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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. 2013-AP-1753CR and 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

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

Wisconsin Statutes

Federal Statutes

ARGUMENT

I. The RICO Conspiracy Statute Does Not Relate To Controlled Substances Because The Statute Itself Does Not Require A Controlled Substance Violation To Support A Conviction, And Because Nothing About Mr. Guarnero's Conviction Under The Statute Establishes That He Ever Committed Any Narcotics Crime Whatsoever.

The State argues that § 1962(d) is a statute "relating to controlled substances" for purposes of Wis. Stat. § 961.41(3g)(c) because narcotics violations can be one of over seventy[1] so-called "predicate offenses" that *could* trigger a RICO indictment. As we show below, the State's argument ignores this Court's decision in *State v. Moline*, 229 Wis. 2d 38, 598 N.W.2d 929 (Ct. App.), *rev. denied* 230 Wis. 2d 274 (1999), rests upon a fundamental misunderstanding of federal RICO law, and relies on an argument that was soundly rejected by the Ninth Circuit in *Lara-Chacon v. Ashcroft*, 345 F.3d 1148 (9th Cir. 2003). Additionally, the circumstances of the plea agreement Mr. Guarnero entered into further underscore that his prior conviction was not related to controlled substances.

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[1] At pages 13-15 of its brief, the State reprints the text of 18 U.S.C. § 1961(1), which sets forth an expansive list of predicate offenses that can serve as the basis of a RICO indictment. By Mr. Guarnero's count, there are at least 71 enumerated offenses, many of which themselves incorporate other offenses.

A. Predicate Acts Do Not Define The Nature Of The Racketeering Conspiracy Statute.

The State does not challenge (nor could it) 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). Rather, the State devotes a significant portion of its brief to making the unremarkable observation that controlled substance violations *can* be one of the many predicate acts that can give rise to a RICO charge. *See* (Resp. Br. at 6-7, 12-16)[2]. Yet Mr. Guarnero acknowledged in the trial court (R.7:3)[3] and on appeal (App. Br. at 21 n.6)[4] that controlled substances *can* constitute one of numerous predicate offenses. This point, upon which the State rests much of its argument, misses the mark, for it should come as no surprise that the "list of acts constituting predicate acts of racketeering activity is exhaustive." *Annulli v. Panikkar*, 200 F.3d 189, 200 (3d Cir. 1999), *overruled on oth. grounds by Rotella v. Wood*, 528 U.S. 549 (2000).

Although the State notes that controlled substances may be (but certainly need not be) a predicate offense that could ultimately give rise to a RICO charge, Congress has not causally *linked* the definition of racketeering conspiracy to controlled substances because no controlled substance

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[2] All references herein to the Respondent's Brief filed by the State are designated as "Resp. Br."

[3] All record references in this Reply Brief are designated "R." and cite the record in case 2013-AP-1753CR. All appendix references herein are to Mr. Guarnero's appendix, designated "A-App."

[4] All references herein to the Appellant's Brief filed by Mr. Guarnero are designated as "App. Br."

violations are required to sustain a § 1962(d) conviction.[5] *See, e.g., Salinas v. United States*, 522 U.S. 52, 63, 65-66 (1997) (no requirement of any specific act under § 1962(d)); *United States v. Tello*, 687 F.3d 785, 792 (7th Cir. 2012) (racketeering conspiracy conviction does not require that anyone has committed any predicate acts).

The State's argument to the contrary ignores this Court's decision in *State v. Moline*, 229 Wis. 2d 38, 598 N.W.2d 929 (Ct. App.), *rev. denied* 230 Wis. 2d 274 (1999).[6] As Mr. Guarnero showed in his opening brief (App. Br. at 17-19), in holding that a drug paraphernalia conviction arose under a statute "relating to" controlled substances, this Court emphasized that the Wisconsin legislature had specfically linked the definition of drug paraphernalia to drugs. *Moline*, 229 Wis. 2d at 42. As this Court explained, it would have been impossible to sustain a drug paraphernalia conviction *unless* drugs were involved. Stated differently, in *Moline*, controlled substances were the *sine qua non* of a drug paraphernalia conviction because "paraphernalia is not illegal unless it is 'related to' drugs'." *Id.* As this Court aptly observed, "[t]hat is simply common sense." *Id.*

