

**IN THE CRIMINAL COURT OF HAMILTON COUNTY  
STATE OF TENNESSEE**

STATE OF TENNESSEE	)	
	)	
V.	)	
	)	DOCKET NO.: 304518
	)	
CORTEZ SIMS	)	DIVISION II
	)	

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**DEFENDANT CORTEZ SIMS' MOTION NO. 6:  
SUPPLEMENTAL MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS DEFECTIVE PRESENTMENT**

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The Defendant, Cortez Sims (Sims), submits this supplemental memorandum in support of his motion to dismiss the presentment for failure to include an essential element. In his previous motion and memorandum, Sims argued that T.C.A. § 39-12-203(9) requires the State to prove that the racketeering activities alleged against Sims were committed with the intent to make a financial gain. The State proposed an interpretation that would have excluded that requirement from RICO gang offenses only. Argument was held on Sims' motion and it is presently under advisement. This supplemental memorandum is submitted to show the court important legislative history which Sims believes supports his position.

The issue is whether the use of the phrase "for financial gain" was intended to apply to RICO gang offenses similarly as it does to RICO sexual and drug offenses. The statute is somewhat ambiguous. The legislative history shows that the legislature, after passing the act that made gang offenses part of the preexisting RICO statute, interpreted the statute it passed as requiring "for financial gain" to be an element of RICO gang offenses. Then, in a unique event, the legislature was given the opportunity to strike the "for financial gain" requirement from the

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application of the RICO statute to the gang crimes. In something similar to a vote of confidence, the legislature chose not to pass bills that would have excluded “for financial gain” from the RICO statute as it applies to gang offenses. As a result, it is clear that the legislature (1) interpreted the existing RICO statute to require the “for financial gain” element in RICO gang offenses and (2) expressly chose not to change it.

The Tennessee RICO statute was passed in 1989 and in its original version applied only to certain drug offenses (Acts 1989, Ch. 591, § 1). It was amended in 1992 to include certain sexual exploitation crimes (Acts 1992, Ch. 937, § 1). It was amended again in 2012 to add gang offenses (Acts 2012, Ch. 1090, § 1).

A year later, a house member and a senate member introduced a bill in each legislator’s respective chamber to amend the RICO statute to make it clear that “for financial gain” did not apply to RICO gang offenses; leaving it as an element of RICO drug and sex cases only.

A copy of House Bill 2459, introduced by House member Bo Watson, is attached hereto as **Exhibit 1**. A copy of Senate Bill 291, introduced by Senator Vince Dean, is attached hereto as **Exhibit 2**.

The RICO statute contains language evidencing legislative intent in T.C.A. § 39-12-202.

It states:

- (a) The general assembly hereby finds and declares that an effective means of punishing and deterring criminal activities of organized crime is through the forfeiture of profits acquired and accumulated as a result of such criminal activities. It is the intent of the general assembly that this part be used by prosecutors to punish and deter only such criminal activities.
- (b)
  - (1) It is not the intent of the general assembly that isolated incidents of felony conduct be prosecuted under this part, but only an interrelated pattern of criminal activity, the motive or effect of which is to derive pecuniary gain.

The two proposed bills contained the following change:

(b)(1) It is not the intent of the general assembly that isolated incidents of felony conduct be prosecuted under this part, but only an interrelated pattern of criminal activity, the motive or effect of which is to **derive pecuniary gain or to commit gang crimes**. (emphasis added).

The current RICO statute – T.C.A. § 39-12-203(9) says:

(9) "Racketeering activity" means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit an act for financial gain that is a criminal offense involving controlled substances, and the amount of controlled substances involved in the offense is included under § 39-17-417(i) and (j) and its subdivisions or involving aggravated sexual exploitation of a minor, especially aggravated sexual exploitation of a minor under §§ 39-17-1004(b)(1)(A) and 39-17-1005(a)(1) or to commit, attempt to commit, conspire to commit, or to solicit, coerce, or intimidate another person to commit a criminal gang offense, as defined in § 40-35-121(a);

The proposed amendment changed this section to say the following:

(9)(A) To commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit an act for financial gain that is a criminal offense involving controlled substances, and the amount of controlled substances involved in the offense is included under § 39-17-417(i) and (j) and its subdivisions or involving aggravated sexual exploitation of a minor, especially aggravated sexual exploitation of a minor under §§ 39-17-1004(b)(1)(A) and 39-17-1005(a)(1); **or**

**(B) To commit, attempt to commit, conspire to commit, or to solicit, coerce, or intimidate another person to commit a criminal gang offense which is any violation of Tennessee Law:** (remainder omitted) (emphasis added).

