IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE,	)	
	)	
Plaintiff,	)	SECOND DIVISION
	)	
vs.	)	
	)	NO(s). 305636 - 305690
ARTERRIUS ALLEN, ET AL.	)	
	)	
Defendants.	)	

MEMORANDUM OPINION GRANTING, IN PART, BOWLING MOTION NO. 7

This cause came before the Court upon motion by Defendant Quadarius Bowling to dismiss Count 1 of the superseding presentment, which charges him and fifty-four co-defendants with offenses under the Tennessee Racketeering Influenced and Corrupt Organizations Act of 1989 ("**RICO Act**"), Tenn. Code Ann. § 39-12-201, *et seq*. As grounds for his motion, Mr. Bowling argues as follows:

(1) Count 1 fails to allege the existence of two predicate acts occurring within two years of each other, and as such, fails to establish "a pattern of racketeering activity" as defined by Tenn. Code Ann. § 39-12-203(6);

(2) at least one of the predicate acts that he is alleged to have committed after July 1, 2013, does not satisfy the definition of a criminal gang offense as set forth in Tenn. Code Ann. § 39-12-203(9); and

(3) because subsection (e) of Tenn. Code Ann. § 39-12-204(e) prohibits dual convictions for a RICO offense and an individual predicate act and he has already been convicted of the predicate acts alleged in Count 1, he cannot be convicted of a RICO offense.[1]

Given the joinder of other parties to this motion, this memorandum opinion addresses only the first and third arguments raised by Bowling Motion No. 7 in support of his motion. For the reasons given herein, the Court concludes that the superseding presentment fails to allege an essential element of a substantive RICO offense, *i.e.*, a pattern of racketeering activity consisting of at least two predicate acts with the last predicate act occurring "within two (2) years after a prior incident of racketeering conduct." The Court also concludes that the General Assembly did

[1] Several other parties have raised these same issues by filing, or joining in, motions other than Bowling Motion No. 7. The Court will enter separate orders with respect to these other motions and joinders.

not intend to permit dual *state-law* convictions for a substantive RICO offense and a predicate act.[2]

Accordingly, the Court **GRANTS** Bowling Motion No. 7 as to Mr. Bowling and most joining co-defendants. The Court will enter a separate order for cases in which Count 1 either fails to meet the two-year continuity requirement or fails to show the presence of at least two qualifying predicate acts when prior state-law convictions cannot be considered.

FACTUAL BACKGROUND

Mr. Bowling's case is part of the *Allen* cases, wherein he is presently joined with some fifty-four other co-defendants who are charged with involvement in a RICO enterprise and with participating in a RICO conspiracy, among other crimes, in violation of Tenn. Code Ann. § 39-12-204.[3]

In general, Count 1 of the superseding presentment charges the Defendant with violating Tenn. Code Ann. § 39-12-204(c), which criminalizes participating in an enterprise through a pattern of racketeering activity. This Count alleges the existence of a RICO enterprise consisting of a criminal gang to which the Defendant belongs, and it describes the general purposes of the enterprise. The Count also alleges that Mr. Bowling has committed two predicate acts, which the presentment describes as supporting, qualifying, or constituting criminal gang offenses within the meaning of Tenn. Code Ann. § 40-35-121(a)(3)(B).

Count 2 of the superseding presentment purports to charge the accused with participation in a RICO conspiracy in violation of Tenn. Code Ann. § 39-12-204(d). In general, Count 2 describes the conspirators as current members or associates of the criminal gang and, perhaps to narrow the conspiracy to an agreement to commit a subsection (c) violation, as violators of Tenn. Code Ann. § 39-12-204(c). Count 2 further identifies acts taken in furtherance of the conspiracy, including (1) some acts identified by offense, date, and perpetrator(s); and (2) other acts generally described as being "in the conduct of the affairs of the enterprise" with a purpose "to cause victims and witnesses to not report, and not be truthful about, the [gang's] criminal acts to law enforcement."

The remaining counts of the superseding presentment charge one or more Defendants with non-RICO offenses.

Specifically, Count 1 of the superseding presentment alleges that Mr. Bowling has committed two separate acts of simple assault as part of a pattern of racketeering activity. As alleged, he was convicted in state court of each of these assaults on September 9, 2013, and June

---

[2] This opinion addresses only Count 1 of the superseding presentment, which charges a substantive violation of Tenn. Code Ann. § 39-12-204(c). For purposes of this limited memorandum opinion, references to a "RICO offense" or a "RICO violation" herein address substantive violations of section -204(c) only, and do not address possible criminal liability for a conspiracy to violate the substantive provisions of the RICO Act pursuant to section -204(d).

[3] The Court generally refers to these cases collectively as the "*Allen* cases," with the reference being to the first named accused in the superseding presentment.

23, 2016, respectively. Mr. Bowling now seeks dismissal of Count 1 pursuant to Tenn. Code Ann. § 39-12-204(e) as it applies to him, arguing that, because he has already been convicted of the alleged predicate acts, he may not now face conviction for a RICO offense.

LAW AND ANALYSIS

The essential question raised by this motion is whether the presentment properly charges Mr. Bowling with a crime. Before this Court may obtain subject-matter jurisdiction in a criminal case, the Hamilton County Grand Jury must return an indictment or presentment alleging that a defendant has committed a criminal offense.[4]

Where the indictment fails to charge an essential element of an offense, the indictment will fail to place the defendant on notice, and the charge should be dismissed.[5] Indeed, "if the indictment fails to include an essential element of the offense, no crime is charged and, therefore, no offense is before the court."[6] Importantly, application of our criminal law "must be limited in scope to cases defined by the statutory language."[7]

As is relevant to this case, the RICO Act prohibits "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."[8] In this case, the Grand Jury has alleged that the Defendants, including Mr. Bowling, are associated with a criminal gang,[9] and that they have participated in that gang through a "pattern of racketeering activity."[10]

---

[4] *See State v. Penley*, 67 S.W.3d 828, 834 (Tenn. Crim. App. 2001) (recognizing that "the trial court's jurisdiction to act in the matter, apart from the question of bail which we address below, is commenced when the charging instrument issues and is returned to the trial court." (citing *State v. Hammonds*, 30 S.W.3d 294, 303-04 (Tenn. 2000) (a valid indictment confers jurisdiction upon the trial court); *Dykes v. Compton*, 978 S.W.2d 528, 529 (Tenn. 1998); Tenn. R. Crim. P. 12(a) (the lead "pleading" in a criminal case in the trial court is the indictment, presentment, or information)); *see also Flinn v. State*, 354 S.W.3d 332, 334 (Tenn. Crim. App. 2010) ("The Anderson County Criminal Court obtained jurisdiction over the prosecution of the Appellant on February 7, 2006, after he was indicted in Anderson County for the murder of Mr. Beggs.").

[5] *See State v. Sharp*, No. W2018-00156-CCA-R3-CD, 2019 WL 960431, at *7 (Tenn. Crim. App. Feb. 26, 2019) (reversing and dismissing conviction for aggravated child abuse, reasoning that "although the cover sheet for the indictment listed count one as 'aggravated child abuse,' the indictment did not allege that he treated B.S. in such as manner as to inflict injury, which is an element of child abuse. Instead, the indictment alleged that he treated her in such a manner as to affect her health and welfare, which is an element of child neglect.. . . Therefore, we agree with the Appellant and the State that count one of the indictment failed to put him on notice as to which offense he must defend against, aggravated child abuse or aggravated child neglect. Accordingly his conviction of aggravated child abuse in count one must be reversed and vacated and that charge dismissed.").

[6] *See State v. Nixon*, 977 S.W.2d 119, 121 (Tenn. Crim. App. 1997) (citing *State v. Perkinson*, 867 S.W.2d 1, 5–6 (Tenn. Crim. App. 1992)).

[7] *See State v. Amanns*, 2 S.W.3d 241, 245 (Tenn. Crim. App. 1999).

[8] *See* Tenn. Code Ann. § 39-12-204(c).

[9] At least for purposes of this motion, no party disputes that a criminal gang, if established by the proof, could be a RICO enterprise. *See* Tenn. Code Ann. § 39-12-203(3) (providing that the term "'Enterprise' means any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of

As defined in the statute, a 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."[11] For its part, racketeering conduct, or activity, involves the commission of various state criminal offense or "predicate acts," which, in this case involves crimes defined as "criminal gang offenses."[12]

In addition to other requirements governing the legal sufficiency of an indictment or presentment, our General Assembly has required that an indictment alleging a substantive violation of the RICO Act must set forth "the factual basis for the alleged predicate acts" in each count.[13] As to Count 1, therefore, the General Assembly has required that the indictment allege, for each co-defendant, as follows:

- the presence of at least two predicate acts;[14]
- that the last of the predicate acts occurred within two years after a prior predicate act;[15]
- that the predicate acts 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;[16] and
- the factual basis for each of the alleged predicate acts.[17]

---

this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact, although not a legal entity, and it includes illicit as well as licit enterprises and governmental, as well as other entities, including criminal gangs, as defined in § 40-35-121(a)[.]").

[10] *See* Superseding Presentment, Count 1.

[11] *See* Tenn. Code Ann. § 39-12-203(6) (emphasis added).

[12] *See* Tenn. Code Ann. § 39-12-203(9).

[13] *See* Tenn. Code Ann. § 39-12-204(e).

[14] *See* Tenn. Code Ann. § 39-12-203(6) (defining racketeering conduct, in part, as consisting of at least two predicate acts).

[15] *See* Tenn. Code Ann. § 39-12-203(6) (defining racketeering conduct, in part, as consisting of at least two predicate acts in which the last predicate act occurred within two years after a previous incident of racketeering conduct).

[16] *See* Tenn. Code Ann. § 39-12-203(6) (defining racketeering conduct, in part, as conduct having these characteristics).

[17] *See* Tenn. Code Ann. § 39-12-204(e).

I. POSSIBLE LIMITATIONS ON THE USE OF PREDICATE ACTS: CONTINUITY OF PREDICATE ACTS

Generally speaking, no significant dispute exists that the conduct alleged in Mr. Bowling's presentment, which are misdemeanor assaults,[18] *could* constitute predicate acts for purposes of RICO liability under the appropriate circumstances.[19] However, Mr. Bowling argues that the definition of a racketeering activity contained in Tenn. Code Ann. § 39-12-203(6) imposes an additional limitation on the qualification of predicate acts: the last predicate act alleged cannot have occurred more than two years after a prior predicate act.

