STATE OF WISCONSIN

IN SUPREME COURT

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROGELIO GUARNERO,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS AFFIRMING JUDGMENTS AND ORDERS OF THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE TIMOTHY DUGAN PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED

I. Did the Court of Appeals disregard the language of Wis. Stat. § 961.41(3g)(c) as well as its own prior decisions by adopting U.S. Supreme Court caselaw to look beyond the statutory elements of Guarnero's prior racketeering conspiracy conviction and conclude that his prior conviction was a second or subsequent offense?

Neither the trial court nor the Court of Appeals considered the elements of Guarnero's federal racketeering conspiracy conviction, but instead looked to other record materials to conclude that his prior conviction could support a second or subsequent offense under Wis. Stat. § 961.41(3g)(c).

II. Did the Court of Appeals err in adopting the so-called "modified categorical approach" to permit Guarnero's racketeering conspiracy conviction to count as a prior offense for purposes of Wis. Stat. § 961.41(3g)(c) in the absence of any statutory element requiring a nexus to drugs or any record evidence that Guarnero himself committed any prior narcotics violation, and which decision will likely have a confusing effect on lower courts throughout this state?

Both the trial court and the Court of Appeals held that a federal racketeering conspiracy conviction can support a second or subsequent offense under Wis. Stat. § 961.41(3g)(c). The Court of Appeals expressly adopted the "modified categorical approach."

III. Did the Court of Appeals contravene the Rule of Lenity and notions of Due Process by ruling as a

matter of first impression that Guarnero's racketeering conspiracy conviction could support a second or subsequent offense conviction under Wis. Stat. § 961.41(3g)(c)?

The trial court did not address this argument. The Court of Appeals rejected Guarnero's Rule of Lenity and Due Process arguments.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues raised by this appeal involve significant questions of law that appear to be issues of first impression in Wisconsin. This Court's resolution of these issues will establish important precedent statewide. Publication and oral argument are therefore appropriate.

STATEMENT OF THE CASE & FACTS

A. Trial Court Proceedings

Background

Rogelio Guarnero was convicted following a bench trial in the Milwaukee County Circuit Court of possession of cocaine as a second or subsequent offense under Wis. Stat. § 961.41(3g)(c). (R.24,[1] App. 118[2]). Guarnero was also

[1] The Court of Appeals 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 as "**R-1754**".

convicted by the same court of felony bail jumping under Wis. Stat. § 946.49(1)(b). (R-1754.18, App. 120). The "second or subsequent offense" charge was based on Guarnero's prior conviction in federal court for racketeering conspiracy under 18 U.S.C. § 1962(d)—part of the Racketeer Influenced And Corrupt Organizations Act (herein "RICO"). (R.2)

Guarnero's Federal Racketeering Conspiracy Conviction

In 2005, Guarnero was named as one of 49 defendants in a multi-count indictment in the U.S. District Court for the Eastern District of Wisconsin, alleging numerous violations of federal criminal law. (R.27, Ex. C; App. 135). Count Two of the federal indictment (the only count of which Guarnero was convicted) alleged that multiple defendants "knowingly and intentionally conspired to…conduct and participate…in the conduct of the affairs of [the Latin Kings] through a pattern of racketeering activity involving multiple acts" indictable and/or chargeable under various state and federal statutes prohibiting kidnapping, tampering with a witness, retaliation against a witness, homicide, controlled substances, attempt, conspiracy, robbery, and arson. (R.27, Ex. C, ¶ 17; App. 139). This count did not specify *which* defendant allegedly committed *which* acts. Count Two nowhere alleged that Guarnero himself had committed any violation of any controlled substance law. (*Id*. at ¶¶ 14-18, App. 137-39).

Guarnero ultimately pled guilty to the single count of racketeering conspiracy contained in Count Two. (R.27, Ex. D ¶ 4, App. 146). In a 19-page agreement, the parties outlined the factual basis for the plea. (*Id*., ¶ 5, App. 146-48).

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

In the plea agreement, 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*.) But, the agreement contained no indication or admission regarding *which* acts 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 whatsoever. (*Id*.)

In fact, the overwhelming majority of the acts detailed in the plea agreement concerning Guarnero pertain to activities unrelated to narcotics. For example, the parties acknowledge that 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 147-48).

The only mention of narcotics in the narrative relating to 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*. at 147) (emphasis added). There is no mention in the plea agreement or elsewhere in the record that the bags were found on or near Guarnero's person, that they belonged to Guarnero, or that he had any knowledge that they were in his residence. (*Id*.)

As part of the plea agreement, the three firearms counts and the single count of possession of marijuana were dismissed. (*Id*., ¶ 8, App. 148). The district court convicted

Guarnero of the single racketeering conspiracy charge. (R.27, Ex. E; App. 165).

Guarnero's Convictions In This Case

On August 13, 2012, Guarnero was charged with one count of possession of cocaine as a second or subsequent offense, contrary to Wis. Stat. § 961.41(3g)(c). (R.2). The State charged this offense as a "second or subsequent offense" based on Guarnero's prior RICO conspiracy conviction. (*Id.* at R.2:3). The State also charged Guarnero in this same case with one count of concealing stolen property. (*Id*.) While this first case was pending, 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). (R-1754.2).

Guarnero filed a motion to dismiss in the trial court, arguing, *inter alia*, that the prior racketeering conspiracy conviction was insufficient to support a second or subsequent offense under Wis. Stat. § 961.41(3g)(c). (R.7). 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 denied the motion to dismiss, reasoning that although the racketeering 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." (R.37:13, App. 130). 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." (*Id*.)

On November 20, 2012, Guarnero filed a petition in the Court of Appeals for leave to appeal the trial court's non-final order denying the motion to dismiss, which the Court of Appeals denied. (R.12, R.16). Ultimately, Guarnero agreed to a bench trial on stipulated facts with respect to the possession charge. (R.18-19). The trial court found Guarnero guilty and dismissed the count of concealing stolen property on the State's motion. (R.24, App. 118, R.40:17). On January 25, 2013, Guarnero pled guilty to the bail jumping charge, and the court dismissed the charge of Receiving Stolen Property on the State's motion. (R-1754.18, App. 120, R.42:4).

