STATE OF WISCONSIN

IN SUPREME COURT

Nos. 2013AP1753-CR & 2013AP1754-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROGELIO GUARNERO,

Defendant-Appellant-Petitioner.

APPEAL FROM A DECISION OF THE WISCONSIN COURT OF APPEALS AFFIRMING ORDERS DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORALBE TIMOTHY DUGAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

SARA LYNN LARSON
Assistant Attorney General
State Bar #1087785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-5366
(608) 266-9594 (Fax)
larsonsl@doj.state.wi.us

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

Page

STATUTES

Page

OTHER AUTHORITIES

STATE OF WISCONSIN

IN SUPREME COURT

Nos. 2013AP1753-CR & 2013AP1754-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROGELIO GUARNERO,

Defendant-Appellant-Petitioner.

APPEAL FROM A DECISION OF THE WISCONSIN COURT OF APPEALS AFFIRMING ORDERS DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORALBE TIMOTHY DUGAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

The State rephrases the issues on appeal as follows:

1. Guarnero was first convicted under the RICO statute, which "relates to" controlled substances; consequently, his subsequent state conviction of possession of cocaine qualifies as a second offense under Wis. Stat. § 961.41(3g)(c).

2. The court of appeals' adoption of the "modified categorical approach" is appropriate because the RICO statute is a divisible statute. Therefore, the lower courts were allowed to examine Guarnero's RICO indictment and plea agreement to determine whether the route to that conviction related to controlled substances.

3. The rule of lenity does not apply because there is no uncertainty as to the conduct that RICO proscribes.

4. The circuit court's classification of Guarnero's bail-jumping conviction as a felony was proper because the court properly convicted him of felony possession of cocaine.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case presents questions of law that will impact how lower courts are to approach statutes relating to controlled substances. It therefore merits oral argument and publication.

SUPPLEMENTAL PROCEDURAL BACKGROUND

The facts of this case are undisputed.

Guarnero's Federal Indictment:

In October 2005, the United States filed an indictment against Rogelio Guarnero (27:Ex. C; A-Ap. 135-43). The indictment provided that Guarnero knowingly and intentionally violated, in relevant part, the following:

> Title 18, United States Code § 1962(c), that is, to conduct and participate, directly and indirectly, in the conduct of the affairs of that enterprise though a pattern of racketeering activity involving . . . *multiple acts involving the distribution of controlled substances* including cocaine, cocaine base in the form of "crack" cocaine and marijuana in violation of the law of the United States[.]

(27:Ex. C; A-Ap. 139) (emphasis added).

The indictment provided that this was done as "part of the conspiracy that each defendant agreed that a conspirator would commit at least two acts of racketeering activity in the conduct of the affairs of the enterprise," and that this was "in violation of Title 18, United States Code, Section 1962(d)"[1] (27:Ex. C; A-Ap. 139).

---

[1] 18 U.S.C. § 1962(c), provides in part:

> 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.

18 U.S.C. § 1962(d) provides: "It shall be unlawful for any person to conspire to violate" subsection (c).

In addition to Count Two, which will be explored below, Count 25 of the indictment provided that Guarnero "knowingly and intentionally possessed with the intent to distribute a mixture and substance containing a detectable amount of marijuana, a Schedule I controlled substance" (27:Ex. C; A-Ap. 142). Finally, Count 26 provided that Guarnero "knowingly possessed a firearm in furtherance of a drug trafficking crime, namely, possession of a controlled substance marijuana with the intent to deliver as alleged in Count Twenty-Five of this Indictment" (27:Ex. C; A-Ap. 143).

Guarnero's Federal Plea Agreement:

Guarnero pled guilty to Count Two of the indictment, which alleged that Guarnero, and other associates of the Latin Kings, were part of "a criminal organization whose members and associates engaged in acts of violence," including "extortion and distribution of controlled substances" (27:Ex. C:3, Ex. D:2; A-Ap. 161). Count Two also charged that Guarnero conspired 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* in violation of the laws of the United States," and that this violated 18 U.S.C. § 1962(d) (27:Ex. C, Ex. D:19; A-Ap. 149, 163) (emphasis added).

As part of the factual basis for the plea of guilty, Guarnero admitted that, while executing a firearm search warrant at Guarnero's residence, Milwaukee police officers "found . . . 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.147-48).

The plea agreement contained a section entitled, "**ELEMENTS**," which provided the following:

> The parties understand an agree that in order sustain the charge of Conspiracy to Commit RICO *as set forth in Count Two*, the government must prove each of the following propositions beyond a reasonable doubt:
>
> First, that the defendant knowingly conspired to conduct or participate in the conduct of the affairs of the Milwaukee Latin Kings, an enterprise, through a pattern of racketeering activity *as described in Count Two*;
>
> Second, that the Milwaukee Latin Kings were an enterprise; and
>
> Third, that the activities of the Milwaukee Latin Kings would affect interstate commerce.

(27:Ex. D:5; A-Ap. 149) (emphasis added).

Guarnero's State Conviction:

In 2012, the State charged Guarnero with one count of possession of cocaine as a second or subsequent offense, in violation of Wis. Stat. § 961.41(3g)(c), (2). The statute provides in relevant part.

