

element in this case. A Presentment, like this one, that does not set forth both the allegation of financial gain and a recitation of facts the State relies upon to support that the allegation is constitutionally defective and should be dismissed.

PRIOR PROCEEDINGS

Sims moved the Court to dismiss the original Presentment because it did not contain a particularized allegation of financial gain with respect to the racketeering acts alleged against him in violation of the Constitutions of the United States and the State of Tennessee. At argument, the issue of whether the statutory provision describing acts of racketeering was ambiguous¹ was discussed which, in turn, raised the issue of legislative intent. Noting that the Tennessee RICO statute contained some specific language about the legislative intent that emphasized the financial aspect of the statute generally, the Court asked the parties to investigate the legislative history further.

Following oral argument, the State filed a Superseding Presentment. The Court determined that it might have mooted some of the issues raised by the defendants, including those raised by Sims. The Court dismissed Sims' motion but allowed him to refile it if he believed that the Superseding Presentment did not resolve this issue of financial gain as a necessary element. Because the Superseding Presentment does not contain any statement alluding to financial gain in its recitation of the facts and circumstance of Sims' acts of racketeering (predicate acts), the same defect originally complained of is present. This motion for dismissal will address the issue in light of the Superseding Presentment.

ARGUMENT

A. The requirements of RICO

¹ Sims does not concede this issue.

In Count 1 he is charged with being either employed or associated with an enterprise and with conducting or participating in the enterprise through a pattern of racketeering activity in violation of Tenn. Code Ann. § 39-12-202 (RICO). That act makes it a crime to (1) receive proceeds (2) knowingly (3) from a pattern of racketeering activity (or collection of an unlawful debt) (4) and using any part of the proceeds (5) in the acquisition of real or personal property or in the establishment or operation of the enterprise. The Legislature specifically states, “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.” Tenn. Code Ann. § 39-12-202 (2018). Further, Racketeering Activity, as it pertains to this matter, means to commit² a gang offense “for financial gain.” Tenn. Code Ann. § 39-12-203(2)(9). The offenses that constitute gang offenses are the following:

- (i) First degree murder, as defined in § 39-13-202;
- (ii) Second degree murder, as defined in § 39-13-210;
- (iii) Voluntary manslaughter, as defined in § 39-13-211;
- (iv) Assault, as defined in § 39-13-101;
- (v) Aggravated assault, as defined in § 39-13-102;
- (vi) Kidnapping, as defined in § 39-13-303;
- (vii) Aggravated kidnapping, as defined in § 39-13-304;
- (viii) Especially aggravated kidnapping, as defined in § 39-13-305;
- (ix) Robbery, as defined in § 39-13-401;
- (x) Aggravated robbery, as defined in § 39-13-402;
- (xi) Especially aggravated robbery, as defined in § 39-13-403;
- (xii) Carjacking, as defined in § 39-13-404;
- (xiii) Rape, as defined in § 39-13-503;
- (xiv) Aggravated rape, as defined in § 39-13-502;
- (xv) Rape of a child, as defined in § 39-13-522;
- (xvi) Aggravated burglary, as defined in § 39-14-403;
- (xvii) Especially aggravated burglary, as defined in § 39-14-404;
- (xviii) Aggravated criminal trespass, as defined in § 39-14-406;
- (xix) Coercion of witness, as defined in § 39-16-507;
- (xx) Retaliation for past action, as defined in § 39-16-510;
- (xxi) Riot, as defined in § 39-17-302;
- (xxii) Aggravated riot, as defined in § 39-17-303;

² Or “attempt, conspire, solicit, coerce or intimidate another person...”

- (xxiii) Inciting to riot, as defined in § 39-17-304;
- (xxiv) The illegal sale, delivery or manufacture of a controlled substance or controlled substance analogue, as defined in §§ 39-17-417 and 39-17-454;
- (xxv) Possession of a controlled substance or controlled substance analogue with intent to sell, deliver, or manufacture, as defined in § 39-17-417(a)(4) and § 39-17-454;
- (xxvi) Unlawful carrying or possession of a weapon, as defined in § 39-17-1307;
- (xxvii) Trafficking for commercial sex acts, as defined in § 39-13-309.

