IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE,	*	**NO. 305683**
	*	
vs.	*	
	*	**SECOND DIVISION**
CORTEZ SIMS,	*	
Defendant.	*	

STATE'S RESPONSE TO DEFENDANT CORTEZ SIMS' MOTION NUMBER 7: MOTION AND MEMORANDUM OF LAW TO DECLARE TENNESSEE'S RICO STATUTE UNCONSTITUTIONAL

COMES NOW the State of Tennessee, by and through counsel, the District Attorney General of Hamilton County, Tennessee, Neal Pinkston, for the 11th Judicial District, and submits this response to the defendant's motion and memorandum of law to dismiss the RICO Presentment Count One and Count Two.

The State of Tennessee would submit the following reasons as to why the defense fails to meet the burden:

A. Under the Federal and State Constitutions, the RICO statute is not vague and overbroad.

Petitioner argues that the financial gain special circumstance is unconstitutionally vague, but he fails carry his burden of demonstrating that it does not have a "common-sense core of meaning" that a criminal jury "should be capable of understanding." Tuilaepa, 512 U.S. at 973–74, 114 S.Ct. 2630. The California Supreme Court's resolution of this claim did not "result[ ] in a decision that was contrary to, or involve[ ] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" nor did it "result[ ] in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." 28 U.S.C. § 2254(d). The financial gain special circumstance is not vague and overbroad generally, or as applied in this case. Accordingly, this issue presents no basis for habeas corpus relief. *Noguera v. Davis*, 290 F.Supp.3d 974, 1088-99 (C.D. Cal. 2017).

B. The Legislative intent provides ample context for the understanding of the term "for financial gain."

In *People v. Howard*, cited at 44 Cal.3d at page 410, 243 Cal. Rptr. 842, 749 P.2d 279, the court held that "financial gain" is not an actual technical term, requiring any further need for refinement of that phrase, without a showing of confusion resulting from use of the term. The court further rejected the defendant's claim that the "financial gain" special circumstance is impermissibly vague or overbroad on the ground that persons must guess at its meaning, citing *People v. Edelbacher*, at 47 Cal.3d at p. 1025, 254 Cal.Rptr. 586, 766 P.2d 1., holding that the meaning of "for financial gain", then, does not require any special jury instruction or any special or technical terms that would require any special or alternative definitions to be provided for a jury to understand the meaning. The meaning is clear within the "common-sense core.

The court finds that the proscription that "[no] public official ... shall use an official position or office to obtain direct personal financial gain for himself ..." is not "so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." Therefore, the statute does not violate due process of law on the basis of vagueness. *Hunt v. Anderson*, 794 F.Supp. 1557, 1564 (M.D. Ala. 1992).

The law enjoining one not to "use his official position or office to obtain financial gain" is not too vague. The rule against vagueness does not invalidate every law that leaves room for two or more interpretations on which legislators, lawyers and courts may differ; most laws do. Nor does the rule require that one must be able to predict with certainty the application of the law to every hypothetical set of facts. *Davidson v. Oregon Government Ethics Comm'n*, 712 P.2d 87, 94 (Or. 1985) (en banc).

C. (addressing multiple defense arguments): Defense contention that the legislative intent in enacting the statute sheds no meaningful light on the definition of "for financial gain." The Legislature clearly defines "for financial gain."

1.) The defense contends that the operative phrase is "the forfeiture of profits" and then provides in relevant part that "an effective means of punishing and deterring criminal activities of organized crime is through forfeiture of profits acquired...." The defendant's statement is a conclusion without legal basis. Here, the Legislature specifically addresses the nature of the intended activity: gang activity, which is necessarily derived from a motive of empowering the gang.

2.) *Hunt v. State*, 642 So.2d 999 (Ala. Crim. App. 1993) (rejecting argument that failure of the legislature to define the words "use" and "to obtain direct personal financial gain" rendered statute unconstitutionally vague).

D. **Any Legislative intent as to "for financial gain" is not applicable as "for financial gain" is not an element of a "pattern of racketeering activity" when litigating under a theory of criminal gang activity.**

T.C.A. § 39-12-204 (c) states it is unlawful for any person employed by, or associated with, any enterprise to knowingly conduct or participate, directly or indirectly, in the enterprise through a pattern of racketeering activity or the collection of any unlawful debt.

T.C.A. § 39-12-203 (9) defines "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 State contends that the legislative intent as stated in T.C.A. § 39-12-201, et seq, was enacted in 1989, Acts 1989, ch. 591, § 1, to include § 204 which proscribed certain unlawful activities. In 2012, the legislature updated and passed T.C.A. § 39-12-203, 2012, ch. 1090, §§ 1, which defined gang crimes as meeting the definition of "racketeering activity" without imposing the statutory language of "financial gain."

When reviewing the Tennessee Pattern Injury Instruction § 5.01 (Part C) Violation of RICO Act, one will not find reference to "for financial gain." § 5.01 of the TN PJI states:

Any person who violates the Racketeer Influenced and Corrupt Organization Act of 1989 is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

Part C:

(1) that the defendant was [employed by] [associated with] an enterprise;

and

(2) that the defendant knowingly [conducted] [participated in], directly or indirectly, the enterprise [through a pattern of racketeering activity] [through the collection of an unlawful debt].]

The 2012 amendment to T.C.A. § 39-12-203, specifically did not require a "financial gain" element when addressing gang crimes. The legislature quite clearly made the gang crime section an "or" when reading T.C.A. § 39-12-203 and did not add the language of "financial gain" as stated earlier in section § 203. For this reason the legislative intent is clear and § 203 should be read on its face.

UPON CONSIDERATION OF THESE OBJECTIONS AND SUPPORTING LEGAL ARGUMENT, the State of Tennessee, respectfully prays that this court not enter....

Respectfully submitted,

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District Attorney General

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading was provided to:

Mr. Joshua Weiss
Attorney for the defendant, CORTEZ SIMS
3001 Broad Street, Ste. 101
Chattanooga, Tennessee 37408

Either by hand-delivery or by placing the same in the United States Postal system, with sufficient postage affixed and paid to allow the document to be sent to Mr. **Joshua Weiss** on this 24th day of Sep, 2018.

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