> No person may possess or attempt to possess a controlled substance or a controlled substance analog . . . . Any person who violates this subsection is subject to the following penalties:
>
> . . . .
>
> (c) *Cocaine and cocaine base. If a person possess[es] or attempts to possess*

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

Wis. Stat. § 961.41(3g)(c) (Introduction's italics in original; emphasis added).

Thus, in order to be a "2nd or subsequent offend[er]" under § 961.41(3g)(c), Guarnero must have "been convicted of any felony or misdemeanor . . . under any statute of the United States . . . *relating to controlled substances*" (emphasis added).

The circuit court found Guarnero guilty (18; 19). Guarnero moved for postconviction relief, and the court denied his motion without a hearing (28). In its decision, the court concluded that a "RICO conviction can deal with drug-related activity or not be related to drugs or drug activity" (28:2). The court noted that "count two of the federal indictment related to distribution of controlled substances, including cocaine and other drugs" (*id*).

Guarnero appealed.

The Court of Appeals' Decision:

1. RICO relates to controlled substances.

On appeal, Guarnero argued that his prior RICO conviction did not satisfy Wis. Stat. § 961.41(3g)(c)'s enhancement provision because, he argued, RICO is not a statute that "relates to" controlled substances. He argued that RICO is a statute relating to racketeering, not drugs, and that, on its face, RICO says nothing about controlled substances.

The court of appeals disagreed, noting that "[a]lthough neither section [18 U.S.C. § 1962(c) or (d)] references controlled substances *in haec verba*,"[2] they do make unlawful "'racketeering activity' and conspiring to engage in 'racketeering activity' which . . . is defined by [RICO] to include activities involving controlled substances, such as cocaine" (A-Ap. 111). Therefore, the court of appeals held that the circuit court correctly concluded that RICO relates to "controlled substances" as that phrase is used in Wis. Stat. § 961.41(3g)(c) (A-Ap. 111).

2. The Modified Categorical Approach Applies.

The court of appeals then concluded that its decision was "keeping with the rule most recently recognized by the United States Supreme Court in *United States v. Castleman*, 572 U.S. ___, 134 S. Ct. 1405 (2014), and *Descamps v. United States*,

[2] Black's Law Dictionary defines "*in haec verba*" as "in these same words; verbatim." Black's Law Dictionary (9th ed. 2009).

570 U.S. ___, 133 S. Ct. 2276 (2013), which permit looking at a charging document and a guilty plea . . . when a predicate criminal statute has alternate paths to conviction" (A-Ap. 111). Known as the "modified categorical approach," the court concluded:

> - "If the face of the statute (here, [RICO]) reveals that there is more than one route to conviction, and
> - one of those routes satisfies an enhancement prerequisite, then
> - a court asked to apply the enhancement may look to see what route the defendant took towards his or her conviction."

(A-Ap. 114; bullets in original).

Therefore, the court of appeals concluded that it and the circuit court could look at Guarnero's federal indictment and plea agreement to see which route he took towards his conviction (A-Ap. 114).

3. The Rule of Lenity Does Not Apply.

The court of appeals also rejected Guarnero's argument that it should apply the "rule of lenity" (A-Ap. 115). Guarnero argued that because no other Wisconsin court had considered whether RICO is a statute "'relating to controlled substances,'" that he did not have fair warning that his RICO plea agreement could subject him to the repeater provision of Wis. Stat. § 961.41(3g)(c) (A-Ap. 115).

The court of appeals disagreed, concluding "there is no 'doubt' as to what [RICO] says are the activities that it proscribes" (A-Ap. 115).

Guarnero appeals.

STANDARD OF REVIEW

This Court's review on this statutory-interpretation appeal is *de novo*. *See Village of Shorewood v. Steinberg*, 174 Wis. 2d 191, 201, 496 N.W.2d 57 (1993). Further, this Court applies a statute as it is written unless it is constitutionally infirm or its text does not reveal the legislature's intent. *See State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶¶43-44, 271 Wis. 2d 633, 681 N.W.2d 110.

ARGUMENT

I. GUARNERO'S CONVICTION UNDER THE RICO STATUE "RELATES TO" CONTROLLED SUBSTANCES; CONSEQUENTLY, GUARNERO'S STATE CONVICTION OF POSSESSION OF COCAINE QUALIFIES AS A SECOND OFFENSE UNDER WIS. STAT. § 961.41(3G)(C).

Guarnero argues that the RICO statute does not relate to controlled substances, and therefore his conviction under that statute does not qualify as an offense "relating to" controlled substances under Wis. Stat. § 961.41(3g)(c) (Guarnero's brief at 9-15). The State disagrees.

Wisconsin Statute § 961.41(3g)(c) provides in relevant part: "an offense is considered a 2nd or subsequent 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" (emphasis added). This 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." *See State v. Moline*, 229 Wis. 2d 38, 42, 598 N.W.2d 929 (Ct. App. 1999) (emphasis added)[3]. "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*. (emphasis added).

