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DEPARTMENT OF JUSTICE

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Diane M. Fremgen
Clerk of the Court of Appeals
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Re: ***State of Wisconsin v. Rogelio Guarnero***
Appeal Nos. 2013AP1753-CR and 2013AP1754-CR
District I

Dear Ms. Fremgen:

Pursuant to this Court's April 3, 2014, Order, the State submits this letter brief to "address the impact of *United States v. Castleman*, No. 12-1371, 2014 WL 1225196 [134 S. Ct. 1405 (2014)] (U.S. Mar. 26, 2014), and *Descamps v. United States*, 133 S. Ct. 2276 (2013), on these appeals."

Summary of Argument:

Guarnero's prior RICO 2009 conviction, in which he pled guilty to conspiring to commit racketeering in violation of 18 U.S.C. §§ 1961 and 1962(d), was a conviction under very broad, "divisible statutes." *See Descamps,* 133 S. Ct. 2276. Because 18 U.S.C. §§ 1961 and 1962(d) set forth "multiple, alternative versions of the crime," the circuit court could consider extra-statutory documents – in this case, the federal indictment – to "determine which statutory phrase (contained within a statutory provision that covers several different generic crimes) covered a prior conviction." *Nijhawan v. Holder,* 557 U.S. 29, 41 (2009); *accord Descamps,* 133 S. Ct. at 2284; *see also Castleman,* 134 S. Ct. at 1414 (providing that because the defendant's prior conviction was under a divisible statute, a court "may accordingly apply the modified categorical approach, consulting the indictment to which [the defendant] pleaded guilty[.]").

***Descamps*: A court applies the "modified categorical approach" to statutes that are divisible.**

The defendant in *Descamps* faced a 15–year minimum sentence based on the finding of a prior conviction for burglary. Descamps had pled guilty to burglary in California, wherein "[A] person who enters [certain locations] with intent to commit grand or petit larceny or any felony is

guilty of burglary." *Descamps,* 133 S. Ct. at 2282. The California statute swept more broadly than the generic definition of burglary under the Armed Career Criminal Act (ACCA), which required the element of "unlawful or unprivileged entry." *Taylor v. United States*, 495 U.S. 575, 599 (1990). To determine whether Descamps' prior offense involved "unlawful or unprivileged entry," the sentencing court looked to facts set forth in the transcript of his plea colloquy. *Descamps,* 133 S. Ct. at 2282. At the plea hearing, the prosecutor had proffered that the crime involved the breaking and entering of a grocery store. *Id.* The sentencing court doubled his sentence. *Id.*

On appeal, the United States Supreme Court held that to determine whether a prior conviction qualifies as a sentence enhancer under the ACCA, a sentencing court must use one of two approaches. If the prior conviction was for violating a "divisible statute"—one that has alternative elements, *e.g.,* burglary involving entry into a building or an automobile—then the "modified categorical approach" must be used, which allows the court to consult a "limited class of documents," (e.g., charging documents, transcripts of plea colloquies, and jury instructions) to determine which element formed the basis of the defendant's prior conviction. *See Descamps*, 133 S. Ct. at 2281–85, 2288 (explaining that the approach "merely assists the sentencing court in identifying the defendant's crime of conviction"). Otherwise, the "categorical approach" must be used, which allows the court to consider only the statutory elements of the prior conviction. *Id.* at 2281–83, 2287–90.[1]

***Castleman:* Courts are to apply the "modified categorical approach" in order to determine which elements formed the basis of that prior conviction.**

The issue in *Castleman* was whether the defendant's prior state conviction for "intentionally or knowingly caus[ing] bodily injury to" the mother of his child qualified as a "misdemeanor crime of domestic violence" under a federal statute. 134 S. Ct. at 1408. The Supreme Court held that it did. *Id.* In its decision, the Court noted that the parties did *not* dispute

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[1] In *Nijhawan,* 557 U.S. at 35, the Supreme Court expounded upon the proper inquiry in these cases, explaining:

> [S]ometimes a separately numbered subsection of a criminal statute will refer to several different crimes, each described separately. And it can happen that some of these crimes involved violence while others do not. A single Massachusetts statute section entitled "Breaking and Entering at Night," for example, criminalizes breaking into a "building, ship, vessel or vehicle." Mass. Gen. Laws, ch. 266, § 16 (West 2006). In such an instance, we have said, a court must determine whether an offender's prior conviction was for the violent, rather than the nonviolent, break-ins that this single five-word phrase describes (*e.g.,* breaking into a building rather than a vessel), by examining "the indictment or information and jury instructions," *or, if a guilty plea is at issue, by examining the plea agreement,* plea colloquy, or "some comparable judicial record" of the factual basis for the plea.