On July 17, 2013, Guarnero filed a timely postconviction motion, arguing that the prior racketeering conspiracy conviction was insufficient to support a "second or subsequent offense" charge under Wis. Stat. § 961.41(3g)(c). (R.27, R-1754.21). Additionally, Guarnero argued that Due Process and the Rule of Lenity precluded the application of Wis. Stat. § 961.41(3g)(c) against him. Finally, because the possession charge should have been at most a misdemeanor first offense, Guarnero again argued that he was improperly charged with and convicted of felony bail jumping. (*Id.*)

The trial court denied the postconviction motion without a hearing, explaining that "[a] RICO conviction can deal with drug-related activity or not be related to drugs or drug activity…" (R.28:2, App. 124). The trial court did not address Guarnero's arguments relating to Due Process or the Rule Of Lenity. Having concluded that the racketeering conspiracy conviction supported a "second or subsequent

offense," the trial court did not address felony bail jumping charge.

B. Appellate Proceedings

Guarnero filed a timely Notice of Appeal in each case from the judgments of conviction and the orders denying postconviction relief (R.31, R-1754.25). The Court of Appeals consolidated both cases upon Guarnero's motion. (R.30, R-1754.24).

Guarnero again argued on appeal that the prior racketeering conspiracy conviction did not arise under a statute relating to controlled substances and therefore could not support a second or subsequent offense under Wis. Stat. § 961.41(3g)(c). Similarly, because the possession charge could at most have been a first offense, Guarnero argued again that his bail jumping charge should also have been at most a misdemeanor, rather than a felony. Guarnero invoked the Rule of Lenity, and further argued that Due Process precluded the trial court's application of Wis. Stat. § 961.41(3g)(c) because neither the statute nor any prior judicial decision suggested that a racketeering conspiracy conviction could give rise to a second or subsequent offense for purposes of § 961.41(3g)(c).

Following briefing, the Court of Appeals *sua sponte* issued an order on April 3, 2014 requiring that the parties file letter briefs addressing "the impact" on these appeals of two recent U.S. Supreme Court Decisions—*United States v. Castleman*, 134 S. Ct. 1405 (2014) and *Descamps v. United States*, 133 S. Ct. 2276 (2013). (App. 117). As described in more detail below, *Castleman* and *Descamps* address the extent to which—if at all—a court may look beyond the statutory elements of a prior conviction under a so-called "modified categorical approach" to determine whether to

apply enhanced penalties under federal law. The parties simultaneously filed the requested letter briefs on April 17, 2014.

In a decision dated April 29, 2014, the Court of Appeals affirmed the trial court in all respects, holding that Guarnero's prior racketeering conspiracy conviction satisfied Wis. Stat. § 961.41(3g)(c). (App. 115-16, ¶ 14). The Court of Appeals concluded that although the RICO conspiracy statute did not specifically "reference[] controlled substances *in haec verba*" (App. 111 ¶ 8), it could nonetheless support a second or subsequent offense.

In so holding, the Court of Appeals found that *Castleman* and *Descamps* were "dispositive" (App. 111, ¶ 8), concluded that "there are many, many ways that a person may violate" RICO, and therefore considered "the indictment to which Guarnero pled guilty as well as his plea-bargained acknowledgment that he was 'in fact, guilty of the offense' set out in…the indictment." (App. 114-15, ¶ 12). The Court of Appeals rejected Guarnero's invocation of the Rule of Lenity and Due Process. (App. 115, ¶ 13).

Because the Court of Appeals concluded that Guarnero had been properly convicted of felony possession of cocaine as a "second or subsequent offense," it affirmed Guarnero's felony bail jumping conviction under Wis. Stat. 946.49(1)(b). (App. 115-16, ¶ 14).

The Court of Appeals ordered its decision to be published. Guarnero filed a timely petition for review of the Court of Appeal's decision, which this Court granted on November 14, 2014. (App. 102).

ARGUMENT

I. This Court Should Reverse The Court Of Appeals Because The Statutory Elements Of A RICO Conspiracy Conviction—Which The Court Of Appeals Failed To Analyze—Show That The RICO Conspiracy Statue Does Not Relate To Controlled Substances.

A. Standard Of Review

Resolution of this appeal involves the construction of a statute and its application to a set of facts, which is a question of law that this Court reviews *de novo* without deference to the lower courts. *State v. Curiel*, 227 Wis. 2d 389, 404, 597 N.W.2d 697 (1999); *State v. Vanmanivong*, 2003 WI 41, ¶ 16, 261 Wis. 2d 202, 661 N.W.2d 76.

B. Courts May Only Consider The Statutory Elements Of A Prior Conviction When Considering A Second Or Subsequent Offense Under § 961.41(3g)(c).

The Court of Appeals erroneously held that a conviction under the RICO conspiracy statute, 18 U.S.C. § 1962(d), arose under a statute "relating to" controlled substances for purposes of Wis. Stat. § 961.41(3g)(c). (App. 114-15, ¶ 12). While the lower court *quoted* from the RICO statute, it failed to examine the statutory *elements* for RICO conspiracy, adopting instead an approach that allowed it to consider the underlying charges of the indictment as well as the terms of his plea bargain. (*Id*.).

Yet, it is settled that "when a defendant pleads guilty to a crime, he waives his right to a jury determination of *only that offense's elements;* whatever he says, or fails to say,

about superfluous facts cannot license a later sentencing court to impose extra punishment." *Descamps*, 133 S. Ct. at 2288. (emphasis added). The only permissible focus of a court is on the statutory *elements* of the statute of prior conviction, because it is those elements that define the prior conviction.

Had the Court of Appeals analyzed those elements in this case, it would have properly concluded that RICO conspiracy does not relate to controlled substances.

1. The RICO Conspiracy Statute Does Not Relate To Controlled Substances Because Narcotics Is Not a Necessary Element Of A Racketeering Conspiracy Conviction, And A Conviction Under Section 1962(d) Establishes Nothing Relating To Controlled Substances.

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*…

As the text of the statute makes plain, the only relevant inquiry for determining penalty enhancement under § 961.41(3g)(c) is whether the "statute" of prior conviction "relates to" controlled substances. Guarnero's racketeering conspiracy conviction does not qualify as a predicate unless the statute under which he was previously convicted "relates to" controlled substances.

Simply stated, it does not, for "nothing about the fact of [Guarnero's] conviction demonstrates violation of a law related to a controlled substance." *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1155 (9th Cir. 2003) (holding that a conviction under an Arizona racketeering statute does *not* arise under a statute "relating to" controlled substances).

