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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

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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I. Section 1962(d) Does Not Relate To Controlled Substances.

A. Guarnero Was Convicted Of Racketeering *Conspiracy* Which Contains No Controlled Substance Element.

The State does not contest that when Guarnero pleaded guilty to conspiracy under 18 U.S.C. § 1962(d), "he waive[d] his right to a jury determination of *only that offense's elements;*" and that "whatever he [said], or fail[ed] to say, about superfluous facts cannot license a later sentencing court to impose extra punishment." *Descamps v. United States*, 133 S. Ct. 2276, 2288 (2013). (emphasis added). Nor does the State contest that § 1962(d) contains no *element* requiring that Guarnero committed—or agreed to commit—any controlled substance violation or any other act of "racketeering activity." *Salinas v. United States*, 522 U.S. 52 (1997); *United States v. Tello*, 687 F.3d 785 (7th Cir. 2012).[1]

The State attempts to divert the Court's attention from the elements of § 1962(d)—which say nothing about controlled substances—by invoking the definition of "racketeering activity" found in 18 U.S.C. § 1961(1). The State observes that that controlled substance offenses are among the dozens of crimes that can (but need not necessarily) constitute "racketeering activity." *See* Resp. Br. at 10, 11, 12.

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[1] Surprisingly, nowhere in its 36-page brief does the State even acknowledge the U.S. Supreme Court's controlling decision in *Salinas v. United States*, 522 U.S. 52 (1997) or the Seventh Circuit's opinion in *United States v. Tello*, 687 F.3d 785 (7th Cir. 2012), which established controlling precedent in the very case in which Guarnero pleaded guilty.

Yet, the list of crimes constituting "racketeering activity" is superfluous in this case because Guarnero was neither charged with nor convicted of *committing* two or more of those offenses under § 1962(c).[2] Rather, Guarnero was convicted under § 1962(d) which punishes "an unlawful *agreement*." *Tello*, 687 F.3d at 792 (emphasis added).

The State's argument thus fails "to appreciate the distinction between the *substantive* RICO charge set forth in Count One of the indictment—to which [Guarnero] did not plead guilty[3]—and the racketeering *conspiracy* charge set forth in Count Two—to which he did plead guilty." *Tello*, 687 F.3d at 791-92 (emphasis added). Guarnero was convicted of *conspiracy* only, which contains no element (and therefore constitutes no admission) that he *committed* any controlled substance violation, or any other act of "racketeering activity."

Undaunted, the State resorts to misquoting the record to suggest that Guarnero somehow committed a controlled substance violation. For instance, the State breathtakingly asserts (at 3) that "[t]he indictment provided that Guarnero *knowingly and intentionally violated…§ 1962(c)*…through a pattern of racketeering activity…" (emphasis added). To the contrary, the indictment the State misquotes actually alleges that Guarnero "knowingly and intentionally *conspired* to violate…§ 1962(c)…." (App. 139) (emphasis added).

Similarly, the State erroneously claims (at 16) that Guarnero "pled that he *agreed to commit* the 'distribution of controlled substances…" (emphasis added). Nowhere does

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[2] A charge under 18 U.S.C. § 1962(c), which alleges that a defendant has *actually committed* at least two qualifying predicate acts of "racketeering activity," is frequently referred to as a "substantive" offense—as separate and distinct from a *conspiracy* charge under § 1962(d).

[3] Guarnero was not charged with a substantive RICO violation under § 1962(c).

the indictment or plea agreement state that Guarnero agreed to distribute controlled substances, and this Court should reject the State's attempt to distort the record in such an overt way. Rather, the indictment alleges that Guarnero *conspired* to violate § 1962(c)—not that he *actually committed* a controlled substance violation or any other specific act.

The State's argument ultimately reduces to the contention that Guarnero's conspiracy conviction somehow establishes a controlled substance conviction. Simply put, the State's "interpretation of the conspiracy statute is wrong." *Salinas*, 522 U.S. at 63.

Section 1962(d) does not, and indeed cannot, "relate to" controlled substances within the meaning of Wis. Stat. § 961.41(3g)(c), for narcotics are never an element of that offense.

