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BY U.S. EXPRESS MAIL
OVERNIGHT DELIVERY

April 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals
110 East Main Street, Suite 215
Madison, WI 53703-3396

Re: State v. Rogelio Guarnero, 2013-AP-1753CR (Milw. Co. # 2012-CF-2319)
State v. Rogelio Guarnero, 2013-AP-1754CR (Milw. Co. # 2012-CF-4088)

Dear Ms. Fremgen:

I represent Defendant-Appellant Rogelio Guarnero in appellate proceedings in the above-named cases. Please find enclosed for filing 10 copies (including a copy with original signatures) of our letter brief per the Court's April 3, 2014 order. A certificate of service is also included.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Atty. Robert J. Eddington
Enclosures

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April 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals
110 East Main Street
Madison, WI 53701-1688

Re: State of Wisconsin v. Rogelio Guarnero, 2013-AP-1753CR & 2013-AP-1754CR

Dear Ms. Fremgen:

In accordance with the order of the Court of Appeals dated April 3, 2014, Defendant-Appellant Rogelio Guarnero (herein "Guarnero") respectfully submits this letter brief to address the impact of *United States v. Castleman*, 188 L. Ed. 426 (2014) and *Descamps v. United States*, 133 S. Ct. 2276 (2013), on the cases at bar.

INTRODUCTION

The U.S. Supreme Court's decisions in *United States v. Castleman*, 188 L. Ed. 426 (2014) and *Descamps v. United States*, 133 S. Ct. 2276 (2013), are the most recent in a line of cases 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.

Under federal law, courts must generally use a "categorical approach" and consider only the elements of the statute of the defendant's prior conviction in order to compare those elements to the elements of a so-called "generic" crime defined under the relevant federal statute. *Descamps*, 133 S. Ct. at 2281 (interpreting the Armed Career Criminal Act, 18 U.S.C § 924(e)); *Taylor v. United States*, 495 U.S. 575 (1990) (same statute). The Supreme Court has approved a variation of this approach, known as the "modified categorical approach," under which courts may consult a limited class of documents, such as charging documents, jury instructions, and plea agreements, when the prior conviction arises under a "divisible" statute which sets out one or more elements of the offense in the alternative. *Descamps*, 133 S. Ct. at 2281; *Castleman*, 188 L. Ed. at 437-38.

In *Descamps*, the Supreme Court rejected the use of this modified categorical approach to hold that a defendant's state-law conviction for burglary—as broadly defined under state law—did not qualify as a "violent felony" for purposes of sentence enhancement under the federal Armed Career Criminal Act. *Descamps*, 133 S. Ct. at 2282.

In *Castleman*, the Supreme Court held that the defendant's prior state-law conviction of intentionally or knowingly causing bodily injury to a family member qualified as a

"misdemeanor crime of domestic violence" for purposes of 18 U.S.C. § 922(g)(9)—a federal statute that prohibited possession of firearms by individuals convicted of certain offenses. In reaching this conclusion, the court noted that the state law under which the defendant was convicted was "divisible," in that it could be violated in several alternative ways—some, but not all of which, would constitute a misdemeanor crime of domestic violence. *Castleman*, 188 L. Ed. 437-38. Accordingly, the Court looked beyond the elements and considered the indictment to which the defendant pleaded guilty to conclude the federal enhancement statute was satisfied. *Id.* at 438.

As described in detail below, neither *Caslteman*, *Descamps*, nor any of the cases upon which they rely, control the outcome of this case. Nonetheless, to the extent this Court looks to this line of cases for guidance, they confirm that only the statutory elements of Guarnero's prior RICO conspiracy conviction can be considered under Wis Stat. § 961.41(3g)(c), and that the trial court's erroneous conclusion that Guarnero's prior conviction arose under a statute "relating to" controlled substances must be reversed.

I. The Wisconsin Legislature Has Directed Through The Statutory Language Of Wis. Stat. § 961.41(3g)(c) That Courts May Examine Only The Statute Of The Prior Conviction.

As a threshold matter, *Castleman, Descamps*, and the cases upon which they rely, do not directly apply to the case at bar, nor do they control the outcome. These cases involved the interpretation of various federal statutes that provide enhanced penalties for certain prior offenses. In the present case, a *Wisconsin* statute—not a federal statute—defines the applicable penalty enhancement (if any).

As Guarnero showed previously (App. Br. at 16-17), an offense is a "2nd or subsequent offense" under Wis. Stat. § 961.41(3g)(c) if the offender has been convicted, *inter alia*, "under any *statute* of the United States or of any state *relating to controlled substances*...." (emphases added). Because the Wisconsin legislature specifically used the word "statute," the only relevant inquiry is whether the *statute* of prior conviction (here the RICO conspiracy statute) relates to controlled substances.

By contrast, the applicable language of the Armed Career Criminal Act 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) (emphasis 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). [1]

[1] This Court recently decided *Evans v. Wisconsin Dep't of Justice*, 2014 WI App. 31, ___ Wis. 2d ___, ___ N.W.2d ___ and examined the same statutory language under federal law at issue in *Castleman*. For the same reasons that the *Castleman* line of cases does not apply, nor does the *Evans* decision control the outcome of this case.

As Guarnero demonstrated in his brief (App. Br. at 18-19), this Court has already held that when Wisconsin statutes require examination of a prior "crime," or "violation," the trial court may look beyond statutory elements and consider conduct underlying the charges. *See, e.g., State v. Collins*, 2002 WI App 177, 256 Wis. 2d 697, 649 N.W.2d 325, *rev. denied*, 2002 WI 121, 257 Wis. 2d 119, 653 N.W.2d 891.