In interpreting statutes, "[t]he paramount rule of statutory construction is to ascertain and give effect to legislative intent without broadening the statute beyond its intended scope."[20] In general, "[w]hen the language of a statute is clear and unambiguous, 'the legislative intent shall be derived from the plain and ordinary meaning of the statutory language.'"[21] Moreover, "[w]here the language of a statute is plain and unambiguous, this Court is not at liberty to apply a construction apart from the words of the statute."[22]

In this case, the conditions upon which "criminal gang activity" can be considered as a predicate act for purposes of a substantive RICO offense are, in fact, clear and unambiguous. Even if a defendant engages in conduct that amounts to "criminal gang activity," that conduct cannot help establish a pattern of racketeering activity for RICO purposes unless, by definition, the second predicate act occurred within two years of the last act of racketeering conduct.[23] This "continuity requirement" is similar to a corresponding limitation in the federal RICO law, except that the time period permitted between predicate acts under federal law is *ten years*, not two years.[24]

Typically, the exact date on which an offense occurred is not an element of an offense, and as such, an indictment that does not allege the exact date of an offense is not generally insufficient on its face.[25] However, Tenn. Code Ann. § 40–13–207 requires that the indictment

---

[18] *See* Superseding Presentment, Count 1, § 2, ¶ 9.

[19] *See* Tenn. Code Ann. § 40-35-121(a)(3)(B)(iv) (defining a "criminal gang offense," in part, as being the commission of "[a]ssault, as defined in § 39-13-101").

[20] *See Baker v. State*, 417 S.W.3d 428, 433 (Tenn. 2013) (citing *Carter v. Bell*, 279 S.W.3d 560, 564 (Tenn. 2009)).

[21] *See State v. Davis*, 484 S.W.3d 138, 145 (Tenn. 2016) (citing *State v. Wilson*, 132 S.W.3d 340, 341 (Tenn. 2004)).

[22] *See Fletcher v. State*, 9 S.W.3d 103, 105 (Tenn. 1999) (citing *Hawks v. City of Westmoreland*, 960 S.W.2d 10, 16 (Tenn. 1997)).

[23] *See* Tenn. Code Ann. § 39-12-203(6).

[24] *See* 18 U.S.C. § 1961(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity").

[25] *See State v. Byrd*, 820 S.W.2d 739, 740 (Tenn. 1991); *see also* Tenn. Code Ann. § 40-13-207 ("The time at which the offense was committed need not be stated in the indictment, but the offense may be alleged to have been committed on any day before the finding of the indictment, or generally before the finding of the indictment, unless the time is a material ingredient in the offense.").

allege the "time at which the offense was committed" when "the time is a material ingredient in the offense." In the context of a RICO offense, the date of the predicate acts is a "material ingredient," of the offense, as without the required continuity between the predicate acts, the indictment will fail to allege the essential element of a pattern of racketeering activity.

Importantly, the RICO Act's definition of a predicate act focuses upon when the predicate act "occurred,"[26] and insofar as this continuity requirement is concerned, allegations as to whether and when a *conviction* for this same conduct later occurred is not germane. As a matter of law, the two concepts of "occurrence" and "conviction" cannot have the same meaning, as an offense must "occur," or be committed, prior to the return of the indictment, which itself must occur before a conviction may be obtained.[27] Moreover, as discussed below, the RICO Act itself makes a distinction between these concepts, as it specifically addresses when state-law *convictions* can be used as predicate acts in Tenn. Code Ann. § 39-12-204(e). Accordingly, under the plain language of the RICO Act, the essential allegation establishing the continuity requirement must focus on when various predicate acts *occurred* or were committed.[28]

However, despite the plain language of the RICO Act, the superseding presentment here does not allege when Mr. Bowling's conduct occurred. Rather, it only alleges when the subsequent *judgments of conviction* for the conduct were entered by a court. As a result, the presentment fails to allege an essential element of the offense, that is, a pattern of racketeering activity consisting of at least two predicate acts "occurring" within two years of each other. Were this Court to permit the Grand Jury's allegations of when a *conviction* was obtained to substitute for when a criminal gang offense *occurred*, then criminal liability could exceed the scope of the RICO Act beyond what the General Assembly intended.[29]

That said, one could read the presentment's allegations as to when a conviction occurred as merely a helpful reference to the case addressing when the conduct occurred. Assuming, without deciding, that a reference to the actual court case in which an alleged predicate act was

---

[26] *See* Tenn. Code Ann. § 39-12-203(6) ("'Pattern of racketeering activity' means engaging in at least two (2) incidents of racketeering conduct . . . and that the last of the incidents *occurred* within two (2) years after a prior incident of racketeering conduct[.]" (emphasis added));

[27] *See* Tenn. Code Ann. § 39-11-201(a)(4) ("No person may be convicted of an offense unless each of the following is proven beyond a reasonable doubt: . . . (4) The offense was committed prior to the return of the formal charge.").

[28] *Cf. United States v. Bonanno Organized Crime Fam. of La Cosa Nostra*, 683 F. Supp. 1411, 1435–36 (E.D.N.Y. 1988), aff'd, 879 F.2d 20 (2d Cir. 1989) (in context of federal civil RICO action, dismissing complaint against defendant for failure to plead a pattern of racketeering activity when although one predicate act was alleged to have occurred in 1969, "there is no allegation that either of the other two of Infanti's racketeering acts occurred within ten years of act # 7 as required by 18 U.S.C. § 1961(5). The allegations of paragraph 29 therefore cannot be considered part of a pattern of racketeering activity attributable to Infanti.").

[29] *See State v. Cabe*, No. M2017-02340-CCA-R3-CD, 2018 WL 6318151, at *3 (Tenn. Crim. App. Dec. 3, 2018) (""Our goal is to give full effect to the legislature's purpose, without exceeding its intended scope." (citing *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 526 (Tenn. 2010))).

This principle necessarily follows because it is not uncommon to resolve multiple criminal cases on a single day, irrespective of when the conduct giving rise to those cases actually occurred. As such, if one referenced only the date of a conviction, the allegation may appear to satisfy the continuity requirement, even though a reference to the *occurrence* of the offense may tell a different story.

prosecuted provides notice of *when* that predicate act actually "occurred," the presentment still fails to allege the proper continuity of action as to Mr. Bowling's case in Count 1.

The allegations against Mr. Bowling are that he committed two criminal gang offenses of assault and that he pled guilty to these offenses in Criminal Court Case No. 283245 on September 9, 2013 and in General Sessions Court Case No. 1631951 on June 23, 2016, respectively.[30] By reference to the records of this Court in Criminal Court Case No. 283245, including the indictment, the assaultive conduct in that case was alleged to have occurred on January 15, 2012. Similarly, by reference to the records of the Court of General Sessions in Case No. 1631951, including the affidavit of complaint, the assaultive conduct in that case was alleged to have occurred on June 8 or 9, 2016.[31]

Looking to the information referenced in the presentment, the last predicate act occurred in 2016 and this conduct occurred more than two years "after a previous incident of racketeering conduct" occurring in 2012. It is clear, therefore, that the Grand Jury has not properly alleged a pattern of racketeering activity consisting of at least two predicate acts with the last predicate act occurring "within two (2) years after a prior incident of racketeering conduct."

As such, irrespective of whether one references to the incomplete allegations as to the date of convictions in the presentment, or further examines the information referenced in the presentment to determine when the criminal gang offense is actually alleged to have occurred, it is clear that the presentment fails to allege the essential element of a substantive RICO offense: a pattern of racketeering activity.

The Court notes that the same result *would not* obtain under the ten-year continuity period permitted under the federal RICO law or under longer continuity periods established in other states.[32] However, because our Tennessee RICO Act appears to be a more purposefully

---

30 *See* Superseding Presentment, Count 1, § 2, ¶ 9.

31 Admittedly, it is unclear whether the Court can take judicial notice of the records in another court, such as the Hamilton County Court of General Sessions or the United States District Court, for example. However, as the presentment specifically alleges that these records provide notice to the accused as to the nature of the charges, it seems appropriate that the Court be able to do so as well. If any party has an issue with the Court taking judicial notice of these records, the Court will certainly reconsider the issue upon request by any party. *See* Tenn. R. Evid. 201(e).

32 *See, e.g.,* Conn. Gen. Stat. Ann. § 53-394(e) ("'Pattern of racketeering activity' means engaging in at least two incidents of racketeering activity that have the same or similar purposes, results, participants, victims or methods of commission or otherwise are interrelated by distinguishing characteristics, including a nexus to the same enterprise, and are not isolated incidents, provided the latter or last of such incidents occurred after October 1, 1982, and within *five years* after a prior incident of racketeering activity." (emphasis added)); Fla. Stat. Ann. § 895.02(7) ("'Pattern of racketeering activity' means engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after October 1, 1977, and that the last of such incidents occurred within *5 years* after a prior incident of racketeering conduct." (emphasis added)); Ga. Code Ann. § 16-14-3(4)(A) (defining "pattern of racketeering activity" as "[e]ngaging in at least two acts of racketeering activity in furtherance of one or more incidents, schemes, or transactions 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 at least one of such acts occurred after July 1, 1980, and that the last of such acts occurred within *four years*, excluding any periods of imprisonment, after the commission of a prior act of racketeering activity[.]" (emphasis added)); Kan. Stat.

limited prohibition on racketeering activity, the Court has no choice but to grant Mr. Bowling's Motion No. 7 as to the first ground.

II. POSSIBLE LIMITATIONS ON THE USE OF PREDICATE ACTS: USING PREVIOUS STATE-LAW CONVICTIONS AS PREDICATE ACTS

In addition, Mr. Bowling argues that, in addition to requiring the presence of at least *two* predicate acts to constitute a pattern of racketeering activity, the RICO Act also imposes an important restriction in this regard: a predicate act cannot be conduct that has been the subject of a previous state-law conviction.