Guarnero pled guilty to conspiracy to commit racketeering under 18 U.S.C. § 1962(d) (R.27, Ex. E, App. 165). This statute is part of the sweeping Racketeer Influenced And Corrupt Organizations Act (RICO), which Congress itself described as an Act "[r]elating to the control of *organized crime* in the United States." Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922 (emphasis added).

The U.S. Supreme Court has also long held that "the major purpose of [RICO] is to address the infiltration of legitimate business by organized crime." *United States v. Turkette*, 452 U.S. 576, 591 (1981). *See also Sedima, S.P.R.L. v. Irmex Co.*, 473 U.S. 479, 481 (1985) (RICO "takes aim at 'racketeering activity'"); *SK Hand Tool Corp. v. Dressler 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).

Although the Court of Appeals failed to analyze the elements of RICO conspiracy, those elements are straightforward. 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.

Pattern Criminal Jury Instructions Of The Seventh Circuit. (R.27, Ex. D at ¶ 9, App. 149; R.27, Ex. F, App. 173)[3]. *See also United States v. Tello*, 687 F.3d 785, 794-95 (7th Cir. 2012).

The Court of Appeals' failure to discuss the elements of racketeering conspiracy is fatal to its analysis and requires reversal, for strikingly absent from these elements is *any* requirement that a controlled substance be committed *by anyone*—let alone the Guarnero.

In the very case in which Guarnero entered his plea, the Seventh Circuit explained:

> In order to establish [the defendant's] guilt on Count Two, 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 predicate acts of racketeering….[Section 1962(d)] punishes the *agreement* to commit such an offense….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 added, internal citations omitted). *See also Salinas v. United States*, 522 U.S. 52, 63

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[3] These were the very elements that the government and Guarnero agreed must be proven in his prior case. (R.27, Ex. D, ¶ 9, App. 149).

(1997) (no requirement that a RICO conspiracy defendant commit a specific act); *United States v. Yannotti*, 541 F.3d 112, 121 (2d Cir. 2008) ("the government need not prove that the defendant himself agreed that he would commit two or more predicate acts").

Nor is RICO a drug statute. Indeed, "[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) (internal punctuation omitted). Thus, Guarnero's liability for racketeering conspiracy was completely unrelated to whether he—or anyone else—committed *any* narcotics violations at all. *Salinas*, 522 U.S. at 63; *Tello*, 687 F.3d at 792; *Yannotti*, 541 F.3d at 121.

Although the Court of Appeals acknowledged below that Congress' definition of "pattern of racketeering activity" is broad enough to encompass both drug and non-drug activity (App. 108-11, ¶¶ 7-8), the Court of Appeals failed to analyze the *elements* of the statute of prior conviction. Had it done so, it would have necessarily concluded that narcotics is simply *not* a statutory element of federal racketeering conspiracy. As Congress itself stated, RICO is a law "[r]elating to the control of *organized crime* in the United States." Pub. L. 91-452, 84 Stat. 922 (emphasis added). It is not a statute relating to controlled substances.

The Ninth Circuit's reasoning in *Lara-Chacon* applies with particularly persuasive force here. At issue in *Lara-Chacon* was a federal immigration statute[4] that made an alien

[4] 8 U.S.C. § 1227(a)(2)(B)(i)

subject to removal if convicted of certain crimes, including violation of a law relating to controlled substances. The petitioner in *Lara-Chacon* had been convicted of violating a state racketeering statute. *Id*.

Like the cases at bar, although the state racketeering statute did not specifically "reference[] controlled substances *in haec verba*" (*see* App. 111, ¶ 8), there were "many, many ways a person may violate" (*see* App. 114, ¶ 12) that statute, including from proceeds derived from controlled substances.

Yet, the Ninth Circuit forcefully 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*.

Lara-Chacon, 345 F.3d at 1155 (emphases added).

Like *Lara-Chacon*, Guarnero's racketeering conspiracy conviction is a distinct crime from any underlying offense and does not require proof of any crime relating to controlled substances. As such, nothing "about the fact of [Guarnero's] conviction demonstrates violation of a law related to a controlled substance." *Id*. *See also State v. House*, 2007 WI 79, ¶ 33, 302 Wis. 2d 1, 734 N.W.2d 140 ("racketeering" under Wisconsin's racketeering statute[5] is not

[5] Wis. Stat. § 946.82 (defining "racketeering activity" and "pattern of racketeering activity" for purposes of state law).

included within the definition of "dealing in controlled substances" for purposes of a wiretapping statute).

Because narcotics is not an element of racketeering conspiracy, and nothing about a racketeering conspiracy conviction establishes a narcotics violation, § 1962(d) is not a statute relating to controlled substances.

2. The RICO Conspiracy Statute Does Not Relate To Controlled Substances Under The Test Previously Articulated By The Court Of Appeals.

Although the scope of the "relating to" language in § 961.41(3g)(c) has not been definitively construed by this Court, it has been the subject of previous published Court of Appeals decisions. Those decisions confirm that—unlike the RICO conspiracy conviction at issue here—a prior statute "relates to" controlled substances when narcotics is a necessary element of the statute of prior conviction.

In *State v. Moline*, 229 Wis. 2d 38, 598 N.W.2d 929 (Ct. App.), *rev. denied* 230 Wis. 2d 274 (1999), the Court of Appeals considered whether a defendant's prior conviction for possession of drug paraphernalia arose under a statute relating to controlled substances. In holding that Moline's prior conviction *was* sufficient to support a second or subsequent offense, the Court of Appeals held 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*. That specific link arose from the fact that drugs were the *sine qua non* of a drug paraphernalia conviction. As aptly put by the *Moline* Court, "paraphernalia is not illegal unless it is 'related to' drugs'." *Id.* It was therefore both logically and textually impossible to sustain a drug paraphernalia conviction without a connection to drugs. *Id*. (noting that the connection between drugs and drug paraphernalia "is simply common sense").[6]

Unlike *Moline*, in which "paraphernalia is not illegal unless it is 'related to' drugs," *id.*, Guarnero's prior RICO conspiracy conviction requires no connection to drugs whatsoever. *Salinas* 522 U.S. at 63; *Tello*, 687 F.3d at 792; *Yannotti*, 541 F.3d at 121. Controlled substances are neither necessary nor sufficient to sustain a racketeering conspiracy conviction and, therefore, § 1962(d) does not relate to controlled substances under the test set forth by the *Moline* court.