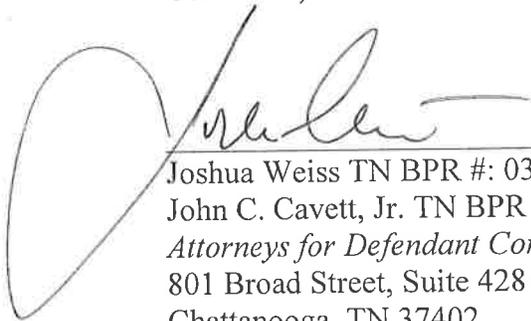
The legislature voted down the amendments (see vote record document attached hereto as **Exhibit 3**), clearly reiterating that it intended the element to apply to RICO gang offenses. The voting record also makes it clear that the legislature interpreted the statute, in its present form, to require the financial gain element to apply to a gang related RICO offense ("Generally, under present law, 'racketeering activity' means the commission of an act for financial gain that is a criminal offense involving controlled substances of an amount that would make the offense a

Class A or Class B felony; or an act involving certain acts of aggravated sexual exploitation of a minor or especially aggravated sexual exploitation of a minor; or the commission of a criminal gang offense.” Vote record (**Exhibit 3**, page 5).

Although many tools exist to aid in the interpretation of an ambiguous statute, ascertaining legislative intent through the legislative history is the most important and persuasive (“[t]o aid us in our work, there are a number of principles of statutory construction, among which is the most basic rule of statutory construction: ‘to ascertain and give effect to the intention and purpose of the legislature.’” *Gleaves v. Checker Cab Transit Corp., Inc.*, 15 S.W.3d 799, 802 (Tenn. 2000) (quoting *Carson Creek Vacation Resorts, Inc. v. State Dep’t. of Revenue*, 865 S.W.2d 1, 2 (Tenn. 1993)). Here the legislative intent is clear – the statute as presently constituted requires the State to prove an intent to make a financial gain as to each of the racketeering activities (predicate offenses) and the legislature has revisited the issue to make it clear that it intended financial gain to be an element of each event of racketeering activity (predicate acts) a RICO gang offense.

Respectfully submitted,

**CAVETT, ABBOTT & WEISS, PLLC**



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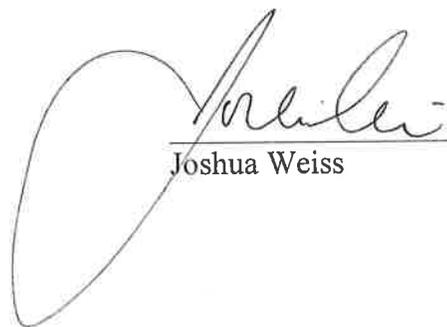
**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a true and correct copy of the foregoing document has been duly served upon:

Hamilton County District Attorney's Office  
600 Market Street  
Suite 310  
Chattanooga, TN 37402

by placing a copy of same in the mailbox designated for the service of motions upon the District Attorney in the Hamilton County Criminal Court Clerk's Office.

This 6<sup>th</sup> day of July 2018.



Joshua Weiss

HOUSE BILL 2377

By Dean

AN ACT to amend Tennessee Code Annotated, Title 39, Chapter 12, Part 2, relative to the "Racketeer Influenced and Corrupt Organization (RICO) Act of 1989."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 39-12-202, is amended by deleting the second sentence of subsection (a), and by substituting instead the following:

It is the intent of the general assembly that this part be used by prosecutors to punish and deter such criminal activities and criminal gang crimes.

SECTION 2. Tennessee Code Annotated, Section 39-12-202, is amended by deleting subdivision (b)(1) and substituting instead the following:

(b)

(1) It is not the intent of the general assembly that isolated incidents of criminal conduct be prosecuted under this part, but only an interrelated pattern of criminal activity, the motive or effect of which is to derive pecuniary gain or to commit criminal gang crimes.