(emphasis added) (citations omitted).

that his conviction of the prior statute was "divisible." *Id.* at 1414. Therefore, citing to *Descamps, Castleman* held that the Court "may apply the modified categorical approach, consulting the indictment to which [a defendant] pleaded guilty in order to determine whether his conviction did entail the elements necessary to constitute the generic federal offense." *Id.* (citing *Descamps*, 133 S. Ct. at 2281–82).

Guarnero's prior conviction was a violation of divisible statutes; courts are therefore allowed to review extra-statutory documents.

The language of 18 U.S.C. §§ 1961 and 1962 – the statutes that Guarnero was convicted of – shows that the statutes are broad and divisible. Section 1961 provides in relevant part:

> (1) "racketeering activity" means (A) any act ***or*** threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, ***or*** dealing in a controlled substance ***or*** listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year . . . ."

18 U.S.C. § 1961(1)(a). Similarly, § 1962 provides in relevant part:

> (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 . . . 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 . . . .
>
> (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.
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> (c) 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.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), ***or*** (c) of this section.

18 U.S.C. § 1962.

As the Supreme Court has stated, "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 . . . any 'offense' involving . . . drug-related activities that is 'punishable' under federal law." *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 481-82 (1985) (quoting 18 U.S.C. § 1961(1)).

Applying these principles to Guarnero's case, the RICO statutes upon which Guarnero was convicted "list potential offense elements in the alternative," so the RICO statutes are "divisible" and the modified categorical approach applies. *See Descamps,* 133 S. Ct. at 2283. The circuit court was allowed to review extra-statutory documents - including his plea agreement and indictment.

Guarnero pled guilty to conspiring 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" (27:Ex. C, Ex. D:19; A-Ap. 121, 146; R-Ap. 104, 134). In his plea agreement, Guarnero admitted:

- He is a member of the Sawyer Kings, which is the Milwaukee chapter of the Latin Kings street gang (27:Ex. D:2; A-Ap. 129; R-Ap. 117);
- Latin Kings is "a criminal organization whose members and associates engaged in acts of violence" (27:Ex. C:3, Ex. D:2; A-Ap. 120, 129; R-Ap. 103, 117);
- Those acts include "extortion and distribution of controlled substances" (27:Ex. C:3, Ex. D:2; A-Ap. 120, 129; R-Ap. 103, 117); and
- While executing a search warrant at Guarnero's residence, police officers "found within the 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. 130; R-Ap. 118).

He also pled guilty to conspiring 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" (27:Ex. C, Ex. D:19; A-Ap. 121, 146; R-Ap. 104, 134).

Guarnero's State Conviction and the Circuit Court's Decision:

Guarnero was convicted of possession of cocaine as a second or subsequent offense, contrary to Wis. Stat. § 961.41(3g)(c). That statute provides in relevant part:

> No person may possess or attempt to possess a controlled substance or a controlled substance analog . . . .
>
> (c) . . . 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). In denying Guarnero's motion to dismiss, the circuit court noted at the evidentiary hearing that it "looked at any statute relating to controlled substances." (37:12; A-Ap.112; R-Ap. 113) It found that "the [RICO] statute does relate to controlled substances."

(37:13; A-Ap.113; R-Ap. 114). It also found that "before a conviction under a RICO charge can constitute a second or subsequent offense," the underlying charges "must relate to controlled substances." *Id.* The circuit court concluded that "the interpretation of [] [Wis. Stat. § 961.41(3g)(c)] properly applies to a RICO charge, first the statute, but specifically the charge that relates to drug-related activities or offenses." And, in its Order denying the motion, the court found Guarnero's "undisputed prior [RICO] convictions are sufficient to support a charge under Wis. Stat. § 961.41(3g)(c)." *Id.* Finally, the postconviction court reasoned that the second or subsequent offense was appropriate because the allegations of "count two *of the federal indictment* related to distribution of controlled substances[.]" (28:2; A-Ap. 107).

Applying *Descamps* and *Castleman*, this was the correct decision. As indicated above, Guarnero pled to the "extortion and distribution of controlled substances" and to conspiring 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" (27:Ex. C, Ex. D:19; A-Ap. 121, 146; R-Ap. 104, 134). Under Wis. Stat. § 961.41(3g)(c), this constitutes a prior conviction of "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."

Conclusion

Applying the principles in *Descamps* and *Castleman* to this case, a court can, in addition to looking at the plain language of the divisible RICO statutes, consider extra-statutory documents, including a plea agreement and indictment, to determine what formed the basis of the Guarnero's prior RICO conviction. *See Descamps*, 133 S. Ct. at 2281–85, 2288.

Sincerely,

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