Yet, as Mr. Guarnero has shown, a racketeering conspiracy conviction under § 1962(d) is illegal *regardless of*

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[5] 18 U.S.C. § 1962(d) simply states that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

[6] Surprisingly, although *Moline* is the most pertinent ruling from this Court addressing the scope of the "relating to" language of Wis. Stat. § 961.41(3g)(c), the State only briefly acknowledges this decision once (Resp. Br. at 9), and notes in passing that the trial court mentioned it (Resp. Br. at 5).

any connection to drugs.[7] Thus, unlike the drug paraphernalia statute at issue in *Moline*, Congress has not made controlled substances the *sine qua non* of a § 1962(d) racketeering conspiracy conviction. Quite the contrary, liability under that statute does not depend on—or even remotely require—drugs. *Salinas*, 522 U.S. at 63, 65-66; *Tello*, 687 F.3d at 792.

This conclusion is bolstered by the line of cases (which the State fails even to acknowledge) that clearly hold that a predicate act is *not the same offense* as the RICO conspiracy charge. As both the Eleventh and Second Circuits have held:

> The 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.

(internal quotations omitted) *United States v. Boldin*, 772 F.2d 719, 729 (11th Cir. 1985), *citing United States v. Thomas*, 757 F.2d 1359, 1371 (2d Cir. 1985) (narcotics charges and RICO charges "intended to deter two different kinds of activity")

And, of course, there are over seventy other predicate offenses that can give rise to RICO liability. But the expansive list of predicate offenses does not change the fact that Congress' purpose in enacting RICO was to prevent the infiltration of legitimate businesses by organized crime, *Turkette*, 452 U.S. at 591, not to combat drugs or any of the other more than seventy predicate offenses.

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[7] The State erroneously suggests (Resp. Br. at 4) that Mr. Guarnero violated § 1962(d) *and* § 1961. Section 1961 is a definitional statute and does not impose liability. The federal judgment of conviction shows that Mr. Guarnero was convicted under § 1962(d), not § 1961. (R. 27, Ex. E; A-App. 148).

Thus, § 1962(d) is no more a statute relating to controlled substances than it is a statute relating to passport fraud,[8] "white slave traffic",[9] or weapons of mass destruction[10] –all of which *could* constitute predicate offenses for purposes of RICO. Yet these predicate offenses, contrary to the State's argument, do not somehow transform § 1962(d) into a statute relating to controlled substances.

B. A RICO Conspiracy Conviction Does Not Require That Mr. Guarnero Or Anyone Else Have Committed A Controlled Substance Violation.

The State opines (Resp. Br. at 16) that "it does not matter whether Guarnero was convicted of *conspiracy* to commit racketeering or a *substantive* RICO violation." (emphases in original). This statement evidences a fundamental misunderstanding of RICO law—particularly as it applies to this case. Contrary to the State's assertion, it very much *does* matter that Mr. Guarnero was convicted of racketeering conspiracy and not a substantive RICO violation.

Had Mr. Guarnero been convicted of a *substantive* RICO violation (which he was not), the government would have had to prove that Mr. Guarnero himself committed at least two qualifying predicate acts in order to constitute a "pattern of racketeering activity." 18 U.S.C. § 1961(5);

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[8] 18 U.S.C. § 1961(1), designating as a predicate offense, 18 U.S.C. § 1543 (forgery or false use of passport)

[9] *Id.*, designating as a predicate offense, 18 U.S.C. §§ 2421-24 (offenses relating to "white slave traffic")

[10] *Id.*, designating as a predicate offense, 18 U.S.C. §§ 175-178 (offenses relating to biological weapons) and §§ 229-229F (offenses relating to chemical weapons), § 831 (offenses relating to nuclear materials)

Sedima, S.P.R.L. v. Irmex Co., 473 U.S. 479, 496 n.14 (1985). In such a case, the record would presumably have disclosed *which* specific predicate acts Mr. Guarnero allegedly committed.

But that is clearly not the case at bar. Here, Mr. Guarnero was convicted of racketeering *conspiracy* under § 1962(d), and, as we show above, there is simply no requirement under that statute that Mr. Guarnero had actually committed any predicate offense—let alone one relating to controlled substances. *Tello*, 687 F.3d at 792.

