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, MAYES MOTION NO. 13

This cause came before the Court upon motion by Defendant Dexter Mayes seeking the dismissal of the superseding presentment for failure to allege essential elements of a substantive offense under the Tennessee Racketeering Influenced and Corrupt Organizations Act ("**RICO Act**").[1] Mr. Mayes also seeks dismissal of Count 2 of the superseding presentment, which alleges the existence of a conspiracy to violate multiple provisions of the RICO Act. This Court has already addressed issues related to the substantive RICO offenses, and this opinion addresses only the allegations of a RICO conspiracy.

For the reasons given herein, the Court finds that the General Assembly expressly intended that conspiracy law operate more narrowly in the context of a RICO action. Thus, a RICO conspiracy brought under Tennessee law includes elements that are not typically required in other aspects of criminal conspiracy law, and these limitations also compel results that would not follow under either the federal RICO law or the racketeering laws of other states.

Our Supreme Court has held that "it is easily seen that the object of any conspiracy is the crime which the defendants conspire to commit."[2] In this case, the Grand Jury did not identify the actual substantive racketeering crime(s) that the co-conspirators agreed to commit. Instead, the Grand Jury has alleged the possible existence of at least four separate RICO conspiracies, each with different substantive objects and agreements. In so doing, the Grand Jury has failed to provide notice of "the nature and cause of the accusation" brought against the accused.[3]

Moreover, because the Grand Jury has failed to identify the object(s) of its RICO conspiracy—or the particular racketeering crime or crimes that the co-conspirators agreed to commit—the Grand Jury has also failed to allege an essential element of a Tennessee RICO

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1 *See* Tenn. Code Ann. §§ 39-12-201, *et seq.*

2 *See State v. Smith*, 273 S.W.2d 143, 146 (Tenn. 1954).

3 *See* Tenn. Const. art. I, § 9 (providing "[t]hat in all criminal prosecutions, the accused hath the right to . . . demand the nature and cause of the accusation against him, and to have a copy thereof . . .").

offense, *i.e.*, that there existed "a meeting of the minds between all co-conspirators" as to the object of the criminal conspiracy.[4]

Accordingly, the Court finds that Mayes Motion No. 13 is well taken. Although the Court grants Mr. Mayes's motion, it does so without prejudice to the Grand Jury's reconsideration and bringing of an indictment or presentment that alleges each of the essential elements of the criminal conspiracy offense and that is brought in the form required by the RICO Act.

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[4] *See* Tenn. Code Ann. § 39-12-204(f).

FACTUAL BACKGROUND

This case is part of the *Allen* cases, wherein the Defendant is presently joined with fifty-four 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.[5]

With respect to Mr. Mayes, the Court has previously dismissed Count 1, though its allegations are nevertheless relevant to the analysis of Count 2. In general, Count 1 of the superseding presentment charged Mr. Mayes with violating Tenn. Code Ann. § 39-12-204(c), which criminalizes participating in an enterprise through a pattern of racketeering activity. This Count alleged the existence of a RICO enterprise consisting of a criminal gang to which the Defendants belong, and it described the general purposes of the enterprise. Count 1 also alleged that each accused had committed one or more predicate acts, which the presentment described 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 Mr. Mayes 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 a criminal gang and alleges a conspiracy to "violate *any of the provisions* of Tennessee Code Annotated § 39-12-204 subsections (a), (b) *or* (c) in violation of Tennessee Code Annotated § 39-12-204(d)." Count 2 also 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."

LAW AND ANALYSIS

The essential question raised by Mr. Mayes's motion is whether the presentment properly charges him with the crime of conspiring to commit a pattern of racketeering activity for a prohibited purpose under the RICO Act. 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.[6]

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[5] 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.

[6] *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.").

Where an 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.[7] These principles also apply in conspiracy cases under Tennessee law.[8] 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."[9] Importantly, the application of our criminal law "must be limited in scope to cases defined by the statutory language."[10]

I. GENERAL TENNESSEE LAW OF CONSPIRACY

Generally speaking, Tennessee law imposes criminal liability for persons who conspire with others to commit a criminal offense.[11] In its most simplistic formulation, two people engage in a criminal conspiracy when they agree with each other to commit an offense[12] and, then, at least one of the persons commits an "overt act" that is in "pursuance of the conspiracy."[13]

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[7] *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.").