At first blush, the argument seems unpersuasive. After all, the Tennessee RICO Act was modeled in large part on the federal RICO law,[33] and, as is well known, the latter contains no such prohibition.[34] Indeed, the federal courts have specifically recognized that

> [t]here is nothing in the RICO statutory scheme which would suggest that Congress intended to preclude separate convictions or consecutive sentences for a RICO offense and the underlying or predicate crimes which make up the racketeering pattern. The racketeering statutes were designed primarily as an additional tool for the prevention of racketeering activity, which consists in part

---

Ann. § 21-6328(e) ("'Pattern of racketeering activity' means engaging in at least two incidents of racketeering activity that have the same or similar intents, results, accomplices, victims or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after the effective date of this act and that the last of such incidents occurred within *5 years*, excluding any period of imprisonment, after a prior incident of racketeering activity." (emphasis added)); La. Stat. Ann. § 15:1352(c) ("'Pattern of racketeering activity' means engaging in at least two incidents of racketeering activity that have the same or similar intents, results, principals, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurs after August 21, 1992 and that the last of such incidents occurs within *five years* after a prior incident of racketeering activity." (emphasis added)); N.C. Gen. Stat. Ann. § 75D-3(b) ("'Pattern of racketeering activity' means engaging in at least two incidents of racketeering activity that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated and unrelated incidents, provided at least one of such incidents occurred after October 1, 1986, and that at least one other of such incidents occurred within a *four-year period* of time of the other, excluding any periods of imprisonment, after the commission of a prior incident of racketeering activity." (emphasis added)); N.M. Stat. Ann. § 30-42-3(D) ("'[P]attern of racketeering activity' means engaging in at least two incidents of racketeering with the intent of accomplishing any of the prohibited activities set forth in Subsections A through D of Section 30-42-4 NMSA 1978; provided at least one of the incidents occurred after February 28, 1980 and the last incident occurred within *five years* after the commission of a prior incident of racketeering." (emphasis added)).

[33] *See* 18 U.S.C. §§ 1961–1968.

[34] *See United States v. Gonzalez*, 921 F.2d 1530, 1537-38 (11th Cir. 1991) (footnote omitted) ("The Supreme Court's holding in [*Garrett v. United States*, 471 U.S. 773 (1985)] clearly allows for subsequent prosecutions for complex crimes such as the RICO violation [that the defendant] is charged with, notwithstanding an earlier conviction on a predicate charge."); *United States v. Phillips*, 664 F.2d 971, 1009 n. 55 (5th Cir.1981) ("The legislative history of RICO demonstrates that Congress intended to permit the imposition of cumulative sentences for both RICO offenses and the underlying predicate offenses. Thus, a defendant may be convicted for the predicate acts which form the basis for the RICO charge and later charged under RICO. A conviction under RICO does not, therefore, grant immunity for the offenses charged as the predicate acts of racketeering activity." (citations omitted)).

> of the commission of a number of other crimes. *The Government is not required to make an election between seeking a conviction under RICO, or prosecuting the predicate offenses only. Such a requirement would nullify the intent and effect of the RICO prohibitions.*[35]

However, as authority for his argument, Mr. Bowling cites Tenn. Code Ann. § 39-12-204(e) (hereinafter referred to as "**Subsection (e)**"), which provides as follows:

> (e) Multiple and alternative violations of this section shall 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 (1) criminal violation of this section, including a conviction for conspiring to violate this section, or for one (1) or more of the predicate acts, but not both.* The state shall not be required to elect submission to the jury of the several counts.[36]

The Defendant contends that Subsection (e) expressly bars his present prosecution for a RICO offense if it is based upon a previous conviction for a predicate act. He notes that the limitation on multiple punishments for a RICO offense and a predicate act is unconditional. He also cites the Supreme Court's decision in *State v. Watkins*, 362 S.W.3d 530 (Tenn. 2012), a case in which the Court cited Subsection (e) specifically as an example of a statute where the legislature "has expressed an intent to preclude multiple punishment[s]."[37]

For its part, the State challenges whether Subsection (e) operates as a bar to RICO liability simply because the Defendant has been previously convicted of an offense that could be characterized as a predicate act. Rather, it argues that the context of the entire Subsection (e) is important, as the remainder of the paragraph addresses procedural issues involved in the overall RICO action presently before the Court. As such, reading the second sentence in context, Subsection (e) prohibits convictions for predicate acts only when they are brought in the same action as the RICO case itself.

A. PLAIN LANGUAGE OF SECTION 39-12-204(E)

Resolution of this question requires consideration of whether our General Assembly intended to prohibit the State's use of prior convictions to establish a pattern of racketeering activity for RICO liability, and this question is one of statutory interpretation. As is well-established, "[t]he paramount rule of statutory construction is to ascertain and give effect to legislative intent without broadening the statute beyond its intended scope."[38] This Court must

---

[35] *See United States v. Rone*, 598 F.2d 564, 571 (9th Cir. 1979) (quoted in *United States v. Licavoli*, 725 F.2d 1040, 1050 (6th Cir. 1984) (emphasis added)); *United States v. Grayson*, 795 F.2d 278, 283 (3d Cir. 1986) (same).

[36] *See* Tenn. Code Ann. § 39-12-204(e) (emphasis added).

[37] *See State v. Watkins*, 362 S.W.3d 530, 556 n.44 (Tenn. 2012).

[38] *See Baker v. State*, 417 S.W.3d 428, 433 (Tenn. 2013) (citing *Carter v. Bell*, 279 S.W.3d 560, 564 (Tenn. 2009)).

"'begin with the words that the General Assembly has chosen' and 'give these words their natural and ordinary meaning.'"[39]

As noted above, "[w]here the language of a statute is plain and unambiguous, this Court is not at liberty to apply a construction apart from the words of the statute."[40] "It is only when a statute is ambiguous that we may reference the broader statutory scheme, the history of the legislation, or other sources."[41] Importantly, the Court should "not construe statutory language to unduly expand it beyond its plain and obvious import."[42] As such, when confronted with clear and unambiguous language, "the duty of the courts is simple and obvious[:] to say *sic lex scripta*, and obey it."[43]

Because "there are limitations in the English language with respect to being both specific and manageably brief,"[44] the Court occasionally encounters statutory text whose meaning cannot be readily determined by reference to its "plain language." However, this is not one of those cases.

Subsection (e)'s express command is that one cannot be convicted of both a RICO offense and of a predicate act. By its terms, the prohibition is not limited to situations in which the convictions both occur in a single trial, and the prohibition itself admits of no exception. The plain language of Subsection (e) bars multiple punishments under the RICO Act for a RICO violation and for a predicate act.[45]

---

[39] *See Baker v. State*, 417 S.W.3d 428, 433 (Tenn. 2013) (quoting *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 526 (Tenn. 2010)); *cf. also* Tenn. Code Ann. § 1-3-105(b) ("As used in this code, undefined words shall be given their natural and ordinary meaning, without forced or subtle construction that would limit or extend the meaning of the language, except when a contrary intention is clearly manifest.").

[40] *See Fletcher v. State*, 9 S.W.3d 103, 105 (Tenn. 1999) (citing *Hawks v. City of Westmoreland*, 960 S.W.2d 10, 16 (Tenn. 1997)).

[41] *See In re Estate of Davis*, 308 S.W.3d 832, 837 (Tenn. 2010) (citing *Parks v. Tenn. Mun. League Risk Mgmt. Pool*, 974 S.W.2d 677, 679 (Tenn. 1998)); *State v. Frazier*, No. M2016-02134-SC-R11-CD, 2018 WL 4611624, at *4 (Tenn. Sept. 26, 2018) ("If an ambiguity exists, however, 'we may reference the broader statutory scheme, the history of the legislation, or other sources' to determine the statute's meaning." (quoting *State v. Sherman*, 266 S.W.3d 395, 401 (Tenn. 2008)); *State v. Gibson*, 506 S.W.3d 450, 455-56 (Tenn. 2016) ("If the language is ambiguous, however, we look to the 'broader statutory scheme, the history of the legislation, or other sources to discern its meaning.'" (quoting *State v. Smith*, 436 S.W.3d 751, 762 (Tenn. 2014))).

[42] *See Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 413 (Tenn. 2002).

[43] *See Kradel v. Piper Indus., Inc.*, 60 S.W.3d 744, 749 (Tenn. 2001) (quoting *ATS Southeast, Inc. v. Carrier Corp.*, 18 S.W.3d 626, 630 (Tenn. 2000) (citation and internal quotation marks omitted).

[44] *See, e.g., Phillips v. State Bd. of Regents of State U. and Community College System of State of Tenn.*, 863 S.W.2d 45, 49 (Tenn. 1993).

[45] The power to limit prosecutions under various statutes is part of the General Assembly's authority to define criminal offenses, and this authority is recognized by Tenn. Code Ann. § 39-11-109, which provides as follows:

> (a) When the same conduct may be defined under both a specific statute and a general statute, the person may be prosecuted under either statute, unless the specific statute precludes prosecution under the general statute.

What is clear from the plain language is also confirmed by other considerations. In *dicta*, our Supreme Court has cited Subsection (e) of the RICO Act as a statute where the General Assembly "has expressed an intent to preclude multiple punishment[s]."[46] Moreover, the language used in subsection -204(e) of the RICO Act is not unique in Tennessee law, and the General Assembly has included similar, if not identical, language in other statutes as well to preclude multiple prosecution and punishment under certain statutes. For example, in the case of especially aggravated burglary, the legislature has also provided that "[a]cts which constitute an offense under this section [the especially aggravated burglary statute] may be prosecuted under this section or any other applicable section, but not both."[47] Our courts have recognized that the effect of this statute is to prohibit the State from "using the same act to prosecute an accused for both especially aggravated burglary and another offense."[48]

Although the State argues that Subsection (e) must be interpreted in its larger context such that the RICO Act only bars dual convictions occurring in the same trial, this interpretation impermissibly narrows the import of the statute's plain language.[49] The fact remains that, if Mr. Bowling is ultimately convicted of violating the RICO Act in the current prosecution, he will be in the *very scenario* that the plain language of Subsection (e) expressly prohibits: he will have been convicted both of a RICO violation and of the predicate acts alleged to have constituted the pattern of racketeering activity.

Try as it may, the Court can imagine no plausible interpretation of Subsection (e) that can possibly avoid this conclusion.[50]

(b) When the same conduct may be defined under two (2) or more specific statutes, the person may be prosecuted under either statute unless one (1) specific statute precludes prosecution under another.

Significantly, both subsections of Tenn. Code Ann. § 39-11-109 expressly recognize that the General Assembly may, by separate statute, permit or prohibit prosecution of a criminal offense under a specific statute.

[46] *See State v. Watkins*, 362 S.W.3d 530, 556 n.44 (Tenn. 2012).