The RICO statute relates to controlled substances. Section 1961 defines "racketeering activity" to include:

> (A) any act or threat involving murder, kidnapping, gambling, arson, robbery,

---

[3] In *State v. Moline*, the defendant was charged with one count of possessing cocaine, contrary to Wis. Stat. § 961.41(3g)(c). The complaint alleged that the defendant was a repeat drug offender subject to enhanced penalties. The defendant moved to dismiss, asserting that possession of drug paraphernalia is not an offense which qualifies as a prior conviction within the meaning of Wis. Stat. § 961.48(3) and (4). 229 Wis. 2d at 38, 39-40, 598 N.W.2d 929 (Ct. App. 1999). Similar to Wis. Stat. § 961.41(3g)(c), subsection (3) of 961.48 provided in part:

> For purposes of this section, an offense is considered a 2nd or subsequent offense if, prior to the offender's conviction of the offense, the offender has at any time been convicted under this chapter *or under any statute of the United States or of any state relating to controlled substances*[.]

Moline, 229 Wis. 2d at 40 (emphasis added).

> 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). Congress provided the definition of "'racketeering activity'" to include "*dealing in a controlled substance*[.]" 18 U.S.C. 1961(1)(A) (emphasis added). The definition also includes "the felonious manufacture, importation, receiving, concealment, buying, selling, *or otherwise dealing in a controlled substance* . . . punishable under any law of the United States." 18 U.S.C. § 1961(1)(D) (emphasis added).

While Guarnero argues that the major *purpose* of RICO is to "to address the infiltration of legitimate business by organized crime," (*see* Guarnero's Brief at 11, citing *United States v. Turkette*, 452 U.S. 576, 591 (1981)), a statute's "purpose" is not the focus of Wis. Stat. § 961.41(3g)(c). Rather, Wis. Stat. § 961.41(3g)(c) provides that the proper inquiry is whether the prior statute "*relat[es] to*" controlled substances. Wis. Stat. § 961.41(3g)(c). And RICO does. Guarnero cannot escape the plain language of the RICO statute: it defines "racketeering activity" as including the distribution of "controlled substances." 18 U.S.C. § 1961(1)(A) and (D). And as stated in *Moline*, if it is "related to drugs, it is very clearly an offense which may serve as the basis for an enhanced penalty[.]" 229 Wis. 2d at 42.

In this case, the court of appeals concluded that "[a]lthough neither section [18 U.S.C. § 1962(d) or 18 U.S.C. § 1962(c)] references controlled substances *in haec verba*, they do, of course, make unlawful 'racketeering activity' and conspiring to engage in 'racketeering activity' which, as we have seen, is defined by [RICO] to include activities involving controlled substances" (A-Ap. 111). It therefore affirmed the circuit court, which "correctly concluded that [RICO] and 18 U.S.C. §§ 1962(c) & (d) are a statute and sections 'relating to controlled substances' as that phrase is used in WIS. STAT. § 961.41(3g)(c)" (A-Ap. 111). The court of appeals' decision that RICO "relates to" controlled substances is correct.

A. The elements of Guarnero's RICO conviction, "as described in Count Two," relate to controlled substances.

Guarnero argues that the statutory elements of a RICO conviction show that the RICO statute does not "relate to" controlled substances for purposes of Wis. Stat. § 961.41(3g)(c). He argues that the court of appeals failed to analyze those elements (Guarnero's Brief at 11, 12, 13, 18, 25), and had the court done so, it would have concluded that a RICO conviction does not relate to controlled substances. This argument fails.

As previously indicated, Guarnero's RICO plea agreement expressly provided the elements of his conviction:

> First, that the defendant knowingly conspired to conduct or participate in the conduct of the

> affairs of the Milwaukee Latin Kings, an enterprise, through a pattern of racketeering activity *as described in Count Two*;[4]
>
> Second, that the Milwaukee Latin Kings were an enterprise; and
>
> Third, that the activities of the Milwaukee Latin Kings would affect interstate commerce.

(A-Ap. 149) (emphasis and footnote added). Count Two of the indictment provided that members of the Latin Kings had "engaged in" the "distribution of controlled substances" (A-Ap. 161). Count Two also charged that Guarnero conspired 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* in violation of the laws of the United States," and that this violated 18 U.S.C. § 1962(d) (27:Ex. C, Ex. D:19; A-Ap. 163). Finally Guarnero admitted in his plea that Milwaukee police officers "found [in Guarnero's 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. 147-48).

In this case, the court of appeals concluded:

> Guarnero pled guilty to Count Two of the federal indictment, which charged that Guarnero violated 18 U.S.C. § 1962(d) by conspiring to violate 18 U.S.C. § 1962(c). Although neither section references

[4] Guarnero fails to point out in his appellate brief that the plea agreement provided the elements for his RICO conviction. The elements were specific to those "as described in Count Two" (A-Ap. 149).

> controlled substances *in haec verba*, they do, of course, make unlawful "racketeering activity" and conspiring to engage in "racketeering activity" which, as we have seen, is defined by the Racketeer Act to include activities involving controlled substances, such as cocaine.