For some of these offenses, such as selling controlled substances, the financial gain component is obvious, at least by implication. But for most, such as murder, assault, rape and rioting, the intent to make a financial gain by committing the crime is not an element of the offense, explicitly or by implicitly.

An element of an offense is a fact or set of facts that the state must prove beyond a reasonable doubt in order to obtain a conviction. 8 Tenn. Juris. *CRIMINAL PROCEDURE* § 34 (2018). With respect to statutory offenses, like this one, the elements are found in the act of the Legislature. In order to obtain a conviction in this instant matter, the State has the burden to prove that two of the enumerated gang offenses were not only committed but were committed specifically *for financial gain*. Financial gain is therefore an essential element of the offense.

B. The Superseding Presentment does not allege any specific fact constituting an allegation of financial gain against Sims.

The Superseding Indictment alleges the following:

At all times relevant to this Presentment, members of the criminal enterprise, known as the Athens Park Bloods of Chattanooga, or simply APB, and their associates would use proceeds from various activities to aid members of the enterprise and their associates and families needed money for family support, which includes, but not limited to the following:

- i. Paying lawyer fees, placing money on their jail commissaries, and raising funds to get members of the enterprise and their associates released from custody on monetary bonds;
- ii. Members of this criminal enterprise and their associates shared in the proceeds of the enterprise's illegal activities;

- iii. Financial obligations in the form of dues, other monies used for paying for food and drinks in order to hold parties, celebrations and other general entertainment purposes;
- iv. Members of the enterprise and their associates possessed, distributed, and possessed with the intent to distribute controlled substances in the conduct of the affairs of the enterprise for the benefit of the criminal enterprise known as the Athens Park Bloods of Chattanooga (APBs)

These allegations fail to give Sims adequate notice of how his participation in this alleged enterprise was for financial gain. The Superseding Presentment contains some financial language relative to the Enterprise. Financial gain does not relate to the Enterprise but to Racketeering Activity. It is contained in the definition of Racketeering Activity (T.C.A. § 39-12-203(2)(9)); not in the definition of Enterprise (T.C.A. § 39-12-203(3)). An act of Racketeering Activity is, for the purposes of the RICO statute's use in a gang prosecution, one of the enumerated gang offenses (T.C.A. § 39-12-203(2)(9)) *if* committed for financial gain. Enterprise is, according to the definition, merely a person, group or legal entity and this definition, alone, does not differentiate between legal and illegal Enterprises. Legal business arrangements are usually for financial gain therefore having financial gain as an element of the Enterprise would make no sense. The Enterprise becomes a Criminal Enterprise when operated through a pattern of Racketeering Activity. Pattern of Racketeering is two or more incidents of racketeering activity. The Racketeering Act (Predicate Acts) has financial gain as an element.

However, the State has specifically accused Sims of the following allegations in the Superseding Presentment:

48. Cortez Sims, a/k/a "Awax", was found guilty by a Hamilton County jury of the criminal gang offence of First-Degree Murder in Hamilton County Criminal Court in Docket number 295685 on April 4, 2017 in Chattanooga, Tennessee, which qualifies as a gang offense is defined under T.C.A. § 40-35-121(a)(3)(B). (Count 1 Section II, page 17).

That Cortez Sims, alias Awax, heretofore on or about January 20, 2014, in the County aforesaid, did unlawfully, intentionally and with premeditation kill the Deontray Southers, in violation of Tennessee Code Annotated 19-13-202, against the peace and dignity of the State. (Count Three, page 22).

2. That on January 7th, 2015 in Hamilton County Tennessee, an Athens Park Blood member or associate, Cortez Sims, alias Awax, murdered Talitha Bowman and attempted to murder Marcell Christopher, Bianca Horton, and Zoey Duncan, the daughter of Bianca Horton. Christopher was a member or associate of a rival Chattanooga street gang known as the Bounty Hunter Bloods.