[47] *See* Tenn. Code Ann. § 39-14-404(d). The same is also true with respect to "communication theft." In Tenn. Code Ann. § 39-14-149(c)(1), the legislature has provided that "[i]f conduct that violates this section: [a]lso constitutes a violation of § 39-14-104 relative to theft of services, that conduct may be prosecuted under either, but not both, statutes as provided in § 39-11-109."

[48] *See State v. Oller*, 851 S.W.2d 841, 843 (Tenn. Crim. App. 1992) ("In this case, the act of killing the victim constituted the 'serious bodily injury' which would enhance the burglary offense to an especially aggravated one. However, by virtue of the Defendant's prosecution and conviction for murder, Subsection (d) proscribes the prosecution and conviction for especially aggravated burglary."); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993) ("Subsection (d) prohibits using the same act to prosecute for especially aggravated burglary and another offense. By virtue of the prosecution and conviction of Holland for aggravated rape, the statute prohibits his prosecution and conviction for especially aggravated burglary.").

[49] *See Carter v. Bell*, 279 S.W.3d 560, 564 (Tenn. 2009) ("When statutory language is clear and unambiguous, we must apply its plain meaning in its normal and accepted use, without a forced interpretation that would extend the meaning of the language and, in that instance, we enforce the language without reference to the broader statutory intent, legislative history, or other sources.").

[50] Subsection (e) contemplates that an indictment charging a RICO offense may or may not charge more than one RICO offense or one or more predicate acts. Nevertheless, Subsection (e) explicitly and unconditionally prohibits convictions both for multiple RICO offenses and for a RICO offense and one or more predicate acts, thereby allowing the State a choice as to how it wishes to proceed.

Consequently, the plain language of Subsection (e) does not allow the State to rely upon a previous state conviction as a predicate acts in a RICO prosecution. It follows then that an indictment alleging only the existence of predicate acts that are the subject of a prior conviction will necessarily fail to allege the existence of a pattern of racketeering activity, which is an essential element of a substantive RICO offense. Accordingly, because the allegations against Mr. Bowling consist only of two predicate acts that were the subject of a prior conviction, the presentment fails to properly charge him with a criminal RICO offense.

B. IMPUTING PREDICATE ACTS

The State argues that the Court may attribute predicate acts alleged against other co-defendants to remedy the absence of appropriately alleged predicate acts in Mr. Bowling's case. The Court respectfully disagrees. As applied in Count I, the RICO Act specially requires a "person" *to participate* in an enterprise through a pattern of racketeering activity.[51] In other words, the defendant himself or herself must be the person "participating" in the enterprise through the racketeering activity. In no place does the RICO Act allow the Court to impute or attribute the acts of others to a defendant who has not otherwise committed a statutorily-defined predicate act. Simply as a matter of semantics—that is, the study of language and its meaning—it is difficult to see how one can *individually participate* in an enterprise when all the criminal conduct is being committed by other people.

In the context of a substantive RICO offense, a construction that allows predicate acts to be imputed among co-defendants would create obvious notice issues, including as to when a limitations period would begin to run. It would also unduly damage the structure of the RICO Act, which treats conspiracies to violate RICO and substantive RICO offenses separately. Indeed, in this latter context, at least one federal court has rejected the argument, which is a natural extension of the argument advanced by the State here, that the limitations period for a *substantive* RICO offense should commence from the date of the last predicate racketeering act by any person associated with the enterprise:

> Based on the reasoning of our prior decisions, we conclude that in order to satisfy the statute of limitations for section 1962(c) [the federal substantive RICO statute], the government must demonstrate that a defendant committed at least one predicate racketeering act within the limitations period. Such a conclusion comports with the structure of section 1962, which treats conspiracies to violate RICO and substantive RICO offenses separately. *The focus of section 1962(c) is on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise*, which are proscribed by

---

Where a single trial results in a conviction of both a RICO offense and of a predicate act, the State could presumably elect to sustain one conviction over the other, such as the RICO conviction over a conviction for the predicate act, for example. However, where the State has already obtained a conviction for the predicate act, any subsequent conviction for a RICO offense based upon that predicate act will violate the prohibition that a defendant not be convicted of "both." Thus, the plain and palpable effect of Subsection (e) is to bar a conviction for a RICO offense where the defendant has been previously convicted of the predicate acts.

[51] *See* Tenn. Code Ann. § 39-12-204(c).

> section 1962(d) [the federal RICO conspiracy statute]. We reject the government's attempt to analyze section 1962(c) as if it were a second RICO conspiracy statute.[52]

In response to these concerns, the State cites a decision from the United States Court of Appeals for the District of Columbia, *United States v. Richardson*,[53] as standing for the proposition that predicate acts committed by one defendant may be imputed to other defendants. Upon review, the Court does not find that *Richardson* may be properly read in this manner.

Importantly, the challenge in *Richardson* related to whether the defendant's actions represented "long-term criminal conduct," not whether the separate actions of the co-defendants could be imputed, or attributed, to the defendant.[54] Although the actions of all co-defendants were considered, the court did so while considering whether the enterprise itself was likely to continue until its conduct was arrested by the Government's actions.[55] With respect to the defendant, though, the focus remained on his four predicate acts.

Under the federal RICO law, the United States Supreme Court has made clear that "[i]t is the 'person' charged with the racketeering offense—not the entire enterprise—who must engage in the 'pattern of racketeering activity.'"[56] Indeed, the federal RICO law assigns the pattern of racketeering activity, committed through the predicate acts, to the "person," not the "enterprise":

> (c) It shall be unlawful for any *person* employed by or associated with any *enterprise* engaged in, or the activities of which affect, interstate or foreign

---

52 *See United States v. Persico*, 832 F.2d 705, 713 (2d Cir. 1987) (emphasis added).

53 *See United States v. Richardson*, 167 F.3d 621 (D.C. Cir. 1999).

54 *See United States v. Richardson*, 167 F.3d 621, 626 (D.C. Cir. 1999) ("Richardson argues that because the four predicate acts in which he participated spanned only thirty-four days, and the entire crime spree only three and one-half months, the evidence does not satisfy [the *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 242 (1989)] 'long-term criminal conduct' requirement. The government counters that had Richardson and his codefendants not been arrested, their criminal enterprise would have continued indefinitely, thus 'threatening ... future criminal conduct.'").

55 *See United States v. Richardson*, 167 F.3d 621, 626 (D.C. Cir. 1999) ("The 'fortuitous interruption of [racketeering] activity such as by an arrest' does not grant defendants a free pass to evade RICO charges. As the district court observed, the sheer number of serious crimes, 'which victimized dozens of persons and led to five deaths during the course of one summer, with no abatement of activity in sight,' made the 'threat of future criminality ... palpable.' We have no doubt that a jury could reasonably infer from the frequency and escalating seriousness of the defendants' crimes that their 'past conduct ... by its nature project[ed] into the future with a threat of repetition,' thus satisfying RICO's pattern requirement. Because we have found sufficient evidence of an ongoing RICO enterprise involving Richardson, Cunningham, and Barron to support their joint trial and joinder of offenses, we need not address Richardson's claim of prejudice. The district court did not err in denying Richardson's pretrial motion to sever or in refusing to declare a mistrial on Richardson's substantive convictions." (quoting *United States v. Busacca*, 936 F.2d 232, 238 (6th Cir. 1991); and *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 242 (1989))).

56 *See United States v. Bergrin*, 650 F.3d 257, 267, 270 (3d Cir. 2011) (quoting *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 244 (1989) and also finding a RICO indictment sufficient in part because "[t]he indictment also alleges facts indicating that each individual defendant engaged in at least two predicate acts, which is the basis for the assertion that each engaged in a "pattern of racketeering activity").

> commerce, to conduct or participate, directly or indirectly, in the conduct of such *enterprise's* affairs through a pattern of racketeering activity . . . .[57]

So, too, does the Tennessee RICO act:

> (c) 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 . . . .[58]

As such, the Court does not believe that *Richardson* stands for the proposition that an indictment may impute predicate acts committed by others to a particular defendant against whom no pattern of racketeering activity is otherwise properly alleged.

Moreover, the Court does not find that applying theories of criminal responsibility would permit a similar construction. Under Tennessee law, "[c]riminal responsibility represents a legislative codification of the common law theories of aiding and abetting and accessories before the fact,"[59] and a person who "aids or abets" the crime is guilty to "the same degree" as the principal offender.[60] These principles are codified in Tennessee Code Annotated section 39-11-401(a), which provides that "[a] person is criminally responsible as a party to an offense if the offense is committed by the person's own conduct, by the conduct of another for which the person is criminally responsible, or by both."

Criminal responsibility is not a separate crime; rather, it is "solely a theory by which the State may prove the defendant's guilt of the alleged offense . . . based upon conduct of another person."[61] As such, and generally speaking, a separate indictment charging criminal responsibility is not required when the indictment charges the defendant as the principal of the offense.[62] This follows because an indictment on the principal offense "'carries with it all the nuances of the offense,' including criminal responsibility."[63] Thus, the State may generally

---

[57] 18 U.S.C. § 1962(c) (emphasis added).

[58] Tenn. Code Ann. § 39-12-204(c) (emphasis added).

[59] *See State v. Williams*, No. M2017-00509-CCA-R3-CD, 2018 WL 1640410, at *7 (Tenn. Crim. App. Apr. 5, 2018) (citing *State v. Lemacks*, 996 S.W.2d 166, 170 (Tenn. 1999)).

[60] *See State v. Lemacks*, 996 S.W.2d 166, 171 (Tenn. 1999); *State v. Lowe*, No. E2017-00435-CCA-R3-CD, 2018 WL 3323757, at *12 (Tenn. Crim. App. July 6, 2018) ("No specific act or deed needs to be demonstrated by the State, and the presence and companionship of an accused with the offender before and after the offense are circumstances from which participation in the crime may be inferred." (citing *State v. Ball*, 973 S.W.2d 288, 293 (Tenn. Crim. App. 1998)).

[61] *See State v. Lemacks*, 996 S.W.2d 166, 170 (Tenn. 1999); *see also State v. Lowe*, No. E2017-00435-CCA-R3-CD, 2018 WL 3323757, at *12 (Tenn. Crim. App. July 6, 2018) ("Although not a separate crime, criminal responsibility is a theory by which the State may alternatively establish guilt based on the conduct of another.").

[62] *See State v. Daniel*s, No. M2015-01939-CCA-R3-CD, 2017 WL 1032743, at *13 (Tenn. Crim. App. Mar. 16, 2017) (citing *State v. Davidson*, 509 S.W.3d 156, 235-26 (Tenn. 2016) (appendix)).