(A-Ap. 111). The court also verbatim discussed 18 U.S.C. § 1962(c) and (d) (*See* A-Ap. 106). Guarnero's claim throughout his brief that the court of appeals failed to address his RICO conviction fails.

Guarnero next argues that his RICO conviction does not require proof of any crime related to controlled substances (Guarnero's Brief at 14). Guarnero relies on a Ninth Circuit case, *Lara-Chacon v. Ashcroft*, 345 F.3d 1148 (9th Cir. 2003), to support this position, but the Ninth Circuit case is neither binding nor persuasive.

One question that *Lara-Chacon* reviewed was whether the defendant's state conviction of conspiracy to commit money laundering was a deportable offense under the federal Controlled Substances Act. 345 F.3d at 1151. The Ninth Circuit concluded that the defendant's conviction under the state statute was not a "drug trafficking crime" under the federal law because his crime was not "punishable under the federal law." *Id.* at 1152. 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.

Lara-Chacon is also inapposite because in this case, by its very terms, Guarnero's RICO Count Two conviction *incorporated* the illegal drug

activity. He pled guilty to the agreement to commit "*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," and that this violated 18 U.S.C. § 1962(d) (27:Ex. C, Ex. D:19; A-Ap. 163) (emphasis added). Thus, Guarnero's conviction was for a crime expressly relating to controlled substances. And in *Lara Chacon*, the defendant's "plea concerned the money laundering charge *only*." 345 F.3d at 1156 (emphasis added). *Lara-Chacon* is inapposite.

B. *State v. Moline*: "If it is related to drugs," it is a basis for an enhanced penalty. Both the RICO statute and the elements of Guarnero's RICO conviction relate to drugs.

Guarnero next argues that his RICO conviction "requires no connection to drugs whatsoever" (Guarnero Brief at 16). As previously indicated, the *Moline* Court concluded that Wis. Stat. § 961.48(3) "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." *Moline*, 229 Wis. 2d at 42. That "[i]f 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*.

The State agrees that not every RICO conviction requires a connection to drugs. But the critical analysis under Wis. Stat. § 961.41(3g)(c) is whether RICO *relates to* drugs, which it does.

And, as argued above, Guarnero's RICO *conviction* also had a connection to drugs: he pled that he agreed to commit 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," in violation of 18 U.S.C. § 1962(d) (27:Ex. C, Ex. D:19; A-Ap. 163). He also admitted in his plea that Milwaukee police officers "found . . . 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. 147-48).

II. THE COURT OF APPEALS' ADOPTION OF THE MODIFIED CATEGORIAL APPROACH IS APPROPRIATE IN THIS CASE BECAUSE THE RICO STATUTE IS A DIVISIBLE STATUTE. THEREFORE, THE LOWER COURTS WERE PERMITTED TO EXAMINE GUARNERO'S RICO INDICTMENT AND PLEA AGREEMENT TO DETERMINE WHETHER THE ROUTE TO THAT CONVICTION RELATED TO CONTROLLED SUBSTANCES.

In addition to finding that the RICO statue "relates to" controlled substances, the court of appeals then concluded that its decision "is in keeping with" United States Supreme Court cases which permit courts to look at an indictment and plea agreement "when a predicate criminal statue

has alternate paths to conviction" (A-Ap. 111) (citing *United State v. Castleman*, 134 S. Ct. 1405 (2014) and *Descamps v. United States*, 133 S. Ct. 2276 (2013)). Known as the "modified categorical approach," Guarnero argues that the court of appeals erroneously applied it.

In *Evans v. Wisconsin Dept' of Justice*, the court of appeals set out the two approaches that courts use to determine whether a prior conviction qualifies as a sentence enhancer: under the "categorical approach," courts look to "'the fact of conviction and the statutory definition of the prior offense'" in question. 2014 WI App 31, ¶18, 353 Wis. 2d 289, 844 N.W.2d. 403 (quoting *Shepard v. United States*, 544 U.S. 13, 17 (2005)). "When a statute defines an element in the alternative, however, the categorical approach is 'modified' to determine which alternative formed the basis of conviction." *Evans*, 353 Wis. 2d 289, ¶18 (citing *Descamps*, 133 S. Ct. at 2281). The court of appeals stated that "[t]he purpose of consulting such documents is 'to identify from among several alternatives, the crime of conviction." *Id*. (quoting *Descamps*, 133 S. Ct. at 2285.

This "modified categorical approach" is used when a court could not know, just from looking at the statute, which version of the offense the defendant was convicted. *Shepard,* 544 U.S. at 26. As stated in *Descamps*, "'the "modified categorical approach" . . . permits a court to determine which statutory phrase was the basis for the conviction.'" 133 S. Ct. at 2285 (quoting *Johnson v. United States,* 559 U.S. 133, 144 (2010)).

Under this approach, when a statute is "divisible," lower courts are allowed to scrutinize a restricted set of materials, including indictments,

plea agreements or transcripts of colloquy. *See id*. A "divisible statute" sets out one or more elements of the offense in the alternative – for example, stating that burglary involves entry into a building *or* an automobile. *Descamps,* 133 S. Ct. at 2281. *See also United States v. Bonilla–Mungia,* 422 F.3d 316, 320 (5th Cir. 2005) ("If a statute contains multiple, disjunctive subsections, courts may look beyond the statute to certain conclusive records made or used in adjudicating guilt in order to determine which particular statutory alternative applies to the defendant's conviction.") (internal quotation marks omitted).