[8] *See State v. Perkinson*, 867 S.W.2d 1, 5 (Tenn. Crim. App. 1992) (dismissing indictment which failed to allege that either of the defendants committed "an overt act in pursuance of [the] conspiracy," as required by statute).

[9] *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) (itself citing *De Jonge v. Oregon*, 299 U.S. 353, 362 (1937) ("Conviction upon a charge not made would be sheer denial of due process."); *State v. Hughes*, 371 S.W.2d 445 (Tenn. 1963) (providing that a lawful accusation is an essential jurisdictional element without which there can be no prosecution)); *State v. Dison*, 03C01-9602-CC-00051, 1997 WL 36844, at *20 (Tenn. Crim. App. Jan. 31, 1997) ("It is an elementary rule of law that an accused cannot be required to defend against, or be convicted of, a crime that is greater than the crime alleged in the charging instrument. Thus, an accused cannot be convicted of a felony if the charging instrument does not contain an essential element of the felony. Under these circumstances, the accused may only be convicted of a misdemeanor, if the charging instrument alleges the essential elements of the misdemeanor offense. An accused cannot be validly prosecuted or convicted of a criminal offense under color of a charging instrument which fails to allege a crime." (footnotes omitted)).

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

[11] *See* Tenn. Code Ann. § 39-12-103 (criminalizing conspiracy of two or more persons to commit a criminal offense).

[12] *See* Tenn. Code Ann. § 39-12-103(a) ("The offense of conspiracy is committed if two (2) or more people, each having the culpable mental state required for the offense that is the object of the conspiracy, and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct that constitutes the offense."); *see also State v. Vasques*, 221 S.W.3d 514, 522 (Tenn. 2007) ("A conspiracy is 'an agreement to accomplish a criminal or unlawful act.'" (citing *State v. Pike*, 978 S.W.2d 904, 915 (Tenn. 1998))).

[13] *See* Tenn. Code Ann. § 39-12-103(d) ("No person may be convicted of conspiracy to commit an offense, unless an overt act in pursuance of the conspiracy is alleged and proved to have been done by the person or by another with whom the person conspired.").

As the Court of Criminal Appeals has recognized, in order to commit the general offense of conspiracy, the State must prove the following essential elements:

(1) each conspirator had the culpable mental state to commit the offense;

(2) each conspirator must act for the purpose of promoting or facilitating the offense; and

(3) at least one of the conspirators must commit an overt act in furtherance of the agreement.[14]

The force of criminal conspiracy law lies in the fact that once a conspiracy is established, then all members of the conspiracy are criminally liable for the acts taken in furtherance of the conspiracy.[15] This is true even if a particular individual did not actually commit the substantive crime that is the object of the conspiracy or otherwise commit an overt act.[16] In other words, "[t]he act of any party to a conspiracy is an act of all."[17]

Nevertheless, irrespective of the label attached to any type of conspiracy, "[t]he essential feature of the crime of conspiracy is the accord—the agreement to accomplish a criminal or unlawful act."[18] This agreement "'need not be formal or expressed, and it may be proven by

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[14] *See State v. Perkinson*, 867 S.W.2d 1, 5 (Tenn. Crim. App. 1992); *see also State v. Vasques*, 221 S.W.3d 514, 521 (Tenn. 2007) (stating that conspiracy "requires the prosecution to prove that 'two (2) or more people, each having the culpable mental state required for the offense which is the object of the conspiracy and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct which constitutes such offense.'" (quoting Tenn. Code Ann. § 39-12-103(a); *State v. Thornton*, 10 S.W.3d 229, 239 (Tenn. Crim. App. 1999) (same))).