Unlike the federal statutes under consideration in *Castleman* and *Descamps*, Wis. Stat. § 961.41(3g)(c) does not direct the sentencing court to examine any specific "crime", "violation", or any particular "conduct." Rather, § 961.41(3g)(c) directs the trial court to examine the statute—and only the statute—under which the prior conviction arose. This very difference in statutory language was expressly noted by the Court of Appeals. *Collins*, 2002 WI App 20 at ¶ 15 n.6.[2]

That the *Castleman* line of cases permits examination of certain documents beyond the statute under the "modified categorical approach" in limited circumstances does not change the result in this case because the very statutes the Supreme Court considered made specific references to "crimes," "violations," and "conduct." Unlike § 961.41(3g)(c), these federal statutes were not limited on their face to consideration of only a "statute."

II. Even Under The *Castleman* Line Of Cases The Court Should Only Examine Statutory Elements Because The RICO Conspiracy Statute Does Not Require The Trial Court To Choose Among Various Alternative Versions Of The Crime.

Even if this Court looks to the *Castleman* line of cases for guidance, under the Supreme Court's reasoning, the trial court should examine only the statutory elements under the strict "categorical approach."

The Supreme Court explained that the *modified* categorical approach is only appropriate where the statute of the prior offense "effectively creates several different...crimes." *Descamps*, 133 S. Ct. at 2285, *citing Nijhawan v. Holder*, 557 U.S. 29, 41 (2009) (internal quotation omitted). Where there are multiple, alternative versions of a particular crime, a trial court cannot 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).

In the case at bar, the RICO conspiracy statute (18 U.S.C. § 1962(d)) does not "effectively create[] several different crimes", *Descamps*, 133 S. Ct. at 2285, but rather a single crime of broadly-defined conspiracy. The government must prove three elements under § 1962(d): (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. (*See* App. Br. at 20).

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[2] The *Collins* court specifically noted Wis. Stat. § 961.48(3), which contains the very language under consideration in this case.

That the term "pattern of racketeering activity" is broad enough to encompass many different predicate acts—some which may involve controlled substances and others which do not—is of no consequence. Supreme Court and Seventh Circuit precedent make clear that a conviction for RICO conspiracy under § 1962(d) "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...." *United States v. Tello*, 687 F.3d 785, 782 (7th Cir. 2012). *Salinas v. United States*, 522 U.S. 52, 63, 65-66 (1997) (no requirement of any specific act under § 1962(d)). Therefore, the trial court need not decide whether a defendant committed a predicate act, let alone decide among various alternatives to determine *which* predicate act was committed.

To the extent the State attempts to argue that a modified categorical approach is appropriate because the statutory definition of "racketeering activity" can include drug offenses and non-drug offenses (*compare* Resp. Br. at 9), this argument fails for the same reason. Had Guarnero been convicted of a *substantive* racketeering violation (which he was not), the government would have to prove that Guarnero himself committed at least two qualifying predicate acts, and the record would necessarily disclose *which* two. *Sedima, S.P.R.L. v. Irmex Co.*, 473 U.S. 479, 496 n.14 (1985). In such a case, the State might have been able to advance an argument that the modified categorical approach required an examination beyond the elements to determine *which* predicate act Guarnero was convicted of committing.

However, in *this* case, the trial court considering Guarnero's prior RICO conspiracy conviction need not speculate as to which predicate act he allegedly committed—if any—because no such proof is required to sustain a RICO conspiracy conviction.

III. Even Under A Modified Categorical Approach There Is No Evidence 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 any controlled substance violation.

As a preliminary matter, the Supreme Court has 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). 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, and the plea agreement falls woefully short of establishing that he "necessarily admitted" (or even suggested) facts demonstrating that Guarnero committed a narcotics crime. (*See* App. Br. at 25-26, Reply Br. at 8-10)

Count Two of the federal indictment to which Guarnero pleaded guilty contains no allegation that Guarnero himself committed any narcotics crime, and the only charges against Guarnero concerning controlled substances were dismissed. Any attempt by the State to suggest a different result (*compare* Resp. Br. at 3-4, 10) because Count Two contained allegations that unnamed Latin Kings gang members may have engaged in distribution of controlled substances ignores that there were *49 defendants* named in this count, and no allegation suggested that any particular defendant—let alone Guarnero—committed a narcotics crime.

The vast majority of admissions in the federal plea agreement specific to Guarnero related to firearms, not drugs. (App. Br. at 25-26, Reply Br. at 8) 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 passing mention of four bags of marijuana purportedly found on the premises. There was no suggestion that the marijuana was found on 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[3]—the U.S. Supreme Court took great care in *Descamps* to clarify 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)

For all of these reasons, neither *Casllteman*, *Descamps*, nor any of the cases upon which they rely, directly control the outcome of this case. To the extent this Court looks to these cases for guidance, they firmly support Guarnero's position that only the statutory elements of RICO conspiracy can be considered by a sentencing court under Wis. Stat. § 961.41(3g)(c). Because the RICO conspiracy statute simply is not related to controlled substances, as Wis. Stat. 961.41(3g)(c) requires, the trial court must be reversed.

Respectfully submitted,

Robert J. Eddington
Attorney for Defendant-Appellant
State Bar. No. 1078868

[3] *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.