B. The Conspiracy "As Described In Count Two" Shows No Relationship To Controlled Substances.

In an attempt to devise a connection between § 1962(d) and controlled substances, the State suggests (at 12-13) that the conspiracy "as described in Count Two" somehow establishes that relationship. The State cryptically suggests that the elements of § 1962(d) "were specific to those 'as described in Count Two.'" Resp. Br. at 13 n.4. The State's argument is without merit.

As a preliminary matter, the State again distorts the record by claiming (at 13 n.4) that Guarnero "fails to point out in his appellate brief that the plea agreement provided the elements for his RICO conviction." To the contrary, Guarnero cited in his opening brief (at 12 n.3) the very paragraph to which the State refers.

Nothing "described in Count Two" changes the fact that the conspiracy conviction establishes *precisely nothing*

about controlled substances, or about any specific act Guarnero did or did not commit. *Salinas*, 522 U.S. at 63; *Tello*, 687 F.3d at 792; *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1155 (9th Cir. 2003).

To the contrary, the description in Count Two reinforces the lack of relationship to controlled substances in this case. Count Two names 49 defendants, references at least 12 different offenses (most of which have nothing to do with controlled substances),[4] and contains no allegation that *Guarnero* committed a controlled substance offense. Nor is there any allegation in Count Two that shows *which* of the 49 defendants purportedly committed *which* of the enumerated offenses. This omission is not at all surprising because no such allegation is required for a conspiracy charge under the controlling Supreme Court precedent the State fails even to acknowledge. *See Salinas*, 522 U.S. at 63.

This Court should therefore reject the State's invitation to parse the record to devise a connection to controlled substances where none exists—particularly when it settled law that commission of a narcotics offense *never* constitutes an element of § 1962(d). To hold otherwise would be to engage in "precisely the sort of *post hoc* investigation into the facts of predicate offenses that [the Supreme Court has] long deemed undesirable." *Montcrieffe v. Holder*, 133 S. Ct. 1678, 1690 (2013) (italics in original).

C. *Lara-Chacon* Is Analogous To The Case At Bar And Highly Persuasive Authority.

In *Lara-Chacon v. Ashcroft*, 345 F.3d 1148 (9th Cir. 2003), a federal appeals court flatly rejected the very argument the State urges here in a case on remarkably similar

[4] Although the State prefers to ignore these other allegations, focusing instead on the controlled substance language, the other offenses the State fails to acknowledge include kidnapping, tampering with a witness, retaliation against a witness, homicide, robbery, and arson. (App. 139, ¶ 17)

facts. Not surprisingly, the State attempts (at 14) to argue that *Lara-Chacon* should not be viewed as persuasive authority, suggesting that the racketeering statute under consideration in that case supposedly "did not mention controlled substances." Resp. Br. at 14. The State's argument fails to withstand analysis.

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

Like the racketeering statute in *Lara-Chacon*, § 1962(d) does not reference controlled substances *in haec verba*, (*cf.* App 111, ¶ 8, Resp. Br. at 7), although a separate definition of racketeering activity can include many activities, "including 'prohibited drugs'." *Id.* Thus, like *Lara-Chacon*, "nothing about the fact of [Guarnero's] conviction demonstrates violation of a law related to a controlled substance." *Id.* at 1155.

II. The Modified Categorical Approach Has No Role To Play In This Case.

A. The State Does Not Contest That The Court Of Appeals Failed To Follow The Framework Of *Descamps*.

The State does not challenge that the Supreme Court's opinion in *Descamps v. United States*, 133 S. Ct. 2276 (2013) sets forth the "only way [the Court has] ever allowed" a modified categorical approach to be used. *Id.* at 2285. Nor does the State contest that the Court of Appeals failed to follow this framework. Rather, the State simply argues that the modified categorical approach "is appropriate in this case because the RICO statute is a divisible statute." Resp. Br. at 26. This is simply not the test, and the State's argument fails.