3. That after January 7th, 2015, Cortez Sims, alias Awax, was charged with various criminal offenses including first-degree murder and attempted murders. Sims was a juvenile at the time of the offense and his charges were filed in Hamilton County Juvenile Court.

4. That after January 7th, 2015, a hearing was held in Hamilton County Juvenile Court to transfer Cortez Sims', alias Awax, murder and attempted murder charges to Hamilton County Criminal Court.

5. That at this transfer hearing, Bianca Horton appeared and testified to the events of January 7th, 2015, wherein Bianca Horton identified Cortez Sims, alias Awax, as the individual responsible for the murder and attempted murders of January 7th, 2015. Horton had previously identified Sims as the perpetrator to the Chattanooga Police Department in an oral statement and also identified Sims in a photo array.

6. That in July 2015, Cortez Sims, alias Awax, was indicted by the Hamilton County Grand Jury for first-degree murder and attempted first-degree murder. His cases were subsequently set for a jury trial in September 2016.

7. That Bianca Horton was a witness the State of Tennessee intended to call in the trial of Cortez Sims, alias Awax. That Bianca Horton was a witness against Cortez Sims, alias Awax, and members and associates of the Athens Park Bloods knew her previous testimony. (Conspiracy to Commit First Degree Murder, page 23).

As can readily be seen, the Superseding Presentment does not set forth the element of financial gain in any of its allegations against Sims.

C. The Tennessee Rico Statute makes “for financial gain” an element of each act of racketeering activity therefore the Constitutions of the State of Tennessee and the United States require it to be specifically pled.

The RICO statute contains language evidencing legislative intent regarding financial gain 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.

T.C.A. § 39-12-203(9) states:

(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 legislative intent set forth in the statute along with the language in T.C.A. § 39-12-203(9) make it clear that all acts of racketeering activity must properly allege financial gain.

Without it, the Superseding Presentment is constitutionally defective and must be released.

To be constitutionally sufficient an indictment must allege each element of the offense charged. “The law in Tennessee is that an indictment must provide "sufficient information (1) to

enable the accused to know the accusation to which answer is required, (2) to furnish the court adequate basis for the entry of a proper judgment, and (3) to protect the accused from double jeopardy. *State v. Hill*, 954 S.W. 2d 725,727 (Tenn. 1997).” *Johnson v. Myers*, No. M2003-02424-CCA-R3-HC, 2004 Tenn. Crim. App. LEXIS 952 (Crim. App. Oct. 25, 2004). *Johnson v. Myers*, No. M2003-02424-CCA-R3-HC, 2004 Tenn. Crim. App. LEXIS 952 (Crim. App. Oct. 25, 2004). “Furthermore, an indictment alleging all elements of an offense is sufficient even though it does not allege the specific theory upon which the prosecution intends to rely to prove each element. *State v. Lemacks*, 996 S.W. 166, 172 (Tenn. 1999). *State v. Rose*, No. W2008-02214-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 466 (Crim. App. May 20, 2010).

D. After the RICO statute was passed, bills were introduced in the legislature to remove the financial gain requirement; both houses voted against the change indicating a clear intent that financial gain remain a necessary element.

Following the enactment of the RICO statute, a member of the House and a member of the Senate filed bills to remove financial gain as an element of RICO crimes. 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 A).

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. 1,2 (Tenn. 1993).

The legislative intent with respect to this issue is clear and abundant. The legislature wrote the statute to require the element of financial gain. It inserted a statement of its intent that the statute be used in situations where there is a financial component to the operation of an enterprise consistent with the forfeiture provisions it enacted. The State Representative and State Senator who introduced the bills to remove financial gain element from the statute obviously believed that financial gain was an element of the statute as originally enacted. The legislature, by rejecting the bill, confirmed that financial gain is indeed an element of RICO.

E. Courts in other jurisdictions, when encountering similar RICO statutes, have held that financial gain is an essential element.