SECTION 3. Tennessee Code Annotated, Section 39-12-203, is amended by deleting subdivision (6) and by substituting instead the following:

(6) "Pattern of racketeering activity" means engaging in at least two (2) incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents; provided, that at least one (1) of such incidents occurred after July 1, 1986, and that the last of the incidents occurred within five (5) years after a prior incident of racketeering conduct;



SECTION 4. Tennessee Code Annotated, Section 39-12-203, is amended by deleting subdivision (9) and substituting instead the following:

(9) "Racketeering activity" means:

(A) To commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit an act for financial gain that is a criminal offense involving controlled substances, and the amount of controlled substances involved in the offense is included under § 39-17-417(i) and (j) and its subdivisions or involving aggravated sexual exploitation of a minor, especially aggravated sexual exploitation of a minor under §§ 39-17-1004(b)(1)(A) and 39-17-1005(a)(1); or

(B) To commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit a criminal gang offense, as defined in § 40-35-121(a);

SECTION 5. Tennessee Code Annotated, Section 39-12-204, is amended by deleting subsections (e) and (f) in their entireties.

SECTION 6. This act shall take effect July 1, 2014, the public welfare requiring it, and shall apply to prohibited acts occurring on or after the effective date of this act.

SENATE BILL 291

By Watson

AN ACT to amend Tennessee Code Annotated, Title 39, Chapter 12, Part 2, relative to the "Racketeer Influenced and Corrupt Organization (RICO) Act of 1989".

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 39-12-202, is amended by deleting the second sentence of subsection (a), and by substituting instead the following:

It is the intent of the general assembly that this part be used by prosecutors to punish and deter such criminal activities and criminal gang crimes.

SECTION 2. Tennessee Code Annotated, Section 39-12-202, is amended deleting subsection (b)(1), and substituting instead the following:

(1) It is not the intent of the general assembly that isolated incidents of felony conduct be prosecuted under this part, but only an interrelated pattern of criminal activity, the motive or effect of which is to derive pecuniary gain or to commit criminal gang crimes.

SECTION 3. Tennessee Code Annotated, Section 39-12-203, is amended by deleting subdivision (a)(6) and by substituting instead the following:

"Pattern of racketeering activity" means engaging in at least two (2) incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents; provided, that at least one (1) of such incidents occurred after July 1, 1986, and that the last of the incidents occurred within five (5) years after a prior incident of racketeering conduct;



SECTION 4. Tennessee Code Annotated, Section 39-12-203, is amended by deleting subdivision (a)(9) and substituting instead the following:

(9) "Racketeering activity" means:

(A) To commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit an act for financial gain that is a criminal offense involving controlled substances, and the amount of controlled substances involved in the offense is included under § 39-17-417(i) and (j) and its subdivisions or involving aggravated sexual exploitation of a minor, especially aggravated sexual exploitation of a minor under §§ 39-17-1004(b)(1)(A) and 39-17-1005(a)(1); or

(B) To commit, attempt to commit, conspire to commit, or to solicit, coerce, or intimidate another person to commit a criminal gang offense, which is any violation of Tennessee Law:

(i) Chargeable as first degree murder under §39-13-202, second degree murder under §39-13-210, voluntary manslaughter under §39-13-211, reckless homicide under §39-13-215, assault under §39-13-101, aggravated assault under §39-13-102, domestic assault under §39-13-111, reckless endangerment under §39-13-103, robbery under §39-13-401, aggravated robbery under §39-13-402, especially aggravated robbery under (§39-13-403), carjacking under §39-13-404, stalking under §39-17-315, aggravated stalking under §39-17-315, especially aggravated stalking under §39-17-315, harassment under §39-17-308, retaliation for past action under §39-16-510, rape under §39-13-503, aggravated rape under §39-13-502, rape of a child under §39-13-522, aggravated rape of a child under §39-13-531, sexual battery under §39-13-505, aggravated sexual battery under §39-13-504, kidnapping under §39-13-303, aggravated kidnapping under §39-13-304, especially

aggravated kidnapping under §39-13-305, especially aggravated burglary under §39-14-404, and possession of a firearm during the commission or attempt to commit a dangerous felony under §39-17-1324; or

(ii) That results, or was intended to result, in the defendant's receiving income, benefit, property, money, or anything of value from the commission of any aggravated burglary under §39-14-403, or from the illegal sale, delivery, or manufacture of a controlled substance under §39-17-417, controlled substance analogue under §39-17-454, or firearm under §39-17-1303 or §39-17-1316;

SECTION 5. Tennessee Code Annotated, Section 39-12-204, is amended by deleting subsections (e) and (f) in their entireties.