Nowhere does the State contest (nor could it) that the Court of Appeals failed to:

- Identify the relevant "generic offense." *Id.* at 2281;
- Identify the elements of the generic offense. *Id*.;
- Identify the elements of conspiracy under § 1962(d). *Id*. at 2281, 2285;
- Compare the elements of conspiracy under § 1962(d) to those of the generic offense. *Id*. at 2281, 2285;
- Determine whether the elements of conspiracy under § 1962(d) are "the same as, or narrower than," those of the generic offense. *Id.* at 2281;
- Identify whether § 1962(d) sets forth one or more elements in the alternative. *Id*. at 2285.

The Court of Appeals undertook none of these steps and therefore failed to apply the modified categorical approach in "the only way" the Supreme Court allows. *Descamps*, 133 S. Ct. at 2285. Unless this Court reverses (as it should), lower courts throughout this State will face the dilemma of whether to apply *Descamps* (as they must) or the Court of Appeals' flawed methodology.

B. The Elements Of § 1962(d) Sweep More Broadly Than Those Of A Generic Drug Offense.

The Supreme Court has made clear that if the elements of a prior offense sweep more broadly than those of the generic offense, the modified categorical approach "has no role to play…," *Descamps*, 133 S. Ct. at 2285, and the prior conviction "cannot serve as….[a] predicate." *Id*. at 2286.

Remarkably, although the State identifies the elements of § 1962(d) and simple possession (at 27), it does not argue that the *elements* for conspiracy are "the same as, or narrower than," those for a generic narcotics crime (which is the only relevant inquiry). Instead, the State asserts (at 26-27) only that "Guarnero's RICO *conviction* was not more broad than" a *conviction* under § 961.41(3g) because the conviction was purportedly "predicated on" controlled substances. (emphasis added).

Yet, by ignoring the elements of § 1962(d) and focusing on the supposed factual "predicate" for Guarnero's conviction, the State turns the Supreme Court's admonition to "focus on the *elements*, rather than the facts, of a crime" on its head. *Descamps*, 133 S. Ct. at 2285 (emphasis added). The State's focus on the supposed facts of Guarnero's conviction is precisely what the Supreme Court forbids. *Descamps*, 133 S. Ct. at 2283 (it is irrelevant whether the defendant "actually committed the offense in its generic form"); *Montcrieffe*, 133 S. Ct. at 1684 (where prior offense does not categorically match elements of subsequent offense, a defendant's "actual conduct…is quite irrelevant") (internal citation and punctuation omitted).

There can be no doubt that the elements of § 1962(d) sweep more broadly than those of simple drug possession. The State cannot (and indeed does not) argue that notions of "conspiracy," "enterprise" and the scope of "interstate commerce" are the same as, or narrower than, elements of a generic drug offense.

Not only are these elements absent from generic drug statutes (including the drug statute the State cites at 27), but the breadth of these concepts can be seen in the voluminous Supreme Court decisions on these topics spanning decades. *See*, *e.g.*, *Salinas*, 522 U.S. at 60-63 (resolving circuit split relating to elements of conspiracy); *Boyle v. United States*, 556 U.S. 938 (2009) (resolving circuit split to clarify requirements of showing a criminal "enterprise"); *National*

Federation of Independent Businesses v. Sebelius, 132 S. Ct. 2566 (2012) (addressing Congressional authority to regulate healthcare as part of interstate commerce power).

C. Section 1962(d) Is Indivisible Because It Contains No Alternative Elements.

A statute is indivisible unless it "sets out one or more elements of the offense in the alternative." *Descamps*, 133 S. Ct. at 2281. The State fails to identify which *elements* of § 1962(d) are purportedly stated in the alternative. The State merely refers (at 28) to the definition of "racketeering activity" found in § 1961(1) which it remarks contains "a long list of crimes."

But, as shown throughout, none of the offenses in this "long list of crimes" constitute *elements* of a conspiracy conviction under § 1962(d). *Salinas*, 522 U.S. at 60-63; *Tello*, 687 F.3d at 792. Because they are not "elements," they cannot constitute "alternative elements." *Descamps*, 133 S. Ct. at 2281. Section 1962(d) is therefore indivisible and the modified categorical approach has no role to play in this case. *Id*. at 2285.