Because a § 1962(d) conviction required no proof that Mr. Guarnero or anyone else committed any narcotics violations whatsoever, his conviction under § 1962(d) did not arise under a statute relating to controlled substances. *Compare Moline*, 229 Wis. 2d at 42 ("paraphernalia is not illegal unless it is 'related to' drugs.")

C. The Ninth Circuit Firmly Rejected The State's Argument And The Trial Court's Reasoning In *Lara-Chacon v. Ashcroft*.

Mr. Guarnero's research has not disclosed any caselaw—nor does the State cite any—in any jurisdiction in which an earlier racketeering conspiracy charge led to a "second or subsequent offense" charge under the Uniform Controlled Substances Act.[11]

[11] The Uniform Controlled Substances Act (UCSA) has been adopted in many jurisdictions in substantially the same form as it exists in Wisconsin. *See, e.g., State v. Hansen*, 2001 WI 53 ¶ 16, 243 Wis. 2d 328, 627 N.W.2d 195 (noting that the UCSA is part of a multi-jurisdictional uniform law drafted by the National Conference Of Commissioners On Uniform State Laws).

The most factually similar decision is *Lara-Chacon v. Ashcroft*, 345 F.3d 1148 (9th Cir. 2003), in which the Ninth Circuit soundly rejected the State's argument and the reasoning of the trial court. The State opines the decision in *Lara-Chacon* is somehow "inapposite" because the state racketeering statute under consideration supposedly did not mention controlled substances. (Resp. Br. at 16). This attempt to distinguish *Lara-Chacon* fails to withstand analysis.

At issue in *Lara-Chacon* was an Arizona racketeering statute that—like § 1962(d)—did not specifically mention controlled substances on its face. *Lara-Chacon*, 345 F.3d at 1154. However, as the Ninth Circuit made clear, that same statute "does refer to the definition of racketeering proceeds…which…refers to proceeds derived from many sources, including 'prohibited drugs'." *Id.*

Thus, like *Lara-Chacon*, the statute under which Mr. Guarnero was convicted (§ 1962(d)) "does not mention controlled substances," on its face even though the definition of racketeering activity can include many activities, "including 'prohibited drugs'." *Id.* Against this backdrop, the Ninth Circuit soundly rejected the State's argument as well as the trial court's reasoning below:

> 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 [racketeering] 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).

Mr. Guarnero respectfully submits that it is highly significant that the only factually similar case found by the parties involved a federal appeals court that squarely held that a racketeering conviction does *not* relate to controlled substances. *Lara-Chacon* provides a compelling basis for this Court to reject the State's argument and reverse the trial court's judgments below.

D. The Circumstances Of Mr. Guarnero's Federal Plea Further Underscore That His Conviction Did Not Arise Under A Statute Related To Controlled Substances.

The State does not dispute that the narcotics allegations against Mr. Guarnero himself were dismissed (R. 27, Ex. E; A-App. 148). Nor can the State challenge that that the vast majority of statements specific to Mr. Guarnero in the 19-page federal plea agreement related to *firearms*, not narcotics. (R. 27, Ex. D ¶ 5, A-App. 129-30).

Rather, the State attempts to characterize the plea as one purportedly relating to controlled substances by focusing on the allegations that unspecified and unnamed *Latin Kings* members may have engaged in distribution of controlled substances. (Resp. Br. at 3-4, 10). However, there is no admission in the plea agreement or any indication otherwise in the record that *Mr. Guarnero himself* was one of the members engaged in such activity. To the contrary, as we showed in Mr. Guarnero's opening brief (App. Br. at 25-26), the plea admissions that were specific to Mr. Guarnero related overwhelmingly to *firearms*, not drugs. (R. 27, Ex. D ¶ 5; A-App. 129-30)

The State also notes (Resp. Br. at 4) that Count Two of the federal indictment alleged that "the defendants" (of which 49 were named in this count), supposedly engaged in multiple acts involving the distribution of controlled substances. What the State does *not* mention in its brief is that this same paragraph also alleged that "the defendants together with other persons known and unknown" purportedly engaged in the following non-drug activities:

- Kidnapping[12]
- Tampering With A Witness[13]
- Retaliation Against A Witness[14]
- Homicide[15]
- Attempt[16]
- Conspiracy[17]
- Robbery[18]
- Arson[19]

