

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

COPY

STATE OF TENNESSEE)

V.)

CORTEZ SIMS)

) DOCKET NO.: 304518

) DIVISION II

**DEFENDANT CORTEZ SIMS' MOTION NO. 5:
MOTION TO DISMISS DEFECTIVE PRESENTMENT**

NOW COMES the Defendant, Cortez Sims (hereinafter "Sims"), by and through counsel, pursuant to Rule 12(b)(2)(B) of the *Tennessee Rules of Criminal Procedure*, respectfully moves this Court for an Order dismissing the instant Presentment.¹ While Counts 1 and 2 purport to charge Sims with violations of the Tennessee RICO statute and a conspiracy to commit violations of the Tennessee RICO statute, they fail to include the statutory element of financial gain. By authority of *State v. Smith*, 612 S.W.2d 493, 497 (Tenn. Crim. App. 1980) (citing *Inman*

¹ For the purposes of this Motion and Memorandum, a presentment and an indictment are subject to the same constitutional rules. "In discussing the nature of a presentment historically, the Court in *State v. Davidson*, Tenn. 347, 103 S.W.2d 22, 23 (Tenn. 1937) referred to its opinion in *State v. Darnal*, 20 Tenn. 290 (1839) which stated: The presentment is in the form of a bill of indictment, and is signed individually by the grand jurors who returned it. In England, as we have had occasion heretofore to observe, an offender never was put upon trial upon a presentment, but on a return of a presentment by the grand jury, which was merely an informal information of the offence having been committed, the attorney general prepared a bill of indictment thereon, stating an offence in legal and technical form, and upon this the person charged was put upon his trial. Such has not been the practice in the State of Tennessee. Here, when the grand jury is cognizant of an offence, the practice is to inform the attorney general in the first instance, who prepares a bill of indictment upon the information, which is delivered to the grand jury and is by them returned, instead of the old informal presentment; the consequence is that the only difference between a presentment thus made and a bill of indictment is, that the presentment is signed by all the jurors and the bill of indictment is signed only by the foreman." *State v. Chandley*, No. E2006-02366-CCA-R3-CD, 2007 Tenn. Crim. App. LEXIS 864 (Tenn. Crim. App. Nov. 15, 2007)

v. State, 259 S.W.2d 531, 532 (Tenn. 1953)) (“The test for the sufficiency of an indictment is whether it contains the elements of the offense intended to be charged ...”), Counts 1 and 2 must be dismissed.

The Tennessee RICO Act, relative to this case, makes it an offense to commit a statutorily defined gang offense for financial gain. Most of the enumerated gang offenses do not contain a financial gain element. The requirement that the State allege and prove that financial gain was the object of the gang offense constitutes the difference between a gang offense and a RICO offense based on the same conduct; the financial gain requirement is therefore an essential 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.

A. THE REQUIREMENTS OF THE RICO STATUTE

Sims is the subject of a 13 Count Presentment. 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;
- (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.

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

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 PRESENTMENT.

Count 1 of the Presentment (pages 5-6) describes the Racketeering Enterprise. None of the information concerns financial gain. Count 1 also contains an explanation of the Purposes of the Enterprise. It discusses “enriching” the leaders, members and associates and preserving and protecting the “proceeds” of the enterprise but no other or more specific allegation of financial gain is mentioned.

Sims is charged in Count 2 of the Presentment with Racketeering Conspiracy. Paragraph “o” (page 9) sets forth substantive acts relating to specific defendants that are alleged to have been committed “in the conduct of the affairs of the enterprise.” The acts set forth are crimes listed as gang offenses in the statute Tenn. Code Ann. § 40-35-121(a). Sims is the subject of three sub-paragraphs – ii) the murder of Deontray Southers, iv) the murder of Talitha Bowman, and v) the attempted murder of Marcell Christopher, Bianca Horton and Zoe Duncan. No other description of the offenses is included except for the date the crime occurred.

The elements of First Degree Murder are:

(1) that the defendant unlawfully killed the alleged victim;

and

(2) that the defendant acted intentionally. A person acts intentionally when it is the person's conscious objective or desire to cause the death of the alleged

victim; [A defendant's conscious objective need not be to kill a specific victim. If you find beyond a reasonable doubt that the defendant intended to cause the result, the death of a person, and that [he] [she] did so with premeditation, then the killing of another, even if not the intended victim, would be first degree murder;]

and

(3) that the killing was premeditated.

1-7 Tennessee Law of Evidence § 7.01. Financial gain is not an element of murder or attempted murder.

Sims will take the position that "for financial gain" is unconstitutionally vague at a later date. For the purposes of this Motion, however, he takes the position that in a Tennessee RICO prosecution, the Presentment or Indictment must contain the element of "for financial gain" with respect to each crime constituting Racketeering Activity.

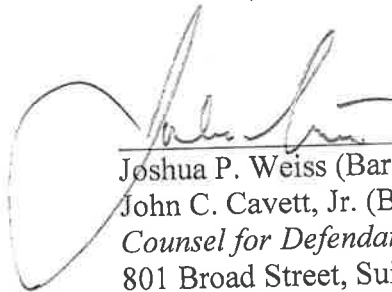
In *State v. Duncan*, the Tennessee Supreme Court held the constitutional requirements for an indictment as follows:

Under both the United States Constitution and the Tennessee Constitution, an accused has the right to be informed of the nature and cause of the accusation against him. The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." U.S. Const. amend. VI. Similarly, the Tennessee Constitution provides: "That in all criminal prosecutions, the accused hath the right . . . to demand the nature and cause of the accusation against him" Tenn. Const. art. I, § 9. Since 1858, the form of the indictment has been governed by the statute now codified at Tennessee Code Annotated section 40-13-202, which states: "The indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in a manner so as to enable a person of common understanding to know what is intended and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment." Tenn. Code Ann. § 40-13-202 (2014); *see also Wyatt v. State*, 24 S.W.3d 319, 324 (Tenn. 2000).

State v. Duncan, 505 S.W.3d 480, 484 (Tenn. 2016). Murders and attempted murders are committed for an almost infinite variety of reasons but only rarely for financial gain. The Presentment, devoid of any language at all that informs Sims of the factual allegation(s) of financial gain, is constitutionally defective, therefore should be dismissed.

Respectfully submitted,

CAVETT, ABBOTT, & WEISS, PLLC



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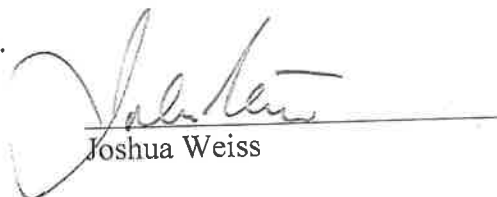
CERTIFICATE OF SERVICE

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 22 day of May, 2018.



Joshua Weiss