SECTION 6. This act shall take effect July 1, 2013, the public welfare requiring it, and shall apply to prohibited acts occurring on or after the effective date of this act.

STATE OF TENNESSEE  
108<sup>th</sup> General Assembly

SENATE REGULAR CALENDAR

Thursday, April 11, 2013

Summary of General Bills

Published by the Office of the Chief Clerk

(Asterisked number indicates which bill is printed in your file.)

**1. SJR 0196 BY \*GREEN ( )**

Senate Co-Sponsors: Ramsey, Yager, Gresham, Bell, Beavers, Bowling  
House Co-Sponsors: None

**Constitutional Amendments** - As introduced, proposes amendment of Article VI, Section 5 to provide for appointment of an attorney general and reporter for the state by joint vote of the general assembly. -

**COMMITTEE VOTE:**

S. Jud Comm. 7-1-0

**FISCAL NOTE:**

SJR0196 Fiscal Note

**SUMMARY:** ON APRIL 11, 2013, THE SENATE COMPLETED THE FIRST READING OF SENATE JOINT RESOLUTION 196.

ON APRIL 16, 2013, THE SENATE COMPLETED THE SECOND READING OF SENATE JOINT RESOLUTION 196.

ON APRIL 17, 2013, THE SENATE COMPLETED THE THIRD READING AND ADOPTED SENATE JOINT RESOLUTION 196.

**FISCAL SUMMARY:** Increase State Expenditures - \$9,100/One-Time

**2. SB 0164 BY \*NORRIS (HB 0158 by \*McCormick)**

Senate Co-Sponsors: None  
House Co-Sponsors: Camper

**Public Defenders** - As enacted, revises provisions governing the funding for public defenders in the 20th and 30th judicial districts. - Amends TCA Title 8, Chapter 14.

**COMMITTEE VOTE:**

S. Jud Comm. 7-1-0, with amendment.

**TIMELY FILED AMENDMENTS:**

1. Amendment No. 1 (SA0353) by S. Jud Comm.

**FISCAL NOTE:**

HB0158/SB0164 Fiscal Note  
FM0568 - SB0164 - (004869)

**SUMMARY:** ON APRIL 4, 2013, THE HOUSE ADOPTED AMENDMENT #1 AND PASSED HOUSE BILL 158, AS AMENDED.

EXHIBIT

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injuries compensation fund or drug court funding. The department will be required to report its findings to the general assembly in January of 2014.

**FISCAL SUMMARY:** Decrease State Revenue - \$7,600/TBI  
\$19,700/District Attorneys Expunction Fund  
\$2,200/Public Defenders Expunction Fund  
\$21,900/General Fund  
Increase State Expenditures - Not Significant

Decrease Local Revenue - \$1,500/Court Clerks  
Increase Local Expenditures - Not Significant

5. **SB 0291 BY \*WATSON** (HB 1025 by \*Dean)  
Senate Co-Sponsors: Finney L, Burks, Ford, Tate  
House Co-Sponsors: White M

Criminal Offenses - As introduced, makes changes to the "Racketeer Influenced and Corrupt Organizations (RICO) Act of 1989" to include criminal gangs and offenses committed by criminal gangs. - Amends TCA Title 39, Chapter 12, Part 2.

**COMMITTEE VOTE:**  
S. Jud Comm. 9-0-0, with amendment.

**TIMELY FILED AMENDMENTS:**  
1. Amendment No. 1 (SA0355) by S. Jud Comm.

**FISCAL NOTE:**  
HB1025/SB0291 Fiscal Note  
FMI153 - SB0291 - (006303)

**SUMMARY:** This bill revises the Racketeer Influenced and Corrupt Organizations Act (the RICO Act) to revise the definitions of "racketeering activity" and "patterns of racketeering activity," removes certain provisions regarding multiple violations of the RICO Act and removes the requirement that the state prove that there was a meeting of the minds between all co-conspirators of a RICO Act violation, as described below.