[15] *See State v. Smith*, 273 S.W.2d 143, 146 (Tenn. 1954) ("In *Williamson v. United States*, the Supreme Court of the United States said: 'But in a charge of conspiracy the conspiracy is the gist of the crime, and certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy.' *See also Solomon v. State*, supra, where this Court definitely approved the statement that 'A conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy.'" (quoting *Williamson v. United States*, 207 U.S. 425, 447 (1908); *Solomon v. State*, 76 S.W.2d 331 (Tenn. 1934))); *see also State v. Lequire*, 634 S.W.2d 608, 612-13 (Tenn. Crim. App. 1981) ("Everyone entering into a conspiracy is a party to every act which has before been done by the others, and to every act by the others afterward, in furtherance of the common design. The act of one is considered the act of all and, therefore, is imputable to all." (citing *Solomon v. State*, 76 S.W.2d 331 (Tenn. 1934))).

[16] *See State v. Lequire*, 634 S.W.2d 608, 613 (Tenn. Crim. App. 1981) ("[W]here one co-conspirator commits the target crime in the absence of the other, the absent one is equally guilty as a principal.").

[17] *See State v. Cole*, 635 S.W.2d 122, 127 (Tenn. Crim. App. 1982) ("In the case of a conspiracy, a member is a party to every act which has been done by the other conspirators. The act of any party to a conspiracy is an act of all." (citations omitted)); *see also State v. Hodgkinson*, 778 S.W.2d 54, 58 (Tenn. Crim. App. 1989) ("Once a party knowingly and voluntarily joins into a conspiracy, even if he comes in after the conspiracy is formed, he becomes a principal. The requirement that the defendants had knowledge of the conspiracy is satisfied by proof he knew of the essential object of the conspiracy." (citations omitted)).

[18] *See State v. Watson*, 227 S.W.3d 622, 642 (Tenn. Crim. App. 2006) (quoting *State v. Pike*, 978 S.W.2d 904, 915 (Tenn. 1998); *State v. Hodgkinson*, 778 S.W.2d 54, 58 (Tenn. Crim. App. 1989)); *see also State v. Clayton*, No. W2018-00386-CCA-R3-CD, 2019 WL 3453288, at *7 (Tenn. Crim. App. July 31, 2019) ("The essential feature of the crime of conspiracy is the 'agreement to accomplish a criminal or unlawful act.'" (quoting *State v. Pike*, 978 S.W.2d 904, 915 (Tenn. 1998))); *State v. Bond*, No. W2018-00107-CCA-R3-CD, 2019 WL 1417871, at *5 (Tenn. Crim. App. Mar. 28, 2019) ("The essential feature of the crime of conspiracy is the

circumstantial evidence.'"[19] Rather, the "State may show the existence of a 'mutual implied understanding' between the parties to the conspiracy in order to prove the existence of a conspiratorial relationship. 'Conspiracy implies concert of design and not participation in every detail of execution.'"[20] However, "[m]ere knowledge, acquiescence, or approval of the act, without cooperation or agreement to cooperate, is not enough to constitute one a party to a conspiracy."[21]

Because the "agreement" is the *sine qua non* of a conspiracy, Tennessee criminal conspiracy law is broad, and it recognizes criminal liability for different types of conspiracies. In its most basic form, Tennessee law would punish an agreement between two people to violate the law. However, as the number of co-conspirators expands, so does the liability that an individual participant may face.

For example, Tennessee law permits criminal liability in what is known as a "wheel" or "hub and spoke" conspiracy.[22] In this type of conspiracy, individual defendants (spokes) have an agreement with a common figure (the hub), but these individuals do not otherwise deal with, or even know of, each other.[23] In other words, an individual need not have an individual "meeting of the minds" with all other co-conspirators for criminal liability for the acts of others under this circumstance. Rather, it is sufficient if each individual only has a "meeting of the minds," or an agreement as to the object of the conspiracy, with the central figure and that the individual knows that the central figure is also conspiring with other people.

Finally, and perhaps most relevant to the instant case, Tennessee's broad conspiracy law also criminalizes a single agreement to commit a number of offenses. Under this circumstance, "the person is guilty of only one (1) conspiracy, so long as the multiple offenses are the object of the same agreement or continuous conspiratorial relationship."[24] So long as there is a single agreement, multiple violations of the law taking place at different times, in different locations, or

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'agreement to accomplish a criminal or unlawful act.'" (quoting *State v. Pike*, 978 S.W.2d 904, 915 (Tenn. 1998))); *State v. Potter*, No. E2015-02261-CCA-R3-CD, 2019 WL 453730, at *33 (Tenn. Crim. App. Feb. 5, 2019) (citing *State v. Pike*, 978 S.W.2d 904, 915 (Tenn. 1998); *State v. Hodgkinson*, 778 S.W.2d 54, 58 (Tenn. Crim. App. 1989)).