Federal RICO Statute

Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 611 (6th Cir. 2004)("[F]or one, plaintiffs do not rely upon any state law predicates, let alone any *Garmon*-preempted state law predicates, so Tyson has no basis for invoking *Garmon* on that ground. For another, plaintiffs do not need to prove a violation of the NLRA in order to establish violations of the federal-law predicate upon which they rely-- § 274 of the Immigration and Nationality Act (codified at 8 U.S.C. § 1324). See 18 U.S.C. § 1961(1)(F) making "any act indictable under . . . section 274 (relating to

bringing in and harboring certain aliens)" a RICO predicate act **if "committed for the purpose of financial gain"**(emphasis added).

Williams v. Mohawk Indus., 465 F.3d 1277, 1283 (11th Cir. 2006)(“ [A]ccording to 18 U.S.C. § 1961(1)(F), "racketeering activity' means any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), . . . **if the act indictable under such section of such Act was committed for the purpose of financial gain.**" (emphasis added).

Commer. Cleaning Servs. v. Colin Serv. Sys., 271 F.3d 374, 379 (2d Cir. 2001)(“[T]his same evidence supports a finding that defendant violated the predicate offenses for financial gain. The evidence indicated that the dancers tipped defendant ten percent of their total take for the shift they worked. Hence, if the dancers earned more money, defendant received more tips. By creating an environment where it was safe and efficient for the dancers to offer sex acts for money and for patrons to obtain sex acts for money, defendant indirectly increased the revenues generated by the dancers who performed sex acts and, thereby, profited as well. Consequently, a rational trier of fact could conclude from the evidence presented that defendant accepted the earnings of a prostitute and **helped to maintain Legg's Lounge as a house of prostitution for financial gain.**”) (emphasis added).

Pennsylvania RICO Statute

Shover v. York Cty., No. 3:CV-11-2248, 2012 U.S. Dist. LEXIS 27194 (M.D. Pa. Jan. 25, 2012)(“[E]ven assuming, *arguendo*, that Plaintiff has properly pled an enterprise and that he has pled the Sabol Defendants were participants in this enterprise, we do not find that he has properly alleged a pattern of racketeering regarding these Defendants. Also, we find that Plaintiff

has failed to allege particular facts that the Sabol Defendants knew that they were participating in **a scheme to traffic people for unlawful confinement in YCP for financial gain.**” (emphasis added). “As discussed above, we find that Plaintiff fails to sufficiently allege the required elements of any predicate offense. As such, we find that Plaintiff fails to sufficiently allege his RICO claims and, we will recommend that these claims be dismissed.”). *Id.*

Winchester v. Stein, 135 Wn.2d 835, 959 P.2d 1077 (1998)(“[T]he penalties do involve scienter in the sense that the predicate crimes underlying a "pattern of criminal profiteering" require whatever mental element is necessary to the crime, and **criminal profiteering is defined as an act or offense committed for financial gain.** RCW 115 Pa. 369, 9A.82.010(14), (15); 9A.82.100.”) (emphasis added).

North Dakota RICO Statute

Geraci v. Women's All., Inc., 436 F. Supp. 2d 1022, fn 16 (D.N.D. 2006)(“[T]he Court would note that the state RICO claim is also *deficient in that there is no evidence in the record to show that any alleged "racketeering" was "committed for financial gain,"* a critical element that needs to be established. N.D. Cent. Code § 12.1-06.1-01(2)(f). Geraci admitted in his deposition that he has no facts which would suggest that any of the Defendants' alleged acts were committed **for financial gain.** (See Deposition of Christopher Geraci, p. 137.”) (emphasis added).

Neubauer v. FedEx Corp., 849 F.3d 400 (8th Cir. 2017)(“[N]orth Dakota's Racketeer Influenced and Corrupt Organizations (RICO) Act creates a civil right of action for a person who sustains injury to person, business, or property by a pattern of racketeering activity. N.D.C.C. § 12.1-06.1-05. **A pattern of racketeering is at least two acts of racketeering activity-or acts**

committed for financial gain, which are chargeable or indictable under the laws of the state in which the acts occurred.”) (emphasis added).