Generally, under present law, it is a Class B felony, punishable by a fine \$250,000 or a sentence to imprisonment from within Range II (or higher) for a Class B felony, or both, for:

- (1) Any person who has, with criminal intent, received any proceeds derived from a pattern of racketeering activity or through the collection of an unlawful debt to use or invest any part of the proceeds in the acquisition of any interest in real or personal property or in the establishment or operation of any enterprise;
- (2) Any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain an interest in or control of any enterprise of real or personal property;
- (3) Any person employed by, or associated with, any enterprise to knowingly conduct or participate in the enterprise through a pattern of racketeering activity or the collection of any unlawful debt; or
- (4) Any person to conspire or endeavor to violate any of the provisions (1) - (3).

Generally, under present law, "racketeering activity" means the commission of an act for financial gain that is a criminal offense involving controlled substances of an amount that would make the offense a Class A or Class B felony; or an act involving certain acts of aggravated sexual exploitation of a minor or especially aggravated sexual exploitation of a minor; or the commission of a criminal gang offense. A "criminal gang offense" is any violation of state law:

- (1) During the perpetration of which the defendant knowingly causes, or threatens to cause, death or bodily injury to another person and specifically includes rape of a child, aggravated rape and rape; or

(2) That results, or was intended to result, in the defendant's receiving anything of value from the commission of any aggravated burglary, or from the illegal sale, delivery or manufacture of a controlled substance, controlled substance analogue or firearm.

Under present law, "pattern of racketeering activity" means engaging in at least two similar or interrelated incidents of racketeering conduct as long as at least one of such incidents occurred after July 1, 1986, and the last of the incidents occurred within two years after a prior incident of racketeering conduct. This bill revises this definition to require that the last of the incidents occurred within "five years," instead of "two years" after a prior incident of racketeering conduct.

This bill redefines "criminal gang offense," for the purpose of defining racketeering activity under the RICO Act, to instead mean any violation of state law:

(1) Chargeable as first degree murder, second degree murder, voluntary manslaughter, reckless homicide, assault, aggravated assault, domestic assault, reckless endangerment, robbery, aggravated robbery, especially aggravated robbery, carjacking, stalking, aggravated stalking, especially aggravated stalking, harassment, retaliation for past action, rape, aggravated rape, rape of a child, aggravated rape of a child, sexual battery, aggravated sexual battery, kidnapping, aggravated kidnapping, especially aggravated kidnapping, especially aggravated burglary, and possession of a firearm during the commission or attempt to commit a dangerous felony; or

(2) That results, or was intended to result, in the defendant's receiving income, benefit, property, money, or anything of value from the commission of any aggravated burglary, or from the illegal sale, delivery, or manufacture of a controlled substance, controlled substance analogue, or firearm.

Under present law, multiple and alternative violations of the offenses described above in (1) - (4) must be alleged in multiple separate counts, with the factual basis for the alleged predicate acts set forth in each count. A person may only be convicted either of one criminal violation described above in (1) - (4) or for one or more of the predicate acts, but not both. This bill removes these provisions.

Under present law, in order to convict a person based upon a conspiracy to violate any offense in (1) - (3), the state must prove that there was a meeting of the minds between all co-conspirators to violate the RICO Act and that an overt act in furtherance of the intention was committed. This bill removes this provision.

ON APRIL 11, 2013, THE SENATE ADOPTED AMENDMENT #1 AND PASSED SENATE BILL 291, AS AMENDED.

AMENDMENT #1 revises the definition of "racketeering activity" to additionally mean the commission of an act for financial gain that is a criminal offense of trafficking for commercial sex acts, promoting prostitution, patronizing prostitution from a person who is younger than 18 years of age or has an intellectual disability, solicitation of a minor, or soliciting sexual exploitation of a minor or exploitation of a minor by electronic means.

NOTE: This amendment revises the directory language in Sections 1 - 4, which may cause for there to be duplicative or contradictory provisions in the code.

ON APRIL 16, 2013, THE SENATE RECALLED SENATE BILL 291, AS AMENDED, FROM THE HOUSE.

**FISCAL SUMMARY:** Summary Not Available

6. **SB 0405 BY \*BEAVERS** (HB 0278 by \*Womick)

Senate Co-Sponsors: None

House Co-Sponsors: None

Taxes - As enacted, adds district attorney generals and their employees, and law enforcement officers and employees, to the list of public officers and employees required to maintain the confidentiality of tax information. - Amends TCA Title 67, Chapter 1, Part 17.