C. Permitting A Court To Look Beyond Statutory Elements Violates A Defendant's Sixth Amendment Rights As Articulated In *Apprendi v. New Jersey*.

This Court should reverse the Court of Appeals for the additional reason that the lower courts' consideration of facts

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[6] 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).

beyond the statutory elements of Guarnero's prior conviction squarely implicates—and violates—his Sixth Amendment[7] rights as articulated by the Supreme Court.

It is well-settled that, other than the fact of a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory minimum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). This Court has further cautioned that when a court assesses "not only the fact of a prior conviction but also the facts and conduct underlying that conviction….these assessments could implicate *Apprendi*." *State v. Long*, 2009 WI 36, ¶ 57, 317 Wis. 2d 92, 765 N.W.2d 557 (italics in original).

Indeed, in the very cases the Court of Appeals found to be "dispositive" (App. 111, ¶ 8), the U.S. Supreme Court squarely warned that increasing a penalty based on a prior offense "would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction." *Descamps*, 133 S. Ct. at 2288. Those concerns counsel against allowing a sentencing court "to make a disputed determination about what the defendant and…judge must have understood as the factual basis of the prior plea…" *Id*., *citing Shepard v. United States*, 544 U.S. 13, 25 (2005) (internal punctuation omitted).

Yet, that is precisely what both lower courts did in this case. Neither the trial court nor the Court of Appeals analyzed the elements of a racketeering conspiracy conviction. Further, the Court of Appeals repeatedly emphasized that there were many "alternate paths to

[7] The Sixth Amendment guarantees a criminal defendant, *inter alia*, the right to trial by jury. U.S. CONST. amend VI. *See also* WIS. CONST. art. I, § 7.

conviction." (App. 111, ¶ 8). *See also* App. 106, ¶ 3 ("many different ways a person can violate the Act"), App. 114, ¶ 11 ("there is more than one route to conviction"); App. 114, ¶ 12 ("there are many, many ways a person may violate" the statute). And, the Court of Appeals looked "at the indictment to which Guarnero pled guilty as well as his plea-bargained acknowledgement that he was 'in fact, guilty of the offense'"..." (App. 114, ¶ 12).

The Court of Appeals explained:

> [T]he modified categorical approach will *benefit* other defendants whose acts underlying their convictions did not satisfy the enhancement criteria, as would be the situation if, for example, a defendant…was charged under the Racketeer act…because he or she "traffick[ed] in counterfeit labels for phonorecords, computer programs or computer program documentation," . . . *rather than, as here, controlled substances.*

(App. 114, ¶ 11) (first emphasis in original; second emphasis added). By erroneously focusing on the "acts underlying their convictions" and concluding that Guarnero "traffick[ed] in…controlled substances," rather than simply analyzing the statutory elements for racketeering conspiracy, the Court of Appeals engaged in precisely the type of judicial fact-finding prohibited by *Apprendi*. *See, e.g.*, *Descamps*, 133 S. Ct. at 2288 ("when a defendant pleads guilty to a crime, he waives his right to a jury determination of *only* that offense's elements") (emphasis added).

The Court of Appeals' failure to consider the statutory elements of Guarnero's prior conviction—and instead focusing on "acts underlying" his conviction to conclude that he had trafficked in controlled substances—is fatal to the decision below and requires reversal. Reversal is all the more appropriate in order to prevent lower courts in future cases

from engaging in judicial fact-finding prohibited by *Apprendi*.

D. Because Guarnero's Possession Charge Should Have Been At Most A Misdemeanor, The Court Of Appeals Erred In Failing To Find Guarnero's Bail Jumping Conviction To Be At Most A Misdemeanor.

The Court of Appeals concluded below (App. 115-16, ¶ 14), and Guarnero agrees, that his bail jumping conviction under Wis. Stat. § 946.49(1) turns on whether his conviction under § 961.41(3g)(c) is a misdemeanor first offense or a felony second or subsequent offense.

Under Wisconsin's bail jumping statute, 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, Guarnero should not have been convicted of possession of cocaine as a second or subsequent offense—a Class I felony. Accordingly, the bail jumping conviction should have been at most a misdemeanor.

II. The Court Of Appeals Erroneously Adopted—And Then Misapplied—A "Modified Categorical Approach" To Consider Materials Beyond The Statutory Elements Of Guarnero's Prior Conviction.

The Court of Appeals found "dispositive" two U.S. Supreme Court decisions (*United States v. Castleman*, 134 S. Ct. 1405 (2014) and *Descamps v. United States*, 133 S. Ct. 2276 (2013)) that address the extent to which—if at all—a court may look beyond the statutory elements of a prior conviction to determine whether to apply enhanced penalties under various federal statutes.

The U.S. Supreme Court has generally restricted courts to using a strict "categorical approach" to consider *only* the elements of the statute of the defendant's prior conviction. *Descamps*, 133 S. Ct. at 2281 (interpreting the federal Armed Career Criminal Act); *Taylor v. United States*, 495 U.S. 575 (1990). Using this methodology, a court must compare the statutory elements of the prior offense to the elements of the relevant "generic" crime under federal law—*i.e.*, the offense as "commonly understood." *Descamps*, 133 S. Ct. at 2281. The prior offense qualifies as a predicate only if the elements of the prior offense "are the same as, or narrower than, those of the generic offense." *Id.*

The Supreme Court has also approved a limited variation of this approach, known as the "modified categorical approach," under which courts may consult a narrow class of documents, such as charging documents, jury instructions, and plea agreements, when the prior conviction arises under a "divisible" statute. *Id.*; *Castleman*, 134 S. Ct. at 1414. A statute is "divisible" only if it creates multiple crimes and sets out one or more elements of the offense in the

alternative (such as defining burglary as entry into a building *or* an automobile). *Descamps*, 133 S. Ct. at 2281. However, even under a "divisible" statute, "at least one…of those crimes [must] match[] the generic version…" *Id*. at 2285. And, the alternative that "matches" must still have elements that "are the same as, or narrower than, those of the generic offense." *Id*. at 2281.

By contrast, if the elements of the prior offense are *broader* than the "generic offense" (as they indisputably are in this case), "[t]he modified approach…has no role to play…," *Descamps*, 133 S. Ct. at 2285, and the statute with broader elements simply "cannot serve as….[a] predicate" to support a later penalty enhancement. *Id*. at 2286. *See also id. at* 2283 ("if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as…[a] predicate….).