[19] *See State v. Vasques*, 221 S.W.3d 514, 522 (Tenn. 2007) (quoting *State v. Pike*, 978 S.W.2d 904, 915 (Tenn. 1998)).

[20] *See State v. Martinez*, 372 S.W.3d 598, 607 (Tenn. Crim. App. 2011) (citing *State v. Shropshire*, 874 S.W.2d 634, 641 (Tenn. Crim. App. 1993)); *State v. Turner*, 675 S.W.2d 199, 203 (Tenn. Crim. App. 1984) ("'Conspiracy implies concert of design and not participation in every detail of execution.'" (quoting *Randolph v. State*, 570 S.W.2d 869, 871 (Tenn. Crim. App. 1978))).

[21] *See State v. Cook*, 749 S.W.2d 42, 44 (Tenn. Crim. App. 1987) (citing *Solomon v. State*, 76 S.W.2d 331, 334 (Tenn. 1941)).

[22] *See* Tenn. Code Ann. § 39-12-103(b).

[23] *See* Tenn. Code Ann. § 39-12-103(b) ("If a person guilty of conspiracy, as defined in subsection (a), knows that another with whom the person conspires to commit an offense has conspired with one (1) or more other people to commit the same offense, the person is guilty of conspiring with the other person or persons, whether or not their identity is known, to commit the offense.").

[24] *See* Tenn. Code Ann. § 39-12-103(c).

under different circumstances may still be punished as part of a single conspiracy.[25] In all cases, it is the object of the conspiracy—or the agreement to violate the law—that is the key to the conspiracy liability.[26]

II. THE RICO ACT AND ALLEGATIONS OF MULTIPLE AGREEMENTS TO VIOLATE THE LAW

One significant limitation found in Tennessee conspiracy law is that an indictment generally cannot allege the existence of multiple conspiracies—meaning multiple *separate* agreements to violate the same law or *separate* agreements to violate different laws—in the same count of the indictment.[27] In part, this prohibition is meant to ensure that a defendant may not be prosecuted a second time for the same conspiracy offense.[28]

This limitation is significant in the context of racketeering. As a practical matter, racketeering activity often consists of many different types of crimes and criminal conduct. When allegations are brought alleging a racketeering conspiracy, there is often difficulty in determining whether the co-conspirators actually reached different agreements to violate the law (multiple conspiracies) or whether they reached a single agreement to violate multiple laws (a single conspiracy).

This difficulty is not unique to Tennessee. In fact, it was this same difficulty that, in part, gave rise to the federal RICO law. To that end, it is helpful to review how the federal courts

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[25] *See State v. Fusco*, 404 S.W.3d 504, 529–30 (Tenn. Crim. App. 2012) ("In his testimony establishing the conspiracy, Swim discussed a single plan, and although the plan involved multiple criminal acts at two locations, it was nonetheless part of a single agreement between the two men. We conclude that the trial court erred when it refused to merge the conspiracy convictions. The case is remanded to the trial court with instructions for the judgments to reflect merger of the Defendant's conspiracy convictions."); *State v. Hardy*, No. M2008-00381-CCA-R3-CD, 2009 WL 2733821, at *10 (Tenn. Crim. App. Aug. 31, 2009) (recognizing that "[w]hen our legislature enacted the statute proscribing conspiracy, it specifically prohibited multiple conspiracy convictions in cases in which multiple offenses result from the same agreement or conspiratorial relationship" and merging convictions for conspiracy to commit especially aggravated robbery and aggravated burglary as being one agreement to violate multiple laws (citing Tenn. Code Ann. § 39-12-103(c); *State v. Farra*, No. E2001-02235-CCA-R3-CD, 2003 WL 22908104, at *11 (Tenn. Crim. App. Dec. 10, 2003))).