That there may be different "ways" a person could be charged with conspiracy does not change this result. The State attempts to disregard the difference between "means" and "elements" (at 27-28), but this very distinction has long been recognized by the Supreme Court. Indeed, "[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*. (emphasis added). *See also Descamps*, 133 S. Ct. at 2288 (noting difference between

the elements of an offense and "legally extraneous circumstances").[5]

Ignoring the language from *Descamps* and *Richardson*, the State relies on the Court of Appeals' decision in *Evans v. WI Dep't of Justice*, 2014 WI App 31, 353 Wis. 2d 289, 884 N.W.2d 403. *Evans* is not binding authority on this Court, and to the extent that it is inconsistent with Supreme Court precedent, this Court should not follow it.

III. The Court Of Appeals' Failure To Follow The Methodology Set Forth By *Descamps* Resulted In The Violation Of Guarnero's Sixth Amendment Rights.

The Supreme Court has repeatedly admonished that courts must focus on the *elements*, rather than the facts, of a prior conviction. This elements-based approach has constitutional moorings, for a fact-based approach "would (at the least) raise serious Sixth Amendment concerns if [a court's finding of a predicate offense] went beyond merely identifying a prior conviction." *Descamps*, 133 S. Ct. at 2288. Notwithstanding, the State opines throughout its brief that Guarnero's prior conviction must have been "predicated on" controlled substances—even though there is no such element (or admission) in this case.

In so arguing, the State ignores the Supreme Court's warning that the Sixth Amendment "counsel[s] against allowing a sentencing court to make a disputed determination about what the defendant and [prior] judge must have understood as the factual basis of the prior plea, or what the jury in a prior trial must have accepted as the theory of the crime." *Id.*

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[5] This very distinction between "means" and "elements" has also been recognized by federal appeals courts post-*Descamps*. *See* Pet. Br. at 29-30.

The State's reliance on *State v. LaCount*, 2008 WI 59, 310 Wis. 2d 85, 750 N.W.2d 780 to authorize a court to consult "an existing judicial record" is misplaced. *LaCount* was decided five years before the Supreme Court's decision in *Descamps*. As discussed throughout, *Descamps* provides the "only way" that a Court may resort to items beyond the statutory elements of a prior conviction. *Descamps*, 133 S. Ct. at 2285. Because the Court of Appeals did not follow this methodology, it simply could not consider material beyond the elements of § 1962(d)—which it never even analyzed.[6]

IV. Due Process And The Rule Of Lenity Apply In This Case Because Of The Unprecedented Nature Of The Court Of Appeals' Decision.

The State's invocation of *United States v. Castleman*, 134 S. Ct. 1405 (2014) to reject Guarnero's Due Process and Rule Of Lenity argument is inapposite. The cornerstone of Guarnero's argument is whether "the statute [or] any prior judicial decision [had] fairly disclosed" that his conspiracy conviction would "be within [the] scope" of § 961.41(3g)(c). *United States v. Lanier*, 520 U.S. 259, 266 (1997). They did not.

The Court of Appeals erroneously adopted the modified categorical approach as a matter of first impression in this state—and contrary to the Supreme Court's methodology in *Descamps*—to sweep within its scope a prior conviction that categorically did not match the elements of § 961.41(3g)(c). By contrast, as the State concedes (at 18), the

[6] The State suggests (at 14) that the Court of Appeals "verbatim discussed" § 1962(c) and § 1962(d). While the Court of Appeals *quoted* from § 1962, it did not identify, analyze, or compare the *elements* required for conviction, which is what the Supreme Court required it to do. The State's distortion of Guarnero's argument that "the court of appeals failed to address his RICO *conviction*" should be rejected outright. (emphasis added). Guarnero's argument is that the Court of Appeals was required to identify and analyze the *elements* of § 1962(d), which it simply failed to do.

parties in *Castleman* had already agreed that the statute in question in that case was susceptible to application of the modified categorical approach.

Thus, while the defendant in *Castleman* had ample notice that a court might look beyond the statutory elements of his prior offense, Guarnero had absolutely no such notice here.

CONCLUSION

For these reasons, as well as the reasons in his opening brief, Guarnero urges that this Court 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 22nd day of January, 2015

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,958 words.

Dated this 22nd day of January, 2015

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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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 22nd day of January, 2015

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