The Supreme Court warned that this strict framework "is the only way we have ever allowed" a modified categorical approach to be used. *Descamps*, 133 S. Ct. at 2285. Nevertheless, the Court of Appeals failed to follow the Supreme Court's strict methodology. This Court should therefore reverse the Court of Appeals to clarify that the "modified approach…has no role to play" in this case, or in any future similar cases. *Descamps*, 133 S. Ct. at 2285.

A. The Modified Categorical Approach Set Forth in *Descamps* and *Castleman* Has No Application To These Cases Because § 961.41(3g)(c) On Its Face Only Permits Consideration Of The "Statute" Of Prior Conviction.

As a threshold matter, *Castleman*, *Descamps*, and the cases upon which they rely involve the interpretation of

federal statutes that provide enhanced penalties for certain prior offenses. Obviously, in the cases at bar it is a *Wisconsin* statute—not a federal statute—that defines the extent of any applicable penalty enhancement.

Because the Wisconsin legislature specifically used the word "statute" in Wis. Stat. § 961.41(3g)(c) to determine whether a prior conviction arises under a statute "relating to" controlled substances, the only relevant inquiry is the *statute* of prior conviction. As we show above in Part I, that inquiry must be limited to the *elements* of the relevant statute.

By contrast, the language of the federal Armed Career Criminal Act[8] under consideration in *Descamps* required three previous convictions for a "violent felony or a serious drug *offense*." 18 U.S.C. § 924(e)(1) (emphasis added). That statute further defined "violent felony" as "any *crime* punishable by imprisonment for a term exceeding one year…" 18 U.S.C. § 924(e)(2)(B), and specifically directed a court to consider whether the crime "involves *conduct* that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii) (emphases added). Similarly, the statute under consideration in *Castleman* prohibited possession of a firearm by any person "who has been convicted in any court of a misdemeanor *crime* of domestic violence…" 18 U.S.C. § 922(g)(9) (emphasis added). *See also Nijhawan v. Holder*, 557 U.S. 29 (2009) (federal immigration statute that defined "aggravated felony" as "an *offense*" involving fraud or deceit…); *Johnson v. United States*, 559 U.S. 133 (2010) (Armed Career Criminal Act); *Taylor v. United States*, 495 U.S. 575 (1990) (same).

Even decisions from the Court of Appeals have recognized that when the Wisconsin legislature speaks in

[8] 18 U.S.C. § 924(e)

terms of a prior "crime" or "violation," it may be referring to certain *conduct*, and that a court may—when necessary to determine the extent of that conduct—look beyond statutory elements. *See, e.g., State v. Collins*, 2002 WI App 177, ¶ 15 n.6, 256 Wis. 2d 697, 649 N.W.2d 325, *rev. denied*, 2002 WI 121, 257 Wis. 2d 119, 653 N.W.2d 891; *State v. Campbell*, 2002 WI App 20, 250 Wis. 2d 238, 642 N.W.2d 230, *rev. denied*, 2002 WI 48, 252 Wis. 2d 150, 644 N.W.2d 686. *See also* Wis. Stat. § 939.12 (defining the statutory term "crime" by reference to "conduct").

But Wis. Stat. § 961.41(3g)(c) directs a court to consider only the *statute* of the prior conviction—not any particular "crime," "offense," or "violation" that led to the conviction. This difference of statutory language is significant, and courts must therefore "presume that a legislature says in a statute what it means and means in a statute what it says…." *State v. Dowdy*, 2012 WI 12, ¶ 31, 338 Wis. 2d 565, 808 N.W.2d 691, *citing Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Because Wis. Stat. § 961.41(3g)(c) speaks in terms of a "statute" and not an "offense," "crime", or "conduct" as did the statues in *Descamps*, *Castleman*, and the cases on which they rely, invocation of the modified categorical approach to permit recourse beyond the elements of the "statute" is impermissible.

B. Under The Supreme Court's Methodology Adopted As Dispositive By The Court Of Appeals, The Lower Court Was Limited To The Strict Categorical Approach.

In *Descamps*, the U.S. Supreme Court admonished that courts are to "focus on the *elements*, rather than the facts, of a crime." *Descamps*, 133 S. Ct. at 2285 (emphasis added). In

order to preserve the appropriate focus on *elements,* the Supreme Court carefully set forth the procedure for using this framework.

First, a court must "compare the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—*i.e.,* the offense as commonly understood." *Id.* at 2281. A prior conviction can only satisfy an enhancement "if the statute's elements are the same as, or narrower than, those of the generic offense." *Id*.

Second, only if the statute of prior conviction is "divisible," (*see, infra,* at Point II(B)(2)), may the court apply the modified categorical approach. *Id*. A statute is only "divisible," if it creates multiple crimes and sets out one or more elements of the offense in the alternative. *Descamps*, 133 S. Ct. at 2281 (such as defining burglary as "entry into a building *or* an automobile"). Even with a divisible statute, a court must still "compar[e] those elements with the generic offense's." *Id*. at 2285. Thus, a modified categorical approach cannot be used in a divisible statute unless one of those statutory alternatives matches the "generic" offense with elements that are the same as or narrower than that generic offense. *Id*. at 2281, 2285.

This is "the only way" the Supreme Court permits this doctrine to be used. *Descamps*, 133 S. Ct. at 2285. Notwithstanding, the Court of Appeals failed to follow the Supreme Court's methodology, never identified the relevant "generic" controlled substance offense, and never compared the elements of Guarnero's RICO conspiracy conviction to the "generic" controlled substance offense as the U.S. Supreme Court clearly required it to do.

1. RICO Conspiracy Is Indisputably Broader Than A "Generic" Controlled Substance Offense.

Descamps makes clear that the first step is to "compare the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—*i.e.,* the offense as commonly understood." *Id.* at 2281.

The Court of Appeals failed to identify the relevant "generic" offense in this case. In many of the Supreme Court cases applying this methodology, the relevant comparison was to the "generic" crime of burglary, as commonly understood and defined in the majority of states. *See, e.g., Taylor v. United States*, 495 U.S. 575, 589 (1990) (the "generic" view of burglary roughly corresponds to the definitions of burglary in a majority of the States' criminal codes); *Shepard v. United States*, 544 U.S. 13 (2005) (sentencing court determining whether defendant pleaded guilty to "generic burglary"); *Descamps*, 133 S. Ct. at 2282 (considering the elements of generic burglary).