[26] *See State v. Smith*, 273 S.W.2d 143, 146 (Tenn. 1954) (recognizing that "it is easily seen that the object of any conspiracy is the crime which the defendants conspire to commit").

[27] *Cf. State v. Keel*, 882 S.W.2d 410, 416 (Tenn. Crim. App. 1994) ("When the evidence adduced at a trial does not correspond to the elements of the offense alleged in the charging instrument, there is a variance. Generally, the evidence establishes the commission of an offense different from the offense alleged in the charging instrument. The variance rule is predicated upon the theory that an accused cannot be charged with one offense and convicted of a completely different offense." (footnotes omitted)).

[28] *See State v. Mayes*, 854 S.W.2d 638, 641 (Tenn. 1993) (permitting immaterial variances in allegations of a conspiracy and proof at trial, but only when the "(1) the indictment otherwise sufficiently informs the defendant of the charge against him such that he will not be misled and can adequately plan a defense and (2) the variance is such that the defendant cannot be prosecuted again for the same offense due to double jeopardy principles."); *State v. March*, 494 S.W.3d 52, 75 (Tenn. Crim. App. 2010) (finding no material variance, and concluding that the "indictment sufficiently informed the defendant of the charges against him so that he could prepare his defense and not be misled or surprised at trial, and the variance did not present a danger that the defendant may be prosecuted a second time for the same offense.").

have grappled with this same question in the context of the federal RICO legislation and then to see how Tennessee purposefully deviated from that path.

A. SCOPE OF FEDERAL RICO LIABILITY

In *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978), the United States Court of Appeals for the Fifth Circuit became the first appellate court to articulate the significance of RICO's conspiracy provision for complex conspiracy prosecutions. In *Elliott*, six co-defendants were alleged to have participated in more than twenty different criminal acts. Although one defendant was implicated in all of the criminal acts, the proof did not show any single act in which all defendants acted in concert. The Government charged all six co-defendants with a conspiracy to violate subsection (c) of the federal RICO law under 18 U.S.C. § 1962(d).[29]

Under traditional notions of criminal conspiracy law, the prosecution in a single indictment would likely not have been permissible. Indeed, the *Elliott* Court admitted as much that the facts before it did not fit the permissible limits of either the wheel or the chain theory. For example, the activities were too diverse; the defendants did not know of one another or of the other activities; and no common objective united all the defendants.

Through the federal RICO law, however, the *Elliott* Court recognized that "Congress intended to authorize the single prosecution of a multi-faceted, diversified conspiracy by replacing the inadequate 'wheel' and 'chain' rationales with a new statutory concept: the enterprise."[30] That is, the essence of RICO conspiracy is not that the defendants agreed to commit various subsidiary criminal acts, any one of which might involve only a subset of the alleged members of the conspiracy, but rather that all the defendants agreed to the common objective of participating in the enterprise's affairs.

1. Limits of Traditional Conspiracy Law to Address Racketeering

In discussing the importance of the RICO conspiracy in a section entitled "RICO to the Rescue," the Fifth Circuit in *Elliott* acknowledged the limitations of traditional conspiracy law in prosecutions for enterprise crimes, focusing in particular on the requirement that all co-conspirators agree on the object of the conspiracy. In particular, the *Elliott* Court recognized that "[i]n the context of organized crime, this principle [of agreement on the objectives of the conspiracy] inhibited mass prosecutions because a single agreement or 'common objective'

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[29] *See United States. v. Elliott*, 571 F.2d 880, 900 (5th Cir. 1978).

[30] *See United States. v. Elliott*, 571 F.2d 880, 902 (5th Cir. 1978) ("In enacting RICO, Congress found that 'organized crime continues to grow' in part 'because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact'. Thus, one of the express purposes of the Act was 'to seek the eradication of organized crime . . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime'. Against this background, we are convinced that, through RICO, Congress intended to authorize the single prosecution of a multi-faceted, diversified conspiracy by replacing the inadequate 'wheel' and 'chain' rationales with a new statutory concept: the enterprise." (quoting Pub. L. 91-452, § 1, 84 Stat. 922 (1970))).

cannot be inferred from the commission of highly diverse crimes by apparently unrelated individuals."[31]

