1962(d), and a conspiracy to commit RICO requires no proof that he actually committed any predicate acts, that his “liability for conspiracy to commit racketeering was completely unrelated to whether he . . . committed any narcotic violations” (Guarnero’s Brief at 20-22).

In this case Guarnero pled guilty to a RICO conspiracy charge. A RICO conspiracy charge requires proof of “conspiring to violate” (18 U.S.C. § 1962(d)) through a “pattern of racketeering activity” (18 U.S.C. § 1962(a)-(c)). Section 1961 defines the enumerated acts of “racketeering activity” to include:

(A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or *dealing in a controlled substance*[.]

. . . .

(D) . . . the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a *controlled substance*[.]

18 U.S.C. § 1961(1)(A) and (D) (emphasis added).⁵

⁵ In its entirety, Congress defined “racketeering activity” to include the following:

- (1) “racketeering activity” means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection

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with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1351 (relating to fraud in foreign labor contracting), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen

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property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

18 U.S.C. § 1961(1).

See also Sedima, 473 U.S. at 482 n.3. Guarnero cannot escape the plain language of the statute. Whether he was convicted of conspiracy to commit racketeering or substantive charge of racketeering, the RICO statute *defines* “racketeering activity” as including acts “dealing in a controlled substance.”

The trial court was correct: “the [RICO] statute does relate to controlled substances” (37:13; A-Ap. 113; R-Ap. 114).

But Guarnero relies on *Lara-Chacon v. Ashcroft*, 345 F.3d 1148 (9th Cir. 2003), to support his position that his racketeering conspiracy conviction does not require proof of any underlying crime related to controlled substances (Guarnero’s Brief at 23). *Lara-Chacon* is inapposite.

One question that *Lara-Chacon* reviewed was whether the defendant’s money-laundering conviction under an Arizona state statute was a deportable offense. *Id.* at 1151. The Ninth Circuit held that a conviction under the statute that punished activities relating to “racketeering proceeds,” which included but was not limited to proceeds from “prohibited drugs,” was not an offense “relating to a controlled substance.” *Id.* at 1154-55. *Unlike* RICO, in *Lara-Chacon*, the Arizona statute *did* “not mention controlled substances.” *Id.* at 1154. However, as has been demonstrated by the plain language of RICO, that statute *does* mention controlled substances.

Regardless, under that plain language of Wis. Stat. § 961.41(3g)(c), it does not matter whether Guarnero was convicted of *conspiracy* to commit racketeering or a *substantive* RICO violation. The fact is, he was convicted under a

statute that “relates to” controlled substances. And under Wis. Stat. § 961.41(3g)(c), “an offense is considered a 2nd or subsequent offense if . . . the offender has at any time been *convicted of . . . any statute of the United States* or of any state *relating to controlled substances*[.]” Wis. Stat. § 961.41(3g)(c) (emphasis added).

Because RICO is a statute relating to controlled substances, the State, for the reasons already described, disputes Guarnero’s next claim that “[e]ven if RICO could qualify as a statute relating to controlled substances in some cases, this [is] not such a case” (Guarnero’s Brief at 25). While Guarnero notes that (1) the possession of marijuana was dismissed, and (2) in his plea he did not admit to any violation of a narcotics statute, the fact remains that Guarnero was *convicted* of under the RICO statute, a statute that relates to drugs. He was convicted of Conspiracy to Commit RICO due to his being an associate of a racketeering enterprise that was involved in the “distribution of controlled substances including cocaine, cocaine base in the form of ‘crack’ cocaine and marijuana in violation of the laws of the United States” (27:Ex. D:19; A-Ap. 146; R-Ap. 134).

**F. The Trial Court’s
Interpretation of Wis. Stat.
§ 961.41(3g)(c) Does Not Lead
to an Absurd Result.**

Guarnero next argues that the trial court’s reasoning is absurd because it would lead to the “result of including potentially thousands of prior offenses under § 961.41(3g)(c) having nothing to do on their face with controlled substances”

(Guarnero's Brief at 27). Guarnero states that "the trial court opined that Mr. Guarnero's prior conviction satisfied § 961.41(3g)(c) because that statute could be applied to drug activity, and that the allegations of the racketeering conspiracy charge 'related to distribution of controlled substance'" (Guarnero's Brief at 27). This is a disingenuous statement of the trial court's decision.