The parties in *Castleman* did not contest that the state statute was a "divisible statute," and so the Supreme Court applied the "modified categorical approach, consulting the indictment to which Castleman pleaded guilty in order to determine whether his conviction did entail the elements necessary to constitute the generic federal offense." *Castleman,* 134 S. Ct. at 1414 (citing *Descamps,* 133 S. Ct. at 2281–82).

Here, the State and Guarnero do not agree that the RICO statute is a divisible statute allowing the modified categorical approach analysis. But the court of appeals concluded that the RICO statute was divisible because "there are many, many ways that a person may violate 18 U.S.C. §§ 1962(c) & (d)" (A-Ap. 114). It noted that the RICO provisions "incorporate [an] expansive definition of 'racketeering activity," thereby permitting "use of the modified categorical approach" (A-Ap. 114). The court of appeals then concluded that it could look to Guarnero's federal indictment and plea agreement, in which he acknowledged that he was guilty of Count Two (A-Ap. 114).

But Guarnero argues that the lower courts were not allowed to review his indictment or plea agreement in order to determine whether his RICO conviction "related to" controlled substances. Because there are many ways in which Guarnero could have violated the RICO statute – ways that do not relate to controlled substances – the State disagrees. For the reasons listed below, the court of appeals applied the correct approach.

A. RICO is a divisible statute because there are several alternative ways for which an individual can be convicted.

Guarnero argues that the RICO statute is not a divisible statute and, therefore, the lower courts could only look to the statutory definition of his RICO conviction, as opposed to the particular facts underlying his RICO conviction. Because the RICO statute provides alternative ways he could have been convicted, the State disagrees.

The court of appeals correctly followed *Descamps, Castleman,* and *Evans* to determine whether Guarnero's RICO conviction qualified as an offense "relating to" controlled substances. *Descamps* involved a defendant convicted of violating a federal law forbidding felons from possessing firearms. 133 S. Ct. at 2282. The United States sought to enhance his penalty under the Armed Career Criminal Act, 18 U.S.C. § 924(e), using his earlier state convictions for "burglary, robbery, and felony harassment." *Id.* Under the federal act, a defendant was subject to

an enhanced sentence if he had "'three previous convictions . . . for a violent felony or a serious drug offense.'" *Id.* (quoting 18 U.S.C. § 924(e)(1)). Descamps argued that his burglary crime under California state law was not "a violent felony" because that statute did not have "unlawful entry" as an element, even though he had, in fact, committed the crime *via* an unlawful entry. *Id.*

The lower courts disagreed with Descamps' argument that they were limited to the burglary statute's stated elements, and they applied the "modified categorical approach," enabling the courts to look at what Descamps had done. *Id.* The Supreme Court, however, reversed:

> Our decisions authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines burglary not (as here) overbroadly, but instead alternatively, with one statutory phrase corresponding to the generic crime and another not. In that circumstance, a court may look to the additional documents to determine which of the statutory offenses (generic or non-generic) formed the basis of the defendant's conviction.

Descamps, 133 S. Ct. at 2286.

The court of appeals in this case then noted that *Castleman* "reaffirmed that under *Descamps,"* courts "'may accordingly apply the modified categorical approach, consulting the indictment to which [a defendant pleads] guilty in order to determine whether his conviction did entail the elements necessary to constitute the generic . . . offense" that permitted the enhancement of his federal sentence (A-Ap. 113, quoting *Castleman*, 134 S. Ct. at 1414-15).

After discussing *Descamps, Castleman,* and the modified categorical approach discussed in *Evans*, the court of appeals in this case concluded, "succinctly":

> - If the face of the statute (here, the Racketeer Act) reveals that there is more than one route to conviction, and
>
> - one of those routes satisfies an enhancement prerequisite, then
>
> - a court asked to apply the enhancement may look to see what route the defendant took towards his or her conviction.

(A-Ap. 114; bullets in original). This is the correct analysis.

The Supreme Court confronted a similar situation in *Shepard,* 544 U.S. 13. Discussing the *Shepard* case in *Descamps*, the Supreme Court acknowledged that:

> [T]he divisible nature of the Massachusetts burglary statute [in *Shepard*] confounded that inquiry: No one could know, just from looking at the statute, *which version of the offense* Shepard was convicted of. Accordingly, we again authorized sentencing courts to scrutinize a restricted set of materials—here, "the terms of a plea agreement or transcript of colloquy between judge and defendant"—to determine if the defendant had pleaded guilty to entering a building or, alternatively, a car or boat. *Ibid.* Yet we again underscored the narrow scope of that review: It was not to determine "what the defendant and state judge must have understood as the factual

> basis of the prior plea," but only to assess whether the plea was to the version of the crime in the Massachusetts statute[.]