To remedy these limitations of traditional conspiracy law, the Fifth Circuit noted that Congress created a new criminal objective: "to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity." In broadening the nature of the agreement away from the notion of a single agreement or common objective and moving toward that of enterprise participation, the *Elliott* Court recognized that the

> gravamen of the conspiracy charge in this [RICO] case is not that each defendant agreed to commit arson, to steal goods from interstate commerce, to obstruct justice, and to sell narcotics; rather, it is that each agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes. Under the statute, it is irrelevant that each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs. To find a single conspiracy, we still must look for agreement on an overall objective. What Congress did was to define that objective through the substantive provisions of the Act.[32]

In so recognizing, the *Elliott* Court abolished the principle that multiple conspiracies could not be charged in a single conspiracy count, and it specifically recognized that the effect of RICO "is to free the government from the strictures of the multiple conspiracy doctrine and to allow the joint trial of many persons accused of diversified crimes."[33]

2. Criticisms of *Elliott*

Although some other federal circuits adopted *Elliott*'s view of how RICO purposefully changed traditional views of conspiracy liability,[34] *Elliott*'s holding was subject to severe

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31 *See United States v. Elliott*, 571 F.2d 880, 902 (5th Cir. 1978).

32 *See United States v. Elliott*, 571 F.2d 880, 902-03 (5th Cir. 1978) (footnote omitted).

33 *See United States v. Elliott*, 571 F.2d 880, 900 (5th Cir. 1978).

34 *See, e.g.*, *United States v. Sinito*, 723 F.2d 1250, 1261 (6th Cir. 1983) ("It is unnecessary that the underlying predicate acts be interrelated as long as the acts are connected to the affairs of the enterprise. Moreover, the defendant's participation in the enterprise may take place through the offense of various crimes unrelated to one another as long as these crimes are in some way intended to further the enterprise's affairs." (citing *United States v. Elliott*, 571 F.2d at 880, 899 n. 23 (5th Cir. 1978))); *United States v. Lee Stoller Enterprises, Inc.*, 652 F.2d 1313, 1319 (7th Cir. 1981) ("Defendants here, as in most RICO cases, were alleged to have committed different predicate crimes. But in a trial on RICO charges, a particular defendant may be the victim of spillover testimony regarding other, more violent or heinous, predicate crimes. This can happen because the specific purpose of the substantive provisions of RICO is to tie together diverse parties and crimes. Under RICO, it is irrelevant that each defendant participated in the enterprise's affairs through different and unrelated crimes." (citing *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir. 1978))); *United States v. Barton*, 647 F.2d 224, 237 (2d Cir. 1981) ("[I]n some instances a prosecution under [18 U.S.C. §] 371 for conspiracy to violate [18 U.S.C. §] 1962 might be improper because the goals of the conspiracy were too farflung" and citing *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978) as "upholding use of § 1962(d) to reach 'a myriopod criminal network, loosely connected but connected nonetheless,'

criticism by other courts,[35] by academics,[36] and by the American Bar Association in the early 1980s.[37] Some in academia noted that "[b]y holding that section 1962(d) is not subject to general federal conspiracy law, *Elliott* created an offense whose characteristics are unknown because they cannot be determined by reference to preexisting law."[38] Others noted that "[t]he most frequently expressed criticism [of *Elliott*'s formulation of enterprise conspiracy] is that it undermines the fundamental concept of conspiracy intent and agreement."[39] Still others took aim at *Elliott*'s holding that effectively permitted multiple different conspiracies to be jointly tried in a single trial:

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that involved arson, theft, fencing goods stolen from interstate commerce, murder, and narcotics activity, while observing that such a prosecution probably would not have been possible under § 371 because it linked 'highly diverse crimes by apparently unrelated individuals[.]'"))).