Nor did the Court of Appeals compare the elements for RICO conspiracy against that "generic" controlled substance offense. Indeed, the Court of Appeals never mentioned the elements for RICO conspiracy. This failure is fatal to the lower court's decision and ignores the Supreme Court's mandate to "focus on the elements, rather than the facts, of a crime." *Descamps* 133 S. Ct. at 2285.

Even if an appropriate "generic" controlled substance offense could be identified, the elements of a RICO conspiracy conviction under § 1962(d) are indisputably *broader* than a generic narcotics crime "as commonly understood." Indeed, both lower courts conceded that § 1962(d) is a broad statute. (App. 130 (trial court noting that

RICO is "a broad statute"), App. 108, ¶ 7 (Court of Appeals' observation that RICO's definition of racketeering activity is "broad")).

As shown above, the elements of racketeering conspiracy under 18 U.S.C. § 1962(d) are:

> (1) that the defendant knowingly conspired to conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity,
>
> (2) that the organization was an enterprise, and
>
> (3) that the activities of the defendant would affect interstate commerce.

(R.27, Ex. D, ¶ 9, App. 149; R.27, Ex. F, App. 173). Questions of what constitutes an "enterprise," a "pattern," "racketeering activity," and activities that "affect interstate commerce," have generated voluminous U.S. Supreme Court decisions over many decades and without any doubt extend well beyond what would be required to sustain a "generic" drug conviction.[9] And, as shown above in Part I(B)(1), the government need not prove that a RICO conspiracy defendant ever committed any controlled substance violation whatsoever.

Even if his RICO conspiracy conviction were predicated on controlled substances, which Guarnero contends is *not* the case here, the elements of a federal racketeering conspiracy conviction are far broader than those

[9] For example, in order to sustain a conviction for simple possession of a controlled substance under Wis. Stat. § 961.41(3g), all the State must prove is that (1) the defendant possessed a substance, (2) the substance was a controlled substance whose possession is prohibited by law, and (3) the defendant knew or believed that the substance was a controlled substance. *See* Wis. J. I.—Criminal 6030 (2013).

required for a "generic" controlled substance violation. Because these elements are broader than—rather than "the same as, or narrower than" those required for a controlled substance conviction, *see Descamps*, 133 S. Ct. at 2281—the inquiry ends, and the Court of Appeals' analysis fails.

The modified categorical approach "thus has no role to play in this case." *Descamps*, 133 S. Ct. at 2285. Because RICO conspiracy is indisputably broader than a generic controlled substance offense, Guarnero's prior conviction "cannot serve as….[a] predicate" under § 961.41(3g)(c). *Id*. at 2286. See also *State v. Dickey*, 329 P.3d 1230, 1244 (Kan. Ct. App. 2014) (where elements of statute of defendant's prior conviction sweep more broadly than the elements in the current statute, "we can categorically say that [the defendant's] prior adjudication" does not count for purposes of sentence enhancement).

2. The RICO Conspiracy Statute Is An Indivisible Statute That Does Not Define Several Alternative Crimes Even If There Is "More Than One Route To Conviction."

The Court of Appeals held that recourse to the modified categorical approach was appropriate because the RICO conspiracy statute was, in its view, "divisible" (App. 114, ¶ 12). The court concluded that because there was "more than one route to conviction," it could "look to see what route the defendant took towards his or her conviction." (App. 114, ¶ 11).

To the contrary, the U.S. Supreme Court has explained that a statute is not "divisible" unless it "effectively creates several different…crimes." *Descamps*, 133 S. Ct. at 2285, *citing Nijhawan v. Holder*, 557 U.S. 29, 41 (2009) (internal

quotation omitted). When a statute creates multiple alternative crimes, a court would not necessarily know "just from looking at the statute, which version of the offense [the defendant] was convicted of." *Descamps*, 133 S. Ct. at 2284, *citing Shepard v. United States*, 544 U.S. 13 (2005).

Stated differently, the modified categorical approach is a tool "to identify *which crime* is the crime of conviction where…it is unclear which…offense the defendant pled to or was found to have violated." *United States v. Carter*, 752 F.3d 8, 19 (1st Cir. 2014) (emphasis added), *citing Campbell v. Holder*, 698 F.3d 29, 33 (1st Cir. 2012).

This is not such a case. The RICO conspiracy statute does not "effectively create[] several different crimes", *Descamps*, 133 S. Ct. at 2285, nor is there any confusion over the crime to which Guarnero pled guilty. Section 1962(d) creates a *single crime*—albeit broadly defined—of racketeering conspiracy. The elements under § 1962(d) are: (1) that the defendant knowingly conspired to conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity, (2) that the organization was an enterprise, and (3) that the activities of the defendant would affect interstate commerce. (R.27, Ex. D, ¶ 9, App. 149, R.27, Ex. F, App. 173). None of these elements are stated in the alternative, and none of these elements require a controlled substance violation. There are no "alternative crimes" created, and the statute is therefore indivisible. Contrary to the Court of Appeals' conclusion, the modified categorical approach simply cannot apply here. *Descamps*, 133 S. Ct. at 2285.

And, even if § 1962(d) were divisible (which it is not), the modified categorical approach would still not apply because there is no "alternative" racketeering conspiracy

crime that has elements that "are the same as, or narrower than, those of the generic offense." *Descamps*, 133 S. Ct. at 2281. Even in a narcotics-based RICO conspiracy conviction (which this is not), the government would still have to prove, *inter alia*, the existence of an "enterprise" and that the defendant's activities affect "interstate commerce." These elements are indisputably broader than those of a "generic" drug offense, which requires no such proof.

That the term "pattern of racketeering activity" is broad enough to encompass drug activity and non-drug activity does not make the conspiracy statute "divisible." The Court of Appeals' observation that "there is more than one route to conviction" and that "there are many, many ways that a person may violate" RICO, (App. 114-15, ¶¶ 11-12), conflates the fundamental difference between the *elements* of an offense and the *means* by which an offense can be committed.

The difference between the *elements* of an offense and the *means* by which a person could violate that statute is critical, because "[c]alling a particular kind of fact an 'element' carries certain legal consequences." *Richardson v. United States*, 526 U.S. 813, 817 (1999). Among those consequences is that "a jury…cannot convict unless it unanimously finds that the Government has proved each element" beyond a reasonable doubt. *Id*. By contrast, a jury need not unanimously agree on "which of several possible *means* the defendant used to commit an element of the crime." *Id*.