Descamps, 133 S. Ct. at 2285 (quoting *Shepard*, 544 U.S. at 25-26) (emphasis added).

Echoing *Descamps*, the court of appeals stated in *Evans*, "When a statute defines an element in the alternative . . . the categorical approach is 'modified' to determine which alternative formed the basis of conviction." 353 Wis. 2d at 298 (citing *Descamps*, 133 S. Ct. at 2281. And in RICO, "racketeering activity" is expansively defined and sets out many different ways a person can violate the Act. *See* 18 U.S.C. § 1961(1)(A) and § 1961(1)(D); *see also Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 481-482 (1985) (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 mail and wire fraud, and any 'offense' involving bankruptcy or securities fraud *or drug-related activities* that is 'punishable' under federal law.") (Emphasis added; quoting 18 U.S.C. § 1961(1)). Specifically, Section 1962, entitled "Prohibited Activities," outlaws the use of income derived from a "pattern of racketeering activity." 18 U.S.C. § 1962(a). And RICO defines "racketeering activity" in terms of a long list of crimes. *See* 18 U.S.C. § 1961(1) and (5).[5] Section 1962 of RICO is the proscriptive

[5] For the expansive list of crimes, *see* court of appeals' decision, located in the appendix of Guarnero's Brief at A-Ap. 108-110 (citing 18 U.S.C. § 1961(1)).

section of the Act, in which four offenses are defined.[6]

---

[6] In its entirety, Section 1962 provides:

> **(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 in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, 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. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
>
> **(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

(continued on next page)

Applying the *Evans*, *Descamps*, and *Castleman* principles to Guarnero's case, the RICO statutes upon which Guarnero was convicted "list[] potential offense elements in the alternative." *Descamps*, 133 S. Ct. at 2283. A violation of 18 U.S.C. 1962(d) can be proved by showing a number of different ways. Therefore, the court of appeals' approach is appropriate. The lower courts were allowed to look at Guarnero's RICO indictment and plea agreement to determine whether his conviction related to controlled substances.

B. The lower courts could look to see which statutory alternative formed the basis of Guarnero's RICO conviction.

But Guarnero argues that RICO does not create multiple different crimes – that Section 1962(d) creates only a single crime of racketeering conspiracy – and therefore, the modified categorical approach does not apply (Guarnero's Brief at 28). This is not the test. As stated in

---

> 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 subsection (a), (b), or (c) of this section.

18 U.S.C. 1962.

Evans – responding to the defendant's claim that courts cannot consider the "actual conduct" of his prior crime – under the modified categorical approach, this Court could look to the complaint and plea colloquy transcript "to determine which *alternative type* of disorderly conduct formed the basis for Evans' conviction." 353 Wis. 2d 289, ¶18 (emphasis added). And, "[w]hen a statute defines an element in the alternative . . . the categorical approach is "modified" to determine *which alternative formed the basis of conviction*." *Id.* (emphasis added) (*see Descamps*, 133 S. Ct. at 2281).[7]

In this case, the lower courts were allowed to determine which type of RICO conspiracy formed the basis of Guarnero's conviction. The courts' purpose was "to identify, from among several alternatives, the crime of conviction[.]" *Descamps*, 133 S. Ct. at 2285. Whether RICO creates only one crime or several crimes is not the issue. Rather, the issue is whether the RICO statute is divisible, and if so, which alternative formed the basis of his conviction. *Id.* at 2281. *See also Decamps*, 133 S. Ct. at 2285, providing that courts in *Shepard* could look to the plea agreement "to assess whether the plea was to the *version of the crime* in the Massachusetts statute[.]" Because RICO sets out one or more elements of a conspiracy offense in the alternative, it is divisible. Therefore, the courts were allowed

[7] As provided in *Descamps*, "the modified approach serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." 133 S.Ct. at 2283.

to see which type of RICO conspiracy formed the basis for Guarnero's conviction.

C. Guarnero's RICO conviction was predicated on controlled substances.

Guarnero also argues that the elements of his RICO conviction are broader than that of his Wisconsin conviction for possession of cocaine, and, therefore, the court of appeals could not apply the modified categorical approach (*See* Guarnero's Brief at 26-27). But Guarnero's RICO conviction was specifically *predicated* on controlled substances, specific to Count II, in which he pled that he conspired 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* in violation of the laws of the United States," and that this violated 18 U.S.C. § 1962(d) (27:Ex. C, Ex. D:19; A-Ap. 149, 163) (emphasis added). *See Sedima*, 473 U.S. at 496 n.14 (providing that predicate acts are related to each other if they "'have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." (quoting Title X of the Organized Crime Control Act of 1970, 18 U.S.C. § 3575(e)).

The elements provided:

> The parties understand an agree that in order sustain the charge of Conspiracy to Commit RICO *as set forth in Count Two*, the government must prove each of the following propositions beyond a reasonable doubt:

> First, that the defendant knowingly conspired to conduct or participate in the conduct of the affairs of the Milwaukee Latin Kings, an enterprise, through a pattern of racketeering activity *as described in Count Two*;
>
> Second, that the Milwaukee Latin Kings were an enterprise; and
>
> Third, that the activities of the Milwaukee Latin Kings would affect interstate commerce.