In delivering the decision from the bench, the court first noted that it "looked at any statute relating to controlled substances" (37:12; A-Ap. 112; R-Ap. 113). It found that "the [RICO] statute does relate to controlled substances (37:13; A-Ap. 113; R-Ap. 114). It then found that "before a conviction under a RICO charge can constitute a second or subsequent offense," the underlying charges "must relate to controlled substances" (*id.*). The trial court concluded "the interpretation of the [Wis. Stat. § 961.41(3g)(c)] properly applies to a RICO charge, first the statute, but specifically the charge that relates to drug-related activities or offenses" (*id.*).

Contrary to Guarnero's claim, it does not follow that under the trial court's decision, convictions relating to "non-drug statutes" could support a second or subsequent charge "so long as" the underlying charges include controlled substances (Guarnero's Brief at 28). That is not what the trial court held, and therefore it is not a consequence of its holding.

II. THERE IS NO “DOUBT AS TO THE MEANING” OF THE RICO STATUTE, AND THEREFORE THE RULE OF LENITY IS INAPPLICABLE.

Guarnero claims that “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’” should be applied prospectively (Guarnero’s Brief at 29). *See State v. Kittilstad*, 231 Wis. 2d 245, 267, 603 N.W.2d 732 (1999) (rule of lenity “holds that where a criminal statute is ambiguous, it should be interpreted in a defendant’s favor.”).

Guarnero’s entire argument is based on his consistent but erroneous claim that RICO “on its face” does not “speak[] of controlled substances” (Guarnero’s Brief at 29). As detailed several times in this brief, however, 18 U.S.C. § 1961(1) defines “racketeering activity” to include: “any act or threat . . . dealing in a controlled substance,” and “the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance[.]” The statute is not ambiguous. It *expressly* relates to controlled substances.

Because the trial court was correct when it concluded that RICO “relates to” controlled substances, that issue is dispositive and this court need not address Guarnero’s remaining issue. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (if a decision on one point disposes of the appeal, we need not address the other issues

raised); *see also State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (“[C]ases should be decided on the narrowest possible ground.”). Furthermore, if this Court affirms on other grounds, it need not discuss its disagreement with the trial court’s chosen grounds of reliance. *See State v. Earl*, 2009 WI App 99, ¶ 18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755.

**III. GUARNERO’S SECOND OR
SUBSEQUENT POSSESSION
CHARGE WAS A FELONY.
CONSEQUENTLY, HIS BAIL
JUMPING CONVICTION⁶ WAS
ALSO A FELONY.**

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 misdemeanor or felony:

(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.

⁶ As explained in Guarnero’s Appellate Brief, Guarnero was charged in another case with one count of felony bail jumping (*See Guarnero’s Brief at 11, citing the Complaint in 2013AP1754-CR*). On January 25, 2013, while this case was pending in circuit court, Guarnero plead guilty to felony bail jumping (*See Guarnero’s Brief at 12*). This Court consolidated the cases for purposes of appeal (30).

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

Wis. Stat. § 946.49.

For the same reasons Guarnero posited in Issues I-II, *supra*, Guarnero argues he should not have been charged with or convicted of possession of cocaine as a *second or subsequent* offense (a Class I felony), but only a misdemeanor first offense. And, therefore he argues, the trial court erred when it convicted him of *felony* bail jumping.

For same reasons the States addressed in Issues I-II, *supra*, the State submits that because the trial court correctly found that Guarnero's possession was a felony as second or subsequent offense pursuant to Wis. Stat. § 961.41(3g)(c), the trial court did not err when it convicted Guarnero of felony bail jumping.

CONCLUSION

Applying Wis. Stat. 961.41(3g)(c), the trial court was correct when it concluded that the "RICO statute does relate to controlled substances" (37:13; A-Ap. 113; R-Ap. 114). The State respectfully requests that this Court affirm the judgment of conviction and order denying postconviction relief.

Dated this 15th day of January, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4514 words.

Sara Lynn Larson
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 15th day of January, 2014.

Sara Lynn Larson
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