Thus, "while indivisible statutes may contain multiple, alternative *means* of committing the crime, only divisible statutes contain multiple, alternative *elements* of functionally separate crimes." *Rendon v. Holder*, 764 F.3d 1077, 1084-85

(9th Cir. 2014). *See also United States v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013), *cert. den.* 134 S. Ct. 1777 (2014) (holding that "offensive physical contact" and "physical harm" are "merely alternative *means* of satisfying a single element" of a state statute, rather than alternative *elements*).

This is more than an academic distinction, for "a prosecutor charging a violation of a divisible statute must generally select the relevant element from its list of alternatives." *Descamps*, 133 S. Ct. at 2290. And "the jury…must then find that element unanimously and beyond a reasonable doubt." *Id.*

The RICO conspiracy statute does not set forth alternative elements, nor must the government ever prove (or a jury unanimously find), that a RICO conspiracy defendant committed a controlled substance violation. *Salinas*, 522 U.S. at 63; *Tello*, 687 F.3d at 792. A prosecutor therefore need not allege in an indictment (and indeed *did not* allege here, *see* R.27, Ex. C, ¶¶ 14-18, App. 137-38), which underlying acts were supposedly committed, nor would a jury be called upon to decide whether a defendant committed a specific predicate act, let alone choose among various "alternatives" to determine *which* predicate act was committed. *Id*.

Because "[w]e know [Guarnero's] crime of conviction, and it does not correspond to the relevant generic offense…[T]he inquiry is over." *Descamps*, 133 S. Ct. at 2286. It was therefore plainly error for the Court of Appeals to hold that it "may look at the indictment…as well as his plea-bargained acknowledgement" as a way "to see what route [Guarnero] took towards his…conviction." (App. 110-12, ¶¶ 11-12). The precise route to conviction for

racketeering conspiracy is wholly irrelevant.[10] The lower court's failure to apply properly the decisions it found to be "dispositive" requires reversal.

C. Even Under A Modified Categorical Approach None Of The Approved *Shepard* Documents Show That Guarnero Committed A Controlled Substance Crime.

Even if this Court were to apply the modified categorical approach (which Guarnero contends it should not), there is no evidence in the record that Guarnero *himself* committed a controlled substance violation.

As a preliminary matter, the Supreme Court has strictly limited the category of documents that may be examined even under a modified categorical approach to "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. United States*, 544 U.S. 13, 16 (2005).

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[10] The Supreme Court actually *forbids* the Court of Appeals from opining as to "what route the defendant took towards his or her conviction," because the Supreme Court made clear that a conviction under a broadly defined indivisible statute can never qualify as a predicate "even if the defendant *actually committed* the offense in its generic form." *Descamps*, 133 S. Ct. at 2283 (emphasis added). *See also Familia Rosario v. Holder*, 655 F.3d 739 (7th Cir. 2011) (rejecting use of the modified categorical approach to examine specific facts about a conspiracy involved in individual's conviction, even though the statute was broad enough to cover the specific crime at issue).

In the context of a plea, examination of the plea agreement must disclose that the prior plea "necessarily admitted" the facts triggering the enhancement statute. *Id*. at 16, 24.

None of those documents—or any other evidence in the record—show that Guarnero committed any controlled substance violation whatsoever, and the plea agreement falls woefully short of establishing that he "necessarily admitted" facts demonstrating that Guarnero committed a narcotics crime. (*See* R.27, Ex. D, ¶ 5, App. 146-48; Ex. E, App. 165).

Count Two of the federal indictment to which Guarnero pled guilty contains no allegation that Guarnero *himself* committed any narcotics crime, and the only charges against Guarnero concerning controlled substances were dismissed. Although the Court of Appeals focused on the language of this count discussing controlled substances (App. 105-06, ¶ 2), examination of Count Two in its *entirety* shows that the government also alleged a multitude of other predicates having nothing to do with controlled substances, including kidnapping[11], tampering with a witness[12], retaliation against a witness[13], homicide[14], attempt[15], conspiracy[16], robbery[17], and arson[18] (R.27, Ex. C, ¶ 17, App. 137-38). Yet, there is no allegation in this count that ties any particular defendant to any one of these offenses (let alone Guarnero to a *controlled substance* offense), because the

[11] 18 U.S.C. § 1201; Wis. Stat. § 940.31
[12] 18 U.S.C. § 1512
[13] 18 U.S.C. § 1513
[14] Wis. Stat. § 940.01
[15] Wis. Stat. § 939.32
[16] Wis. Stat. § 939.31
[17] Wis. Stat. § 943.32
[18] Wis. Stat. § 943.02

government simply was not required to do so under controlling RICO conspiracy law.

Indeed, the vast majority of admissions in the federal plea agreement specific to Guarnero related to firearms, not drugs. (R. 27, Ex. D, ¶ 5; App. 146-48). None of these statements establish—as the Supreme Court in *Shepard* required—that Guarnero "necessarily admitted" any facts that would show a controlled substance violation. *Shepard*, 544 U.S. at 16, 24.

Nor does a different result obtain from a single, passing mention of four bags of marijuana purportedly found on the premises. (R.27, Ex. D, ¶ 5, App. 147). There was no suggestion of *where* on the premises the marijuana was supposedly found, that it was found on or near 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. Even if such a statement somehow constituted an admission of a crime—which it does not[19]—the U.S. Supreme Court took great care to admonish that statements that may hypothetically suggest that a crime *might* have been committed are simply not enough:

> At most, the colloquy showed that Descamps *committed* generic burglary, and so hypothetically *could have been* convicted under a law criminalizing that conduct. But that is just what we said, in *Taylor*, and elsewhere, is not enough.

Descamps, 133 S. Ct. at 2288 (emphases in original).

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[19] *See, Schwartz v. State*, 192 Wis. 414, 417, 212 N.W. 664 (1927) (mere presence of prohibited substance is not unlawful "possession" without evidence that the defendant had knowledge of the presence of the substance.

As such, even if the modified categorical approach applied in this case (which it does not), there is no evidence among the documents approved by *Shepard* showing that Guarnero committed a narcotics crime, nor did the Court of Appeals cite any. Nor can the State cite any. No such evidence exists in the record.

III. This Court Should Reverse The Court Of Appeals Because Adoption Of The Modified Categorical Approach As Part Of Wisconsin Law Is Likely To Have A Confusing Effect On Lower Courts Throughout The State.