[63] *See State v. Lemacks*, 996 S.W.2d 166, 173 (Tenn. 1999); *see also State v. Briggs*, No. E2017-01025-CCA-R3-CD, 2018 WL 3660718, at *10 (Tenn. Crim. App. Aug. 2, 2018) ("Criminal responsibility is not a 'separate and distinct crime; rather, it works in synergy with the charged offense to establish a defendant's guilt through the conduct of another.' An indictment is not void for failing to reference a theory of criminal responsibility

proceed on a theory that a defendant is criminally responsible for the conduct of another without referencing the theory in the indictment itself.

However, this pleading rule is not absolute, and in one important type of case, the theory of criminal responsibility, and facts alleged to support it, must be set forth in the indictment to provide sufficient notice to the accused. In *State v. Barnes*,[64] the Court of Criminal Appeals held that one subject to prosecution for criminal responsibility for the conduct of another must be given notice when:

- there exists two separate offenses committed by two separate actors; and
- excluding the principal's conduct from the "aider's" conduct would not extinguish all criminal activity.

As such, under this circumstance, the indictment must provide the "aider" with adequate notice as to what criminal responsibility is being charged. This requirement exists to provide the "aider" with the knowledge of what criminal conduct the "aider" is being called to defend against.[65]

Although the parties have not addressed the issue in their briefing, the superseding presentment may represent precisely the type of case contemplated by *Barnes*. Mr. Bowling is charged with more than fifty other co-defendants, each of whom is alleged to have committed a separate RICO offense in Count 1 on the basis of their own predicate acts. Moreover, excluding the alleged principal's liability would not extinguish Mr. Bowling's liability, as an aider, given the separate allegations against each co-defendant.[66] As such, this case may fall within the scope of *Barnes*, such that a theory of criminal responsibility for the conduct of another must be supported by facts in the presentment. No such facts appear here.

In any event, as noted above, the RICO Act has special pleading requirements that are not required in other criminal actions. As required by statute, the Grand Jury's findings of a RICO offense must allege the "factual basis" for each of the predicate acts alleged to have been committed by Mr. Bowling.[67] This pleading requirement is special, as it requires the allegations

---

because "an indictment that charges an accused on the principal offense 'carries with it all the nuances of the offense,' including criminal responsibility." (quoting *State v. Lemacks*, 996 S.W.2d 166, 173 (Tenn. 1999) (itself citing *State v. Johnson*, 910 S.W.2d 897, 900 (Tenn. Crim. App. 1995)) and citing *State v. Sherman*, 266 S.W.3d 395, 408 (Tenn. 2008)).

64 *See State v. Barnes*, 954 S.W.2d 760 (Tenn. Crim. App. 1997).

65 *See State v. Barnes*, 954 S.W.2d 760, 764 (Tenn. Crim. App. 1997).

66 *See State v. Barnes*, 954 S.W.2d 760, 764 (Tenn. Crim. App. 1997) (recognizing that "It is fundamental that one cannot be accused of one crime and convicted of another. It is not the policy of the law to compel persons charged with a crime to enter upon their defense without knowledge of the character of proof which they will be compelled to meet. Thus, in the instant case, sufficient notice of criminal liability based upon the conduct of another could have been satisfied (1) by alleging language which imposed criminal responsibility for the conduct of another; (2) by charging both (Harris and the appellant) as co-defendants in the commission of aggravated assault; or (3) by alleging facts sufficient to place the appellant on notice that the charge encompassed the conduct of both." (citations and internal quotation marks omitted; footnote omitted)).

67 *See* Tenn. Code Ann. § 39-12-204(e) (requiring the "factual basis for the alleged predicate acts [to be] set forth in each count").

supporting this one element to be identified in more detail, and the requirement is not satisfied by generally stating the factual basis for the offense as a whole, as it would be in other cases.

In this way, it is not sufficient for the Grand Jury simply to allege the general "factual basis" of the RICO offense overall, such that a defendant could take notice, possibly, from the remaining allegations contained throughout an indictment. Nor are the heightened notice requirements satisfied by implicitly charging a defendant with predicate acts committed by one or more of fifty-four other co-defendants without necessarily including facts showing that the specific defendant is an accomplice with, or an abettor to, those other actors. In other words, the RICO Act requires the indictment to identify the predicate acts attributable to the charged defendant and to identify the factual basis showing how that defendant committed or is responsible for those predicate racketeering acts.

In no other way could the Grand Jury satisfy its heightened statutory obligation to identify the "factual basis for the alleged predicate acts" with respect to each defendant. Notably, the presentment here alleges predicate acts in Count 1 as consisting only of the principal's predicate acts alone. As such, given the specific pleading requirements of section -204(e), the Court respectfully declines to impute to Mr. Bowling predicate acts committed by others, at least in the absence of more particular notice to him of the specific predicate acts upon which he is called upon to defend.

C. Effect of Pending Charges or Prior Federal Convictions

Although the Court's holding as to the effect of Subsection (e) has a broad effect on the prosecution of the *Allen* actions given the nature of the allegations set forth in the presentment, the Court's holding is limited.

First, the Court's holding does not apply, for example, when the previous criminal gang activity has not been the subject of a prior state-law conviction. Where current charges for conduct that amounts to criminal gang activity have yet to proceed to conviction, nothing exists to bar a simultaneous prosecution for a RICO offense.

Some of the individual cases in this consolidated action fall into this category. Take, for example, the case alleged against Mr. Terry Anderson. In his case, the presentment alleges the presence of three predicate acts that purport to constitute a pattern of racketeering activity, none of which consists of previous convictions under state law. As such, no possibility exists in his case for a dual state-law conviction for a RICO violation and for a predicate act, and, as such, no infringement on the prohibition imposed by Subsection (e) can occur. Count 1 in Mr. Anderson's case, therefore, may properly proceed.

Second, the Court's holding does not apply when the underlying predicate acts are the subject of convictions under federal law. With respect to allegations concerning predicate acts, the RICO Act requires that the "factual basis" of the predicate acts be set forth in the indictment. Reference to prior federal convictions can help provide notice as to this factual basis, and, indeed, likely provides *better* notice than a simple recitation of the facts. Again, however, the mere presence of a federal conviction for conduct also alleged to be a predicate act in no way

raises the possibility of dual state-law convictions for a RICO violation and a state-law predicate act. As such, under these circumstances, the prohibition imposed by Subsection (e) again remains fully preserved,[68] and the Court's holding does not affect these situations.

III. PUBLIC POLICY CONSEQUENCES OF TENNESSEE'S NARROW LAW

The Court is not unmindful of the practical policy decisions evident in both the limited continuity requirement of Tenn. Code Ann. § 39-12-203(6) and in the limitation placed on the use of predicate acts imposed by Subsection (e). As has been argued in these proceedings, Tennessee's narrow RICO Act places special burdens on the prosecution that are not faced by authorities in other states. For example:

- At the time of a prosecution for any criminal gang offense, the State may not know that the offense is actually part of an interrelated pattern of criminal activity, or, in other words, could constitute evidence showing a pattern of racketeering activity. This problem is compounded if the offense is truly a first offense—the State cannot know that the crime is really part of a "pattern" of racketeering activity until the second action occurs.

- The limitation of Subsection (e) could effectively immunize a defendant against criminal liability for predicate acts so long as the State is considering, or pursuing, a prosecution for a RICO offense.

- If a defendant has been charged with a predicate act, the defendant could effectively attempt to immunize himself or herself from RICO liability by pleading guilty as charged to a predicate act.

- Subsection (e) restricts the State in having access to the most compelling proof of possible racketeering activity: prior criminal conduct that has been the subject of a conviction, whether by admission or by proof beyond a reasonable doubt.

As others have argued, Tennessee's RICO Act does not have to be so narrowly drafted. From the research submitted, it appears that Tennessee has the shortest continuity requirement for predicate acts among the jurisdictions adopting a racketeering statute.[69]

---

[68] No constitutional prohibition exists to prevent the State of Tennessee from prosecuting, under state law, the same conduct that was the subject of a federal conviction. If permitted by our General Assembly, the State certainly could do so. *See Lavon v. State*, 586 S.W.2d 112, 115 (Tenn. 1979) ("[W]e hold that the question of the propriety of successive state and federal prosecutions for the same act, being essentially one of policy, is best 'committed to the intelligence and discretion' of the legislature, and we leave it to their considered judgment."); *see also Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) ("We have long held that a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign. Under this 'dual-sovereignty' doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute. . . . Today we affirm that precedent, and with it the decision below.").

[69] *See* Note 32, *supra.*

Moreover, the federal RICO law does not include any provision analogous to Subsection (e),[70] and as noted above, the federal courts have expressly held that a defendant can be simultaneously convicted of a substantive RICO offense and of a predicate act.[71] A defendant may also be later prosecuted for a substantive RICO offense despite having been convicted of a predicate act previously.[72] Similarly, a New York law of criminal procedure affecting prosecution for enterprise corruption allows predicate acts for which there were prior convictions, though it requires at least one subsequent, felonious predicate act for which there was no prior prosecution.[73]

One may or may not prefer these public policy consequences,[74] but, these consequences are the natural result of the unique requirements of our Tennessee legislation. In 2013, legislation was proposed that would have both repealed Subsection (e) and extended the continuity requirement to five years.[75] Moreover, in testimony offered before the Senate Judiciary Committee, Mr. Boyd Patterson specifically noted many of these concerns with the limitations imposed by the continuity requirement and Subsection (e) in particular.[76] Although this Court will not ascribe particular motivations to the ultimate defeat of this legislation,[77] the prior debates are evidence that the General Assembly is, or was, aware of how others believed that these provisions placed narrow restrictions on the application of Tennessee's RICO Act.

---

[70] *See* 18 U.S.C. § 1962 (criminalizing racketeering, but not limiting convictions for RICO or non-RICO offenses).

[71] *See, e.g.*, *United States v. Basciano*, 599 F.3d 184, 205 (2d Cir. 2010) ("[I]t is the pattern of activity, not the predicates, that is punished by a racketeering conviction. For precisely this reason, the law permits a defendant to be prosecuted—either simultaneously or at separate times—for both substantive racketeering and the predicate crimes evidencing the pattern of racketeering.").