(R.27, Ex. C, ¶ 17, A-App. 120). Not only are these allegations unrelated to controlled substances, but there is no indication anywhere in the indictment, plea, or otherwise showing *which* of the 49 defendants supposedly committed

[12] 18 U.S.C. § 1201; Wis. Stat. § 940.31
[13] 18 U.S.C. § 1512
[14] 18 U.S.C. § 1513
[15] Wis. Stat. § 940.01
[16] Wis. Stat. § 939.32.
[17] Wis. Stat. § 939.31
[18] Wis. Stat. § 943.32
[19] Wis. Stat. § 943.02

which act. Stated differently, there is nothing in the record showing that Mr. Guarnero was *himself* involved in any narcotics activity, and the State cannot (and indeed does not) cite any. And, of course, the marijuana charge against Mr. Guarnero was dismissed by the federal court. (R. 27, Ex. E; A-App. 148).

Nor is it of any consequence that the plea agreement notes that a small quantity of marijuana was discovered in Mr. Guarnero's residence (R.27, Ex. D; A-App. 130). Nothing in the plea agreement states that the marijuana was found on Mr. Guarnero's person, that it belonged to him, that he knew it was in the residence, or that he had any intentions to do anything with it. (*Id.*) The Wisconsin Supreme Court held long ago that the mere presence of a prohibited substance is insufficient to constitute unlawful "possession" without evidence that the defendant had knowledge of the presence of the substance. *Schwartz v. State*, 192 Wis. 414, 212 N.W. 664 (1927).

Because there is no evidence in the record that Mr. Guarnero *himself* committed any narcotics violations (nor would any such evidence be required under well-settled RICO law), Mr. Guarnero's conviction under § 1962(d) simply cannot, and indeed does not relate to controlled substances for purposes of Wis. Stat. § 961.41(3g)(c).

E. The Trial Court Erroneously Focused On "Underlying Charges."

The State claims that it "fails to see how Guarnero can argue that the trial court 'ignored the statutory language of Wis. Stat. § 961.41(3g)(c),'" and notes that the trial court referred to the word "statute" numerous times in its comments (Resp. Br. at 11-12). However, the State *itself* repeatedly concedes that the trial court indeed focused on "underlying

charges." (Resp. Br. at 4-5, 11, 18).[20] As Mr. Guarnero showed in his opening brief, the trial court concluded that the RICO conviction related to drugs because of the "underlying charges" in the federal complaint. (R.37:13; A-App. 113 ("the underlying charges for the RICO must include some controlled substances. The charges must relate to controlled substances"), R.28:2, A-App. 107 ("the underlying charges for the RICO complaint must include some controlled substances")).

As we show above, predicate offenses (which were not only dismissed in this case, but not even required to sustain a conspiracy conviction) do not transform § 1962(d) into a statute that "relates to" controlled substances. It was therefore error for the trial court to base its decision on "underlying charges."

II. Due Process And The Rule Of Lenity Preclude Application Of Section 961.41(3g)(c) Against Mr. Guarnero.

As discussed above, the only factually similar decision found by the parties held that a racketeering conviction does *not* relate to controlled substances. *Lara-Chacon*, 345 F.3d at 1154. As such, Due Process forbids application of § 961.41(3g)(c) against Mr. Guarnero because "neither the statute nor any prior judicial decision has fairly disclosed" a racketeering conspiracy conviction to be within the scope of § 961.41(3g)(c). *United States v. Lanier*, 520 U.S. 259, 266 (1997).

[20] The State even suggests that Mr. Guarnero's characterization of the trial court's ruling is "disingenuous." (Resp. Br. at 18). Yet, as shown above, the State *itself* concedes repeatedly that the trial court focused on "underlying charges" (Resp. Br. at 4-5, 11, 18).

Similarly, even if this Court were inclined to find Mr. Guarnero's prior conviction to be under a statute relating to controlled substances (which we submit it should not do for the reasons above), the rule of lenity should be applied in Mr. Guarnero's favor. *State v. Cole*, 2003 WI 59, 262 Wis. 2d 167, 663 N.W.2d 700.

CONCLUSION

For all of the reasons in Mr. Guarnero's Appellant's Brief and Reply Brief, we respectfully request that this Court reverse the 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 28th day of January, 2014.

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 2,905 words.

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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:

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