Michigan RICO Statute

People v. Polk, No. 286772, 2010 Mich. App. LEXIS 422 (Ct. App. Mar. 2, 2010)(“[R]acketeering” is further defined as “committing, attempting to commit, conspiring to commit, or aiding or abetting, soliciting, coercing, or intimidating a person to commit” **certain enumerated offenses for financial gain**. MCL 750.159g. (emphasis added). Hence, the prosecution must normally prove the commission of each element of the predicate acts of racketeering, in addition to the other elements of racketeering, in order to prove a racketeering violation.”) (emphasis added).

People v. Martin, 271 Mich. App. 280, 721 N.W.2d 815 (2006)(“[T]he only remaining element is that defendant committed, or aided or abetted **the commission of, the predicate acts for financial gain**. MCL 750.159g.”) (emphasis added).

Arizona RICO Statute

ThermoLife Int'l, Ltd. Liab. Co. v. Gaspari Nutrition, Inc., No. CV 11-01056-PHX-NVW, 2011 U.S. Dist. LEXIS 145504 (D. Ariz. Dec. 16, 2011)(“[I]n order to state a claim under Arizona's RICO statute, A.R.S. §§ 13-2301 *et seq.*, Plaintiff must allege Defendants engaged in a “pattern of racketeering activity . . . defined as '[a]t least two acts of racketeering' that are 'related' and 'continuous'[.]” *Lifeflite Med. Air Transport, Inc. v. Native Amer. Air Servs., Inc.*, 198 Ariz. 149, 151-52, 7 P.3d 158, 160-61 (Ct. App. 2000) (citing *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 241-42, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)); *see*

also A.R.S. § 13-2301(D)(4) (**defining unlawful activities that constitute "racketeering acts" when committed for financial gain**”). (emphasis added).

Washington RICO Statute

Harris v. Obenland, No. 3:15-CV-05191-RJB-JRC, 2016 U.S. Dist. LEXIS 20635 (W.D. Wash. Jan. 13, 2016)(“[A]lthough RCW 9A.82.010(4) includes numerous potential predicate offenses, it also **requires that the potential predicate offense be "committed for financial gain."**) (emphasis added).

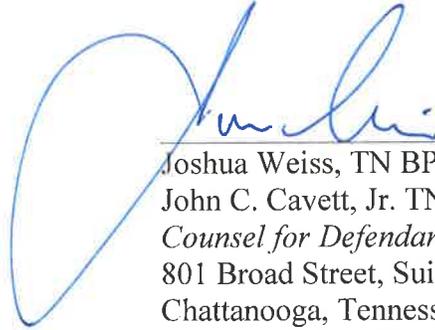
CONCLUSION

The first substantive sentence in the Tennessee RICO statute says: “[T]he 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.” T.C.A. § 39-12-201. There are already two criminal statutory schemes to prosecute and punish defendants in a case such as this – the general criminal statutes governing the acts of racketeering activity (e.g. the general murder statute) and the gang statute. RICO adds or amplifies the important forfeiture tool and that is why the statute requires financial gain as an element. The statute was enacted with financial gain as a requirement. That requirement was recognized by those in the Legislature who sought to remove it. The legislature affirmed its original intent when it rejected the change.

The Superseding Presentment fails to allege this essential element against Sims; an element deemed crucial by a number of jurisdictions dealing with the issue before this Court. The Court should therefore dismiss the Superseding Presentment.

Respectfully submitted,

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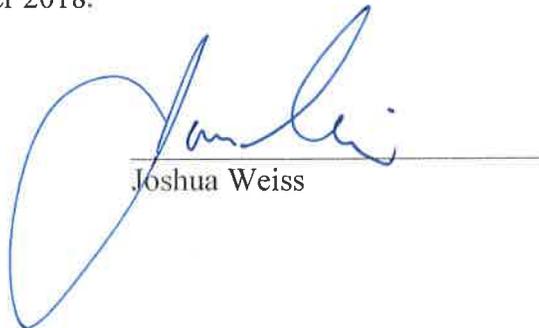
CERTIFICATE OF SERVICE

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

Assistant District Attorney Barry Williams
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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 28 day of September 2018.



Joshua Weiss