[72] *See United States v. Gonzalez*, 921 F.2d 1530, 1537-38 (11th Cir. 1991) (footnote omitted) ("The Supreme Court's holding in [*Garrett v. United States*, 471 U.S. 773 (1985)] clearly allows for subsequent prosecutions for complex crimes such as the RICO violation [that the defendant] is charged with, notwithstanding an earlier conviction on a predicate charge.").

[73] *See* N.Y. C.P.L.R. § 40.50.

[74] As counsel for co-defendant Mr. Mayes argued at the January 28, 2019 hearing, it may not be an absurd result to require the State to wait to prosecute a defendant until the completion of an investigation. In counsel's experience in federal court, it is not uncommon for the government not to commence a prosecution with the first offense, but to continue an investigation and await developments. Counsel reads subsection (e) as "giving the government the ability to wait, observe the organization, bring these charges, the predicates and the RICO violation in a single proceeding, and convict one or the other."

As Mayes's counsel also argued at the hearing, an argument "that the government shouldn't have to wait is not an argument against the language of the statute," as the unconditional language of Subsection (e) seems to indicate a legislative intent to prohibit multiple punishments, independent of other considerations. True enough, perhaps. Absent ambiguous language in Subsection (e), the reasonableness of the consequence of its unconditional language presents less a question of judicial construction for this Court than of a legislative policy for the legislature to consider.

[75] *See* 108th General Assembly, SB291 (HB1025) & SA0355 (proposing amendment to Tenn. Code Ann. § 39-12-204 to repeal subsections (e) and (f) and to refined "pattern of racketeering activity" to include predicate acts occurring within five years of each other).

[76] *See* Hearing on SB291 before the Senate Judiciary Committee (April 2, 2013).

[77] *See Hardy v. Tournament Players Club at Southwind, Inc.*, 513 S.W.3d 427, 443 (Tenn. 2017) (recognized that subsequent "legislative inaction is generally irrelevant to the interpretation of existing statutes . . . .").

Ultimately, if the General Assembly does not intend the consequence of this statutory language, it may certainly reconsider the language at any time. Despite any potential policy concerns voiced by others to the contrary, this Court is not free to adopt a construction that is contrary to the language adopted by our legislature.[78] After all, "[t]he Legislature holds the power to define criminal offenses and assess punishments for crimes. It is not this Court's role to substitute [its] policy judgments for those of the legislature."[79]

CONCLUSION

In summary, the Court holds that Mr. Bowling's Motion No. 7 should be granted as to the first and third grounds asserted. By the plain language of the RICO Act, the Grand Jury was required to allege facts showing a pattern of racketeering activity in Count 1, including the presence of two predicate acts with the last of the predicate acts occurring "within two (2) years after a prior incident of racketeering conduct."

Moreover, the unconditional prohibition on multiple convictions in Subsection (e) is, by implication, a bar to a successive RICO prosecution when the prosecution is based upon a predicate act that has been the subject of a state-law conviction. Thus, once there is a state conviction for a predicate offense, as the Defendant and most of the joining co-defendants have, there cannot be, consistent with Tenn. Code Ann. § 39-12-204(e), a successive prosecution under the RICO Act based upon that predicate act.[80]

Accordingly, and in accordance with an order that will be subsequently entered, the Court requests that the Criminal Court Clerk record the granting of Bowling Motion No. 7 in Mr. Bowling's cases and in the following cases in which a joinder to the motion was properly filed. In each of these cases, the Court finds and concludes that Count 1 fails to allege the existence of an essential element of a substantive RICO offense, *i.e.*, a pattern of racketeering activity. The Court's conclusion is based upon the absence of any allegations showing at least two predicate acts in the first instance or because at least two qualifying predicate acts are not alleged when prior state-law convictions cannot be considered:

---

[78] *See State v. Mallard*, 40 S.W.3d 473, 480 (Tenn. 2001) ("In no case, though, is the judiciary empowered to substitute its own policy judgments for those of the General Assembly or to adopt a construction that is clearly contrary to the intent of the General Assembly."); *see also Coleman v. Olson*, 551 S.W.3d 686, 694 (Tenn. 2018) ("We do not alter or amend statutes or substitute our policy judgment for that of the Legislature." (citing *Armbrister v. Armbrister*, 414 S.W.3d 685, 704 (Tenn. 2013))); *State v. Gentry*, 538 S.W.3d 413, 420 (Tenn. 2017) ("It is not the role of this Court to substitute its own policy judgments for those of the legislature." (citing *Frazier v. State*, 495 S.W.3d 246, 249 (Tenn. 2016))).

[79] *See State v. Cabe*, No. M2017-02340-CCA-R3-CD, 2018 WL 6318151, at *3 (Tenn. Crim. App. Dec. 3, 2018) (citing *State v. Gentry*, 538 S.W.3d 413, 420 (Tenn. 2017)).

[80] *Cf. State v. Watkins*, 362 S.W.3d 530, 556 (Tenn. 2012) ("Under the *Blockburger* test, Tennessee courts must focus upon ascertaining legislative intent. If the General Assembly has expressed an intent to permit multiple punishment, no further analysis will be necessary, and multiple convictions should be upheld against a double jeopardy challenge. *See, e.g.*, *Godsey*, 60 S.W.3d at 777; *Blackburn*, 694 S.W.2d at 936. Likewise, if the General Assembly has expressed an intent to preclude multiple punishment, then no further analysis will be necessary, and improper multiple convictions should be vacated. [¶] Where the General Assembly's intent is not clearly expressed, the *Blockburger* test should be applied to determine whether multiple convictions under different statutes punish the 'same offense.'") (footnotes omitted).

1. Allen (Case No. 305636)[81]
2. Beamon (Case No. 305641)[82]
3. Beard (Case No. 305643)[83]
4. Bowling (Case No. 305644)[84]
5. Clemons, Johnny (Case No. 305651)[85]
6. Davis, Robert (Case No. 305679)[86]
7. Estes (Case No. 305657)[87]
8. Lee (Case No. 305668)[88]
9. McKinney (Case No. 305671)[89]
10. Orton (Case No. 305678)[90]
11. Sneed (Case No. 305686)[91]

With respect to Mr. Lewande Haggard (Case No. 305661), he has joined in Bowling Motion No. 7 seeking dismissal of Count 1. However, in his case, the Grand Jury has alleged

---

[81] In Mr. Allen's case, three predicate acts are alleged, but two of the acts have resulted in state-law convictions. *See* Superseding Presentment, Count 1, § 2, ¶ 1. As such, only one predicate act is properly alleged, and the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[82] In Mr. Beamon's case, two predicate acts are alleged, but both of the acts have resulted in state-law convictions. *See* Superseding Presentment, Count 1, § 2, ¶ 6. As such, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[83] In Mr. Beard's case, five predicate acts are alleged, but all of the acts have resulted in state-law convictions. *See* Superseding Presentment, Count 1, § 2, ¶ 7. As such, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[84] As noted above, two predicate acts are alleged in Mr. Bowling's case, but both of the acts have resulted in state-law convictions. *See* Superseding Presentment, Count 1, § 2, ¶ 9. As such, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[85] In Mr. Clemmons's case, four predicate acts are alleged, but three of the acts have resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 17. As such, because only one predicate act is properly alleged, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[86] In Mr. Robert Davis's case, three predicate acts are alleged, but all three acts resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 44. As such, no predicate act is properly alleged, and the superseding presentment, therefore, fails to allege the essential element of a pattern of racketeering activity.

[87] In Ms. Estes's case, three predicate acts are alleged, but all three acts resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 22. As such, no predicate act is properly alleged, and the superseding presentment, therefore, fails to allege the essential element of a pattern of racketeering activity.

[88] In Mr. Lee's case, three predicate acts are alleged, but all three acts resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 33. As such, no predicate act is properly alleged, and the superseding presentment, therefore, fails to allege the essential element of a pattern of racketeering activity.

[89] In Mr. McKinney's case, three predicate acts are alleged, but all three acts resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 38. As such, no predicate act is properly alleged, and the superseding presentment, therefore, fails to allege the essential element of a pattern of racketeering activity.

[90] In Mr. Orton's case, two predicate acts are alleged, but each of the acts resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 43. As such, no predicate act is properly alleged, and the superseding presentment, therefore, fails to allege the essential element of a pattern of racketeering activity.

[91] In Mr. Sneed's case, six predicate acts are alleged, but each of the acts resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 51. As such, no predicate act is properly alleged, and the superseding presentment, therefore, fails to allege the essential element of a pattern of racketeering activity.

predicate acts consisting of conduct that resulted in two federal convictions and in one pending state case.

As noted above, conduct that is the subject of pending state-law criminal charges may serve as a predicate act, as can conduct that was subject to a previous federal criminal conviction. Moreover, the last predicate act is alleged to have occurred in 2017, which is less than two years after a prior incident of alleged racketeering conduct.[92] As such, the Court would respectfully **DENY** Mr. Lewande Haggard's joinder in Bowling Motion No. 7 to the extent that he joins in assertion of the first and third grounds. The Clerk is respectfully requested to record denial of Bowling Motion No. 7, in part, in Mr. Lewande Haggard's case.

"Because courts cannot act where jurisdiction is lacking, a trial court has an inescapable duty to determine whether the dispute is within its subject matter jurisdiction."[93] Noticing, therefore, the absence of its jurisdiction in other cases not joining in Bowling Motion No. 7,[94] the Court also dismisses Count 1 in the following cases. In each of these cases, the Court finds and concludes that Count 1 fails to allege the existence of an essential element of a RICO violation, *i.e.*, a pattern of racketeering activity consisting of at least two predicate acts. The Court's conclusion is based upon the absence of any allegations showing at least two predicate acts in the first instance or because at least two qualifying predicate acts are not alleged when prior state-law convictions cannot be considered:

1. Armstrong (Case No. 305638)[95]
2. Atkinson (Case No. 305640)[96]
3. Beasley (Case No. 305643)[97]
4. Bragg (Case No. 305646)[98]

---

[92] *See* Superseding Presentment, Count 1, § 2, ¶ 26.

[93] *See Wilson v. Sentence Info. Services*, No. M1998-00939-COA-R3-CV, 2001 WL 422966, at *4 (Tenn. App. Apr. 26, 2001) (citing *Edwards v. Hawks*, 189 Tenn. 17, 23, 222 S.W.2d 28, 31 (1949)); *see also, e.g., Scales v. Winston*, 760 S.W.2d 952, 953 (Tenn. Ct. App. 1988) ("It is the duty of any court to determine the question of its subject matter jurisdiction on its own motion if the issue is not raised by either of the parties, inasmuch as any judgment rendered without jurisdiction is a nullity."); *Ward v. Lovell*, 113 S.W.2d 759, 760 (Tenn. Ct. App. 1937) ("it is the duty of the court to determine the question of its jurisdiction on its own motion; and it will not ignore a want of jurisdiction because the question is not raised or discussed by either party." (citations omitted)).