The Court of Appeals' adoption of the modified categorical approach constituted a sweeping extension of the law in Wisconsin.[20] This Court should also reverse the Court of Appeals for the additional reason that the extension of this difficult doctrine in Wisconsin is likely to have a confusing effect on lower courts throughout the state.

Indeed, this Court has acknowledged that the U.S. Supreme Court has long "struggled to resolve" these doctrinally complex issues. *State v. Long*, 2009 WI 36, ¶ 58, 317 Wis. 2d 92, 765 N.W.2d 557. So, too, have the lower federal courts struggled in parsing the exacting framework set forth by the U.S. Supreme Court. *See, e.g., United States v. Vann,* 660 F.3d 771, 796 (4th Cir. 2011) (describing the court's "heroic struggles to apply faithfully" its

[20] In *Evans v. WI Dep't of Justice*, 2014 WI App 31, ¶ 19, 353 Wis. 2d 289, 844 N.W.2d 403, the Court of Appeals also cited *Descamps* and noted that it had considered the "permitted 'class of documents'…namely, the criminal complaint and the plea colloquy transcript" to determine whether a disorderly conduct conviction was a "misdemeanor crime of domestic violence."

"understanding of the law in this difficult area") (Davis, J., concurring).

The federal circuit courts have often been in disagreement regarding how and when to apply the modified categorical approach. *Descamps*, 133 S. Ct. at 2283 n.1 (resolving a circuit split to clarify that this approach cannot be applied to statutes that contain a single, indivisible set of elements sweeping more broadly than the corresponding generic offense); *Castleman*, 134 S. Ct. at 1410 (resolving a circuit split regarding application of this doctrine in context of a "misdemeanor crime of domestic violence").

This Court should decline the Court of Appeals' invitation for similar confusion throughout the Wisconsin courts. There is no reason to suspect that the courts of this state will struggle any less with this doctrine than their federal counterparts. Indeed, the challenging nature of the modified categorical approach is underscored by the Court of Appeal's own misapplication of the doctrine in this case. Yet, because "[s]tatutes that enhance a conviction's penalty or impose a restriction because the defendant has violated some other law are common," (*see* App. 111, ¶ 9), this scenario is likely to recur.

This Court should therefore reverse the Court of Appeals and restrict lower courts to considering only the statutory elements of a prior offense. Such a bright-line rule is consistent with the Supreme Court's admonition that courts must "focus on the elements, rather than the facts, of a crime," *Descamps*, 133 S. Ct. at 2285, and also avoids the "daunting" practical difficulties and unfairness (and attendant constitutional infirmities) of adopting the type of factual approach the Court of Appeals and trial court used below.

Long, 2009 WI 36, ¶ 58, *citing Taylor v. United States*, 495 U.S. 575, 601 (1990).

IV. Due Process And The Rule Of Lenity Preclude The Court Of Appeals' Application Of § 961.41(3g)(c) To Guarnero's Prior RICO Conspiracy Conviction.

It is well established that "due process[21] 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). Notwithstanding, the Court of Appeals rejected Guarnero's Due Process argument below, concluding that "there is no 'doubt' as to what the Racketeer Act says that it proscribes." (App. 115, ¶ 13).

The Court of Appeals confused the "fair warning" requirement of *Lanier* with the standard for the Rule of Lenity as articulated by this court in *State v. Cole*, 2003 WI 59, 262 Wis. 2d 167, 663 N.W.2d 700. The question of whether there is "doubt" as to the meaning of a criminal statute pertains to whether there is an ambiguity that must be resolved in favor of the accused. *See, e.g., Cole*, 2003 WI 59 at ¶ 13 ("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."). Guarnero's Due Process argument relates to the unprecedented nature of the Court of Appeals' looking beyond the strict statutory elements of 18 U.S.C. § 1962(d) to find that this statute "relates to" controlled substances—even in the absence of any statutory element requiring a nexus to controlled substances or any

[21] U.S. CONST. amend. XIV, § 1. WIS. CONST. art. I, § 8

record evidence showing that Guarnero himself ever committed any prior drug offense.

The Court of Appeals' invocation of *Castleman* as a basis to reject Guarnero's argument is inapposite. (App. 115, ¶ 13). Unlike the instant case in which the Court of Appeals adopted *Descamps* and *Castleman* and applied them to Wis. Stat. § 961.41(3g)(c) as a matter of first impression, the *Castleman* opinion was one in a line of cases nearly a quarter century old that contemplated that courts might in an appropriate case look beyond the elements of the statute of prior conviction.[22] Thus, the defendant in *Castleman* had ample notice that a court might look beyond the statutory elements of a prior offense. Guarnero had no such notice here because the modified categorical approach had never before been adopted in Wisconsin, and as such, application of Wis. Stat. § 961.41(3g)(c) as a penalty enhancement violated his Due Process rights—particularly when "neither the statute nor any prior judicial decision [had] fairly disclosed" that a racketeering conspiracy conviction would "be within [the] scope" of § 961.41(3g)(c). *Lanier*, 520 U.S. at 266.

Similarly, the U.S. Supreme Court's conclusion in *Castleman* that the particular statute under consideration (a federal statute restricting possession of a firearm) was not ambiguous is of no moment here. As Guarnero showed above (*supra,* at II(A)), Wis. Stat. § 961.41(3g)(c) is a very different type of statute than the one considered by the Supreme Court in *Castleman* in that the Wisconsin statute does not refer to a prior "crime," "offense," or "conduct." As such, to the extent the Court of Appeals concluded that Wis. Stat. §

[22] The U.S. Supreme Court's invocation of the "categorical approach" as well as its references to a modified categorical approach date at very least to that court's decision in *Taylor v. United States*, 495 U.S. 575 (1990).

961.41(3g)(c) could be interpreted to apply to a prior racketeering conspiracy conviction, at very least the Rule of Lenity required such a rule to be announced prospectively, and not retroactively to Guarnero.

CONCLUSION

For all of the reasons herein, Guarnero respectfully urges this Court to reverse the Court of Appeals, vacate Guarnero's judgments of conviction, and remand these matters to the trial court with instructions to enter judgments of conviction for *misdemeanor* violations of Wis. Stat. § 961.41(3g)(c) and § 946.49(1)(a).

Dated this 15th day of December, 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 9,771 words.

Dated this 15th day of December, 2014

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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.

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Dated this 15th day of December, 2014

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