(27:Ex. D:5; A-Ap. 149) (emphasis added).

Conversely, Wisconsin Criminal Pattern Jury Instruction 6030 provides the elements the State must prove to show a violation of Wis. Stat. § 961.41(3g):

> 1. The defendant possessed a substance;
>
> 2. The substance was a controlled substance whose possession is prohibited by law;
>
> 3. The defendant knew or believed that the substance was a controlled substance.

Guarnero's RICO conviction was not more broad than Guarnero's conviction for possession of cocaine under Wis. Stat. § 961.41(3g), and so Guarnero's argument fails.

Guarnero next argues that RICO does not set forth alternative *elements*, but that RICO sets forth alternative *means* by which a person can violate the statute, and therefore the statute is not divisible (Guarnero's Brief at 29-30). The court of appeals rejected a similar argument in *Evans*, 353 Wis. 2d 289, ¶¶14-15. In *Evans*, the defendant argued that "the different types of conduct listed in the disorderly conduct statute are alternative

'manner[s] and means' of committing the first element of the crime," as opposed o alternative elements. *Id*. ¶14. The court of appeals was "not persuaded:"

> The "manner and means" discussions in the cases Evans relies on use that phrase as a reference to the specific conduct a defendant engages in to commit a charged crime. *See, e.g., United States v. Calderon–Pena,* 383 F.3d 254, 257 n. 4 (5th Cir.2004) (throwing a bottle at a person is not an element, but rather a "manner" of violating the crime of disturbing the peace). Evans points to nothing in these "manner and means" discussions that conflicts with our conclusion that Wisconsin's disorderly conduct statute can have the use of physical force as an element, such as where the "violent" alternative is charged alone or in the conjunctive with other alternatives.

Id. ¶15.

Similarly, in this case, the RICO statute has alternative elements, not means. Section 1962 outlaws the use of income derived from a "pattern of racketeering activity." 18 U.S.C. § 1962. And RICO defines "racketeering activity" in terms of a long list of crimes. *See* 18 U.S.C. § 1961(1) and (5).[8]

[8] *See also* the court of appeals' decision, in which it lists the activities (A-Ap. 108-10) (citing 18 U.S.C. § 1961(1)).

D. Application of the modified categorical approach shows that Guarnero's RICO Indictment and Plea Agreement Contain His Involvement in the Distribution of Controlled Substances.

As has been previously discussed throughout his brief, in his plea agreement, Guarnero admitted that, as a member of Latin Kings, he engaged in acts that included the "extortion and distribution of controlled substances" (A-Ap. 161). Count Two also provided that, as a member of Latin Kings, he had "engaged in" the "distribution of controlled substances" (A-Ap. 161). Count 25 of the indictment provided that Guarnero "knowingly and intentionally possessed with the intent to distribute a mixture and substance containing a detectable amount of marijuana, a Schedule I controlled substance" (A-Ap. 142). Count 26 provided that Guarnero "knowingly possessed a firearm in furtherance of a drug trafficking crime, namely, possession of a controlled substance marijuana with the intent to deliver as alleged in County Twenty-Five of this Indictment" (A-Ap. 143). Finally, Guarnero admitted in his plea that Milwaukee police officers found in his residence "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.147-48).

The application of the modified categorical approach shows that Guarnero's RICO conviction "related to" controlled substances.

E. The court of appeals' application of the modified categorical approach will benefit defendants whose crimes are not related to controlled substances.

Guarnero argues that the court of appeals' adoption of the modified categorical approach will have a confusing effect on lower courts (Guarnero's Brief at 34). This is not the case. The court of appeals' decision was precise:

> - If the face of the statute (here, [RICO]) reveals that there is more than one route to conviction, and
>
> - one of those routes satisfies an enhancement prerequisite, then
>
> - a court asked to apply the enhancement may look to see what route the defendant took towards his or her conviction.

(A-Ap. 114; bullets in original). As the court of appeals pointed out, although in Guarnero's case the modified categorical approach allowed the circuit court to convict Guarnero for unlawful possession of cocaine as a second offense,

> the 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 potentially subject to the Wis. Stat. § 961.41(3g)(c) enhancement was charged under [RICO] with having engaged in "racketeering activity" because he or she "traffick[ed] in counterfeit labels for phonorecords, computer programs or

> computer program documentation," 18 U.S.C. § 1961(B)[.]

(A-Ap. 114).

The State disagrees that the application of the modified categorical approach would be challenging to the lower courts of Wisconsin.