[94] As noted above, "if the indictment fails to include an essential element of the offense, no crime is charged and, therefore, no offense is before the court." *See State v. Nixon*, 977 S.W.2d 119, 121 (Tenn. Crim. App. 1997) (citing *State v. Perkinson*, 867 S.W.2d 1, 5–6 (Tenn. Crim. App. 1992)).

[95] In Mr. Armstrong's case, two predicate acts are alleged, but one of the acts has resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 3. As such, because only one predicate act is properly alleged, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[96] In Mr. Atkinson's case, only one predicate act is alleged. *See* Superseding Presentment, Count 1, § 2, ¶ 5. As such, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

Of course, in Mr. Atkinson's case, the issue has been rendered moot by the State's dismissal of the case on July 16, 2019.

[97] In Mr. Beasley's case, five predicate acts are alleged, but four of the acts have resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 8. As such, only one predicate act is properly alleged, and the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

5.	Burton	(Case No. 305647)[99]
6.	Caldwell	(Case No. 305648)[100]
7.	Cannon	(Case No. 305649)[101]
8.	Clemons, Countess	(Case No. 305651)[102]
9.	Collier	(Case No. 305653)[103]
10.	Davis, Floyd	(Case No. 305654)[104]
11.	Dean	(Case No. 305655)[105]
12.	Ellis	(Case No. 305656)[106]
13.	Green	(Case No. 305658)[107]
14.	High	(Case No. 305662)[108]
15.	Holland	(Case No. 305663)[109]

---

[98] In Ms. Bragg's case, only one predicate act is alleged. *See* Superseding Presentment, Count 1, § 2, ¶ 11. As such, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[99] In Mr. Burton's case, four predicate acts are alleged, but all of the acts have resulted in state-law convictions. *See* Superseding Presentment, Count 1, § 2, ¶ 12. As such, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[100] In Mr. Caldwell's case, two predicate acts are alleged, but each of the acts has resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 13. As such, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[101] In Mr. Cannon's case, two predicate acts are alleged, but each of the acts has resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 14. As such, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[102] In Ms. Clemmons's case, only one predicate act is alleged. *See* Superseding Presentment, Count 1, § 2, ¶ 16. As such, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[103] In Mr. Collier's case, three predicate acts are alleged, but two of the acts have resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 18. As such, because only one predicate act is properly alleged, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[104] In Mr. Davis's case, two predicate acts are alleged, but one of the acts has resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 19. As such, because only one predicate act is properly alleged, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[105] In Ms. Dean's case, two predicate acts are alleged, but one of the acts has resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 20. As such, because only one predicate act is properly alleged, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[106] In Mr. Ellis's case, only one predicate act is alleged. *See* Superseding Presentment, Count 1, § 2, ¶ 21. As such, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[107] In Mr. Green's case, only one predicate act is alleged. *See* Superseding Presentment, Count 1, § 2, ¶ 23. As such, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[108] In Mr. High's case, three predicate acts are alleged, but two of the acts have resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 27. Special issues are also involved in Mr. High's case. Although the superseding presentment arguably alleges the existence of other predicate act in other counts, the Grand Jury did not allege other predicate acts in Count 1—as it did in Mr. Grier's case, for example—despite the statutory requirement to identify the factual basis of the predicate acts "in each count." *See* Tenn. Code Ann. § 39-12-204(e). As such, because only one predicate act is properly alleged in Count 1 in Mr. High's case, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[109] In Mr. Holland's case, four predicate acts are alleged, but all of the acts have resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 28. As such, because no predicate act is properly alleged, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

16. Johnson, Ladarrius (Case No. 305664)[110]
17. Johnson, Tychius (Case No. 305665)[111]
18. Kirk (Case No. 305666)[112]
19. Lomnick (Case No. 305669)[113]
20. Lykes (Case No. 305670)[114]
21. McReynolds (Case No. 305672)[115]
22. Martin (Case No. 305673)[116]
23. Mayes (Case No. 305674)[117]

---

[110] In Mr. Ladarrius Johnson's case, three predicate acts are alleged, but all of the acts have resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 29. As such, because no predicate act is properly alleged, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[111] In Mr. Tychius Johnson's case, three predicate acts are alleged, but all of the acts have resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 30. As such, because no predicate act is properly alleged, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[112] In Ms. Kirk's case, two predicate acts are alleged, but each of the acts has resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 31. As such, because no predicate act is properly alleged, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[113] In Mr. Lomnick's case, two predicate acts are alleged, but all acts have resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 34. As such, no predicate act is properly alleged, and the superseding presentment, therefore, fails to allege the essential element of a pattern of racketeering activity.

[114] In Ms. Lykes's case, only one predicate act is alleged. *See* Superseding Presentment, Count 1, § 2, ¶ 35. As such, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[115] In Mr. McReynold's case, only one predicate act is alleged. *See* Superseding Presentment, Count 1, § 2, ¶ 39. As such, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[116] In Mr. Martin's case, two predicate acts are alleged, but all acts have resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 36. As such, no predicate act is properly alleged, and the superseding presentment, therefore, fails to allege the essential element of a pattern of racketeering activity.

[117] In Mr. Mayes's case, three (or possibly more) predicate acts are alleged. The predicate acts alleged are as follows:

- a guilty plea to "Federal Distribution of Crack Cocaine" in the United States District Court, Eastern District of Tennessee in docket number 1:16 CR-00055-HSM-SKL-001, being sentenced January 30, 2017;
- a guilty plea in Criminal Court docket number 280811 to the offense of Aggravated Domestic Assault on October 6, 2011; and
- pending "Rape charges pending in Hamilton County Criminal Court[.]"

See Superseding Presentment, Count 1, § 2, ¶ 37. As discussed above, the state-court conviction for aggravated domestic assault cannot qualify for use as a predicate act due to the narrow limitations imposed by Tenn. Code Ann. § 39-12-204(e).

With respect to the other predicate acts alleged, one may reference the records of the United States District Court in Case No. 1:16-CR-55, including the superseding indictment in that case, to determine that the drug distribution conduct in that case that was the subject of the conviction was alleged to have occurred on April 15, 2015. *See United States v. Mayes*, Case No. 1:16-CR-55 (E.D. Tenn.), Court File No. 2 (Superseding Indictment); Court File No. 37 (Judgment).

However, with respect to the predicate act alleging pending "rape charges," the Grand Jury did not identify a factual basis for the predicate acts at all as required by Tenn. Code Ann. § 39-12-204(e). Unlike virtually every

24.	Morris	(Case No. 305675)[118]
25.	Myricks	(Case No. 305676)[119]
26.	Shelton	(Case No. 305681)[120]
27.	Sims, Cortez	(Case No. 305683)[121]
28.	Shepherd	(Case No. 305682)[122]
29.	Smith	(Case No. 305685)[123]
30.	Stamps	(Case No. 305687)[124]
31.	Thomas, Andre	(Case No. 305688)[125]

other case with co-defendants, the Grand Jury here included no facts at all about Mr. Mayes's conduct apart from the general name of the charge(s) and the identification of the court in which the "charges" are pending. The Grand Jury did not reference a single date on which any offense occurred; it did not identify any case numbers or indictments through which reference could be made to ascertain a factual basis or dates; and it did not include any other information at all related to the "charges." Indeed, although the "charges" are referenced in the plural, one cannot determine from the face of the allegations *how many* "charges" are even alleged to exist.

From the face of the allegations in paragraph 37, the Grand Jury failed to provide the "factual basis" for the predicate act(s) alleged. More importantly for purposes of Bowling Motion No. 7, the Grand Jury's allegations fail to establish the presence of a "last" predicate act for purposes of Tenn. Code Ann. § 39-12-203(6), and hence, one cannot determine from the allegations (or by reference to other information identified in the presentment) whether other predicate acts meet, or can meet, the continuity requirement. Accordingly, because the Grand Jury has failed to show an essential element of a substantive RICO offense, *i.e.*, a pattern of racketeering activity, Count 1 of Mr. Mayes's case is subject to dismissal.

[118] In Mr. Morris's case, two predicate acts are alleged, but all acts have resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 40. As such, no predicate act is properly alleged, and the superseding presentment, therefore, fails to allege the essential element of a pattern of racketeering activity.

[119] In Mr. Myrick's case, four predicate acts are alleged, but three of the acts have resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 42. As such, only one predicate act is properly alleged, and the superseding presentment, therefore, fails to allege the essential element of a pattern of racketeering activity.

[120] In Mr. Shelton's case, five predicate acts are alleged, but four of the acts have resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 46. As such, only one predicate act is properly alleged, and the superseding presentment, therefore, fails to allege the essential element of a pattern of racketeering activity.

[121] In Mr. Sims's case, only one predicate act is alleged. *See* Superseding Presentment, Count 1, § 2, ¶ 48. As such, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[122] Mr. Shepherd's case is unique. The superseding presentment alleges two predicate acts consisting of two separate criminal charges, but it identifies no dates on which the alleged criminal gang offense occurred. Rather, the presentment simply identifies a single case number. *See* Superseding Presentment, Count 1, § 2, ¶ 47.

Upon review of the case information referenced by the Grand Jury, Case No. 292287 was resolved in 2014 in the Second Division of the Criminal Court, with Mr. Shepherd pleading guilty to one charge and with the other charge being dismissed by the State. As such, with its reference to a concluded case, the Grand Jury has properly alleged only one predicate act—the conduct comprising the controlled substance charges in the dismissed count. As such, through its reference to Case 292287, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[123] In Mr. Smith's case, two predicate acts are alleged, but all acts have resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 50. As such, no predicate act is properly alleged, and the superseding presentment, therefore, fails to allege the essential element of a pattern of racketeering activity.

[124] In Mr. Stamps's case, three predicate acts are alleged, but each of the acts resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 52. As such, no predicate act is properly alleged, and the superseding presentment, therefore, fails to allege the essential element of a pattern of racketeering activity.

