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DEPARTMENT OF JUSTICE

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

Re: *State of Wisconsin v. Rogelio Guarnero*,
Case Nos. 2013AP1753-CR & 2013AP1754-CR

Dear Ms. Fremgen:

Pursuant to this Court's May 6, 2015 Order, the State submits this letter brief to address "the import, of 21 U.S.C. §841(b)(1)(C) to [the defendant's] conviction."

Summary of Argument:

In 2009, Rogelio Guarnero was convicted in federal court for conspiring to commit racketeering. The judgment in that case (A-Ap. 165) provided that Guarnero was "adjudicated guilty of . . . 18 U.S.C. §§ 1962(d) and 841(b)(1)(C)." The latter section, 841(b)(1)(C) concerns the crimes of distribution and possession of "controlled substances." Consequently, pursuant to Wis. Stat. § 961.41(3g)(c), Guarnero's subsequent state conviction for possession of cocaine constitutes a "second or subsequent" offense.

Wis. Stat. § 961.41(3g)(c) and *State v Moline*:

Wisconsin statute § 961.41(3g)(c) provides in relevant part that "an offense is considered a second 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, or depressant, stimulant, or hallucinogenic drugs" (emphasis added). As stated in *State v. Moline*, 229 Wis. 2d 38, 42, 598 N.W.2d 929 (Ct. App. 1999), "the statute is meant to include all prior convictions, either under ch. 961 STATS., the federal statutes or any other state statute that is *'related to' controlled substances* and the like" (emphasis added). In *Moline*, the defendant was charged with possessing cocaine. The complaint alleged that the defendant was a repeat drug offender subject

to enhanced penalties. The defendant moved to dismiss, asserting that his prior conviction of possession of drug paraphernalia was not a prior conviction within the meaning of Wis. Stat. § 961.48(3) and (4). The court of appeals disagreed, noting, "the term itself—*drug* paraphernalia—signifies that the paraphernalia must have some relation to controlled substances or controlled substance analogs before that paraphernalia will qualify as 'drug' paraphernalia." *Moline*, 229 Wis. 2d at 42.

The court then turned to the drug paraphernalia statute:

> This commonsense reading is bolstered by the drug paraphernalia statute itself. Drug paraphernalia is defined by § 961.571(1)(a), STATS., in pertinent part, as "all equipment, products and materials ... that are used, designed for use or primarily intended for use [in numerous activities with respect to] a *controlled substance or controlled substance analog in violation of this chapter.*" (Emphasis added.) Thus, we see from this language that the legislature very specifically linked, by definition, the term "drug paraphernalia" with the activities related to controlled substances. We conclude that paraphernalia is not illegal unless it is "related to" drugs.

Moline, 229 Wis. 2d at 42.

The *Moline* court concluded, "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.*

Guarnero's Argument – "Elements only" test:

Guarnero's argument at the appellate level, in his brief and at oral argument, has always been the following:

- "Courts may only consider the statutory elements of a prior Conviction when considering a second or subsequent offense under § 961.41(3g)(c)" (Guarnero's Brief at 9).

- "The only permissible focus of a court is on the statutory *elements* of the statute of prior conviction, because it is those elements that define the prior conviction" (Guarnero's Brief at 9)

- "[A] prior statute 'relates to' controlled substances when narcotics is a necessary element of the statute of prior conviction" (Guarnero's Brief at 15).

The State's argument – "Elements only" test is met:

At oral argument, the State agreed with Guarnero that *in this case*, there is no need to look beyond the statutory elements because the statutes upon which Guarnero was convicted "relate to" controlled substances. Under the "elements only" test, he loses because by its own terms, Guarnero's federal conviction incorporated his illegal drug/controlled substances activity.[1]

Guarnero was convicted for conspiring to commit racketeering. The judgment provided that Guarnero was "adjudicated guilty of . . . 18 U.S.C. §§ 1963(d) and 841(b)(1)(C)." The penalty provision for "unlawful acts" under 21 U.S.C. § 841(a), Section § 841(b)(1)(C)[2] provides:

> "In the case of a *controlled substance* in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such *substance s*hall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such *substance* shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such

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[1] The State still asserts, as it did in its appellate brief to this Court, that the RICO statute is also a statute that "relates to" controlled substances. *See* State's brief at 7, 9-12. As recognized by the United States Supreme Court, "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*[.]" *Sedima, S.P.R.L, v. IMREX Co., Inc.*, 473 U.S. 479, 481-82 (1985) (emphasis added) (quoting 18 U.S.C. § 1961(1)).

[2] At oral argument, the State pointed out to this Court that the federal judgment has a scrivener's error: while the judgment is read to suggest that Guarnero was convicted of *18* U.S.C. §841(b)(1)(C), the correct statute is 21 U.S.C. §841(b)(1)(C). During his reply at oral argument, Guarnero did not dispute this scrivener's error. Rather, his reply argument was that the scrivener's error was that the statute – 21 U.S.C. §841(b)(1(C) – was included in the judgment at all.

> term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(Emphasis added.). This Court can therefore follow *Moline* – it can look at the statutes to determine that Guarnero's prior conviction related to drugs.

Also argued at oral argument, while the Court does not need to look at Guarnero's indictment or plea in this case (because the statutory elements "relate to" controlled substances), Guarnero's indictment provided that he "knowingly and intentionally conspired to violate Title 18 United States Code § 1962(c), that is, 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 . . . *Sections 841* and 846" (A-Ap. 139; *see also* Guarnero's plea agreement, A-Ap. 163) (emphasis added). Guarnero did not conspire to commit mail fraud or wire fraud or sports bribery – all other examples of "racketeering activity" under 18 U.S.C. 1961(1). He specifically pled guilty to conspiring to 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).

Conclusion:

Under Guarnero's own argument that "courts may only consider the statutory elements of a prior conviction when considering a second or subsequent offense under [Wis. Stat] § 961.41(3g)(c)," his prior federal conviction has met this test. In this case, this Court need only consider the statutory elements of his conviction because those elements are clear: 21 U.S.C. 841(b)(1)(C) "relates to" controlled substances.

Sincerely,

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SLL:cjs

c: Robert Eddington
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