F. There is no Sixth Amendment Violation.

Guarnero also claims that permitting a court to look beyond the statutory elements of his conviction – the plea agreement and indictment – violate his Sixth Amendments rights as articulated in *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000) (Guarnero's Brief at 18). In *Apprendi,* the Supreme Court concluded, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. It therefore specifically exempted "the fact of a prior conviction" from the factors that must be determined by a jury. *Id.*

But in *State v. LaCount*, 2008 WI 59, ¶52, 310 Wis. 2d 85, 750 N.W.2d 780, this Court explained that

> [t]he *Shepard* decision relaxed the holdings of both *Apprendi* and *Blakely*[9], so that, when

[9] *Blakely v. Washington*, 542 U.S. 296 (2004). In *Blakely,* the Supreme Court reiterated *Shepard's* holding and concluded that a trial court judge could not find, for purposes of a sentence enhancement, that a defendant acted with deliberate cruelty. 542 U.S. at 303-04. This finding had to be made by a jury. *Id.* The Court held that

(continued on next page)

> *Shepard* and *Apprendi* are read together, a trial court judge, rather than a jury, is allowed to determine the applicability of a defendant's prior conviction for sentence enhancement purposes, when the necessary information concerning the prior conviction can be readily determined from an existing judicial record."

Id. (footnote added).

Here, the record contained the relevant information for the trial court: Guarnero's judgment of conviction, as well as his indictment and plea agreement in which he admitted to the elements of his RICO conviction. There is no Sixth Amendment violation.

Furthermore, even if the circuit court had erred on this issue, the error would have been harmless beyond a reasonable doubt. *LaCount*, 310 Wis. 2d. 85, ¶54. The United States Supreme Court recently held that the "'[f]ailure to submit a sentencing factor to the jury, like [the] failure to submit an element to the jury, is not structural error.'" *Id*. (quoting *Washington v. Recuenco,* 548 U.S. 212 (2006)). As a result, a harmless error analysis is applicable if any error occurred. *Id*. And in this case, the information available to the circuit court – the indictment and the plea agreement detailing the acts he admitted to in Count Two that related to controlled substances – eliminates any possibility of error.

---

the relevant statutory maximum was "not the maximum sentence [that] a judge may impose after finding additional facts, but the maximum [sentence that the judge] may impose *without* any additional findings." *Id*

III. THE RULE OF LENITY DOES NOT APPLY BECAUSE THERE IS NO UNCERTAINTY AS TO THE CONDUCT THAT RICO PROSCRIBES.

Guarnero next argues that this Court should apply the "rule of lenity" because, he claims, no other Wisconsin court has considered whether RICO is a statute relating to controlled substances (Guarnero's Brief at 36). *See State v. Cole*, 2003 WI 59, ¶13, 262 Wis. 2d 167, 174, 663 N.W.2d 700, 703 ("[W]hen 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."). He also claims he had no "fair warning" that his plea to Count Two of the RICO indictment could subject him to the repeater provision of Wis. Stat. § 961.41(3g)(c).

The court of appeals rejected this argument, noting that, "as we have set out at some length, the analysis here is straightforward and conclusive; there is no 'doubt' as to what [RICO] says are the activities that it proscribes" (A-Ap. 115). The court then stated that it "need only quote *Castleman* because what it said in response to a comparable request also applies here":

> We are similarly unmoved by Castleman's invocation of the rule of lenity. Castleman is correct that our "construction of a criminal statute must be guided by the need for fair warning." But "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous

> ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." That is not the case here.

(A-Ap. 115) (*quoting Castleman*, 134 S. Ct. at 1416) (internal citations and quoted sources omitted).

It is not the case here case, either. As has been demonstrated in Issues I and II, and as was succinctly said by the court of appeals, there is no doubt that RICO proscribes the distribution of controlled substances. Guarnero had no doubt that he pled to being a member of a criminal organization whose members engaged in the "distribution of controlled substances," (27:Ex. C:3, Ex. D:2; A-Ap. 161) and that he conspired to conduct "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 that this violated 18 U.S.C. § 1962(d). (27:Ex. C, Ex. D:19; A-Ap. 163).

The rule of lenity does not apply.

IV. THE CIRCUIT COURT'S CLASSIFICATION OF GUARNERO'S BAIL-JUMPING CONVICTION AS A FELONY WAS PROPER BECAUSE THE COURT PROPERLY CONVICTED HIM OF FELONY POSSESSION OF COCAINE.

The court of appeals concluded, and Guarnero agrees, that whether Guarnero's bail-jumping conviction was a misdemeanor or a felony[10] depends upon whether Guarnero's possession charge was a felony second offense or a misdemeanor first offense (Guarnero's Brief at 19). Because both the circuit court and court of appeals correctly concluded that Guarnero's charge of possession of cocaine qualified as a felony second offense, this Court should affirm.

CONCLUSION

The circuit court and court of appeals were correct when they concluded that both the RICO statute and Guarnero's RICO conviction relate to controlled substances. Further, the court of appeals application of the modified categorical approach was proper in this case; therefore, the lower courts could look to Guarnero's RICO indictment and plea agreement, both of which detailed that his conviction related to controlled substances. The State respectfully requests that this Court affirm the court of appeals' decision.

---

[10] See Wis. Stat. § 946.49(1)(a) and Wis. Stat. § 946.49(1)(b).

Dated this 12th day of January, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

SARA LYNN LARSON
Assistant Attorney General
State Bar #1087785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-5366
(608) 266-9594 (Fax)
larsonsl@doj.state.wi.us

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 7628 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 12th day of January, 2015.

_____
Sara Lynn Larson
Assistant Attorney General