32. Thomas, Ira (Case No. 305689)[126]
33. Thorne (Case No. 305690)[127]

In accordance with an order that will be subsequently entered, the Court also requests that the Criminal Court Clerk record the granting of Bowling Motion No. 7 in the following cases in which a joinder to the motion was filed. In each of these additional cases, the Court finds and concludes that Count 1 fails to allege the existence of an essential element of a RICO violation, *i.e.*, a pattern of racketeering activity. The Court's conclusion in these cases is based upon the absence of any allegations showing the presence of at least two predicate acts with the last predicate act occurring "within two (2) years after a prior incident of racketeering conduct":

1. Arnold (Case No. 305639)[128]
2. Carter (Case No. 305650)[129]

---

[125] In Mr. Andre Thomas's case, four predicate acts are alleged, but each of the acts resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 53. As such, no predicate act is properly alleged, and the superseding presentment, therefore, fails to allege the essential element of a pattern of racketeering activity.

[126] In Mr. Ira Thomas's case, only one predicate act is alleged. *See* Superseding Presentment, Count 1, § 2, ¶ 54. As such, the superseding presentment fails to allege the essential element of a pattern of racketeering activity.

[127] In Ms. Thorne's case, four predicate acts are alleged, but each of the acts resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 55. As such, no predicate act is properly alleged, and the superseding presentment, therefore, fails to allege the essential element of a pattern of racketeering activity.

[128] In Mr. Arnold's case, three predicate acts are specifically alleged, but only one has resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 4. As such, Count 1 in Mr. Arnold's case is not subject to dismissal on the basis of Tenn. Code Ann. § 39-12-204(e).

Nevertheless, with respect to the remaining allegations against Mr. Arnold, the presentment alleges that Mr. Arnold has committed the most recent criminal gang offense consisting of conspiracy to distribute controlled substances in Case No. 1:18-CR-7 in United States District Court for the Eastern District of Tennessee. The presentment also alleges that he committed the criminal gang offense of unlawful possession of cocaine with intent to distribute in Case No. 1:08-CR-99 in United States District Court for the Eastern District of Tennessee. *See* Superseding Presentment, Count 1, § 2, at ¶ 4.

By reference to the records of the United States District Court in Case No. 1:18-CR-7, including the indictment, the conduct in that case was alleged to have occurred as early as October 2016. *See United States v. Arnold*, Case No. 1:18-CR-7 (E.D. Tenn.), Court File No. 1 (Indictment). Similarly, by reference to the records of the United States District Court in Case No. 1:08-CR-99, including the indictment, the drug possession conduct in that case was alleged to have occurred on January 17, 2008. *See United States v. Arnold*, Case No. 1:08-CR-99 (E.D. Tenn.), Court File No. 3 (Indictment).

Looking to the information referenced in the presentment, the last predicate act occurred in October of 2016 and this conduct occurred more than two years "after a previous incident of racketeering conduct." It is clear, therefore, that the Grand Jury has not properly alleged a pattern of racketeering activity consisting of at least two predicate acts, with the last of the predicate acts occurring within two years of a previous predicate act.

Because of the Grand Jury's failure to allege the existence of an essential element of a substantive RICO offense, this Court lacks subject matter jurisdiction as Count 1 relates to Mr. Arnold.

[129] The allegations against Mr. Carter are that he committed the most recent criminal gang offense consisting of reckless aggravated assault in Criminal Court Case No. 297586 and that he committed the next previous criminal gang offense consisting of aggravated domestic assault in General Sessions Court Case No. 1720748. *See* Superseding Presentment, Count 1, § 2, at ¶ 15.

3. Haggard, LaCharleston (Case No. 305660)[130]

By way of notation, the Court recognizes that Count 1 in the following cases is not affected by this Memorandum Opinion:

1. Anderson (Case No. 305637)[131]
2. Bradley (Case No. 305645)[132]
3. Grier (Case No. 305659)[133]

By reference to the records of this Court in Criminal Court Case No. 297586, including the indictment, the assaultive conduct in that case was alleged to have occurred on November 13, 2015. Similarly, by reference to the records of the Court of General Sessions in Case No. 1720748, including the affidavit of complaint, the assaultive conduct in that case was alleged to have occurred on July 8, 2018.

Looking to the information referenced in the presentment, the last predicate act occurred in 2018 and this conduct occurred more than two years "after a previous incident of racketeering conduct," which occurred in 2015. It is clear, therefore, that the Grand Jury has not properly alleged a pattern of racketeering activity consisting of at least two predicate acts, with the last of the predicate acts occurring within two years of a previous predicate act.

Because of the Grand Jury's failure to allege the existence of an essential element of a substantive RICO offense, this Court lacks subject matter jurisdiction and grants the motion to dismiss.

[130] In Mr. LaCharleston Haggard's case, two predicate acts are alleged, but none has resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 25. Thus, Count 1 in Mr. Haggard's case is not subject to dismissal on the basis of Tenn. Code Ann. § 39-12-204(e).

Nevertheless, the allegations against Mr. Haggard are that he committed the most criminal gang offense of being a felon in possession of a firearm in Case No. 1:16-CR-129 in United States District Court for the Eastern District of Tennessee. The presentment also alleges that he committed the criminal gang offense of unlawful possession of controlled substances in Case No. 1:14-CR-23 in United States District Court for the Eastern District of Tennessee. *See* Superseding Presentment, Count 1, § 2, at ¶ 25.

By reference to the records of the United States District Court in Case No. 1:16-CR-129, including the indictment, the weapons possession conduct in that case was alleged to have occurred on November 15, 2016. *See United States v. Haggard*, Case No. 1:16-CR-129 (E.D. Tenn.), Court File No. 1 (Indictment). Similarly, by reference to the records of the United States District Court in Case No. 1:14-CR-23, including the indictment, the drug possession conduct in that case was alleged to have occurred on January 22, 2014. *See United States v. Haggard*, Case No. 1:14-CR-23 (E.D. Tenn.), Court File No. 1 (Indictment).

Looking to the information referenced in the presentment, the last predicate act occurred in November of 2016 and this conduct occurred more than two years "after a previous incident of racketeering conduct." It is clear, therefore, that the Grand Jury has not properly alleged a pattern of racketeering activity consisting of at least two predicate acts, with the last of the predicate acts occurring within two years of a previous predicate act.

Because of the Grand Jury's failure to allege the existence of an essential element of a substantive RICO offense, this Court lacks subject matter jurisdiction as Count 1 relates to Mr. Haggard.

[131] In Mr. Anderson's case, three predicate acts are alleged, all of which are subject to currently pending state charges. *See* Superseding Presentment, Count 1, § 2, ¶ 2. Although other issues may exist with the allegations, Count 1 in Mr. Anderson's case is not subject to dismissal on the basis of Tenn. Code Ann. § 39-12-204(e) or for a violation of the continuity requirement established by Tenn. Code Ann. § 39-12-203(6).

[132] In Mr. Bradley's case, four predicate acts are alleged, but none has resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 10. Although other issues may exist with the allegations, Count 1 in Mr. Bradley's case is not subject to dismissal on the basis of Tenn. Code Ann. § 39-12-204(e) or for a violation of the continuity requirement established by Tenn. Code Ann. § 39-12-203(6).

[133] In Mr. Grier's case, it appears that ten predicate acts are alleged, though the Grand Jury has erroneously alleged that Mr. Grier committed acts set forth in Counts 3 and 10 of the presentment—no allegations against Mr. Grier appear in those counts. Nevertheless, although two acts have resulted in a state-law conviction, the other alleged conduct remains subject to pending charges or were the subject of a federal conviction. *See*

4. Haggard, Lewande (Case No. 305661)[134]
5. Lay (Case No. 305667)[135]
6. Murphy (Case No. 305677)[136]
7. Ramsey (Case No. 305680)[137]
8. Sims, Coynesha (Case No. 305684)[138]

Finally, this Memorandum Opinion does not address the sufficiency of Count 2 of the superseding presentment.

Enter, this the 23rd day of August, 2019.

TOM GREENHOLTZ, Judge

Superseding Presentment, Count 1, § 2, ¶ 24. Although other issues may exist with the allegations, Count 1 in Mr. Grier's case is not subject to dismissal on the basis of Tenn. Code Ann. § 39-12-204(e) or for a violation of the continuity requirement established by Tenn. Code Ann. § 39-12-203(6).

[134] For the reasons noted above.

[135] In Mr. Lay's case, two predicate acts are alleged, but none has resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 32. Although other issues may exist with the allegations, Count 1 in Mr. Lay's case is not subject to dismissal on the basis of Tenn. Code Ann. § 39-12-204(e) or for a violation of the continuity requirement established by Tenn. Code Ann. § 39-12-203(6).

The second ground for dismissal in Bowling Motion No. 7 concerns possible violations of Ex Post Facto prohibitions found in Article 1, § 11 of the Tennessee Constitution and Article I, § 10 of the United States Constitution. Although the Court does not address this ground as it applies to Mr. Bowling's case, this issue is arguably presented with more force in Mr. Lay's case. In Mr. Lay's case, all of the predicate acts are alleged to have occurred prior to May 21, 2012, which is the effective date after which a pattern of racketeering activity could consist of criminal gang offenses. However, Mr. Lay has not joined in Bowling Motion No. 7 or filed his own motion to dismiss. The Court would invite further consideration of this issue by the State or by Mr. Lay in the interests of justice, but as this issue does not affect the subject matter jurisdiction of the Court, the Court does not resolve this issue herein.

[136] In Mr. Murphy's case, four predicate acts are alleged, but none has resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 41. Although other issues may exist with the allegations, Count 1 in Mr. Murphy's case is not subject to dismissal on the basis of Tenn. Code Ann. § 39-12-204(e) or for a violation of the continuity requirement established by Tenn. Code Ann. § 39-12-203(6).

[137] In Ms. Ramsey's case, two predicate acts are alleged, but none has resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 45. Although other issues may exist with the allegations, Count 1 in Ms. Ramsey's case is not subject to dismissal on the basis of Tenn. Code Ann. § 39-12-204(e) or for a violation of the continuity requirement established by Tenn. Code Ann. § 39-12-203(6).

[138] Similar to Ms. Ramsey's case, two predicate acts are alleged against Ms. Sims, but none has resulted in a state-law conviction. *See* Superseding Presentment, Count 1, § 2, ¶ 49. Although other issues may exist with the allegations, Count 1 in Ms. Sims's case is not subject to dismissal on the basis of Tenn. Code Ann. § 39-12-204(e) or for a violation of the continuity requirement established by Tenn. Code Ann. § 39-12-203(6).