[35] In part, the Fifth Circuit itself later pulled back from broad interpretations of *Elliott* urged by the Government in *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981). In *Sutherland*, the Fifth Circuit recognized that

> *Elliott* does not stand for the proposition that multiple conspiracies may be tried on a single "enterprise conspiracy" count under RICO merely because the various conspiracies involve the same enterprise. What *Elliott* does state is two-fold: (1) a pattern of agreements that absent RICO would constitute multiple conspiracies may be joined under a single RICO conspiracy count if the defendants have agreed to commit a substantive RICO offense; and (2) such an agreement to violate RICO may, as in the case of a traditional "chain" or "wheel" conspiracy, be established on circumstantial evidence, *i.e.*, evidence that the nature of the conspiracy is such that each defendant must necessarily have known that others were also conspiring to violate RICO.

See id. at 1194.

[36] *See, e.g.*, James F. Holderman, *Reconciling Rico's Conspiracy and "Group" Enterprise Concepts with Traditional Conspiracy Doctrine*, 52 U. Cin. L. Rev. 385, 403 (1983) ("RICO is a prosecutorial tool of immense proportions. The *Elliott* opinion stretched RICO, at least in the 'group enterprise' and conspiracy concepts, beyond its limits."); Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 Am. Crim. L. Rev. 213, 258 (1984) ("[T]he Fifth Circuit [in *United States v. Elliott*, 571 F.2d 880, 898 (5th Cir. 1978)], in adopting a very expansive view of what constituted a conspiracy under RICO, stated: 'In this case we deal with the question of whether and, if so, how a free society can protect itself when groups of people, through division of labor, specialization, diversification, complexity of organization and the accumulation of capital turn crime into an ongoing business.' The court's answer to this question was to create a crime of 'enterprise conspiracy' which was far broader than anything envisioned by Congress in a case which involved, not the Mafia, but a disorganized group of Georgia truck hijackers."); Gerard E. Lynch, *Rico: The Crime of Being A Criminal, Parts III & IV*, 87 Colum. L. Rev. 920, 951–52 (1987) ("The *Elliott* court was no doubt both sincere and accurate in stating that it would not have permitted the defendants there to have been convicted of a simple conspiracy. And whatever courts might have accepted if tested, few precedents can be found in 'traditional' conspiracy cases for agreements of the breadth and complexity of RICO illicit association cases involving diversified criminal syndicates. RICO thus may be better seen as the occasion for a change in judicial and prosecutorial policy than as a provider of new theoretical concepts." (footnote omitted)).

[37] *See* American Bar Association Section of Criminal Justice, Report to the House of Delegates 10-12 (1982) (cited in Nancy L. Ickler, *Conspiracy to Violate Rico: Expanding Traditional Conspiracy Law*, 58 Notre Dame L. Rev. 587, 615 (1983).

[38] *See* Barry Tarlow, *Rico Revisited*, 17 Ga. L. Rev. 291, 395 (1983).

[39] *See* Barry Tarlow, *Rico Revisited*, 17 Ga. L. Rev. 291, 384, 391 (1983) ("Commentators have widely criticized *Elliott*'s implication that a section 1962(d) count could include all acts occurring in the conduct of the same enterprise even if there were no other relationship. . . . The original *Elliott* doctrine has been sharply criticized by commentators. The most frequently expressed criticism is that it undermines the fundamental concept of conspiracy intent and agreement. Under *Elliott*, a defendant can intend to join a section 1962(d) conspiracy, even though he does not know the purposes, activities, and scope of the conspiracy." (citations omitted)).

> The *Elliott* court, however, seemed to overlook the fact that the multiple conspiracy doctrine is a procedural safeguard designed to protect each defendant's right to a fair trial. It is difficult to believe that Congress could have substantively overcome the procedural prejudice involved in a joint trial of loosely connected multiple conspiracies by attaching the artificial label of "enterprise" to the whole affair.[40]

For its part, the ABA recommended repealing the entire conspiracy provisions of 18 U.S.C. § 1962(d), in part, to avoid *Elliott*'s broad holding.[41]

B. TENNESSEE'S STRUGGLES TO ADOPT A RICO ACT

It was against this backdrop that the Tennessee General Assembly adopted Tennessee's RICO Act in 1986.[42] By 1986, the General Assembly had been attempting to pass RICO legislation for seven or eight years.[43] Broad RICO legislation had been introduced in both chambers every year, but it was repeatedly defeated in the House Judiciary Committee which did not favor broad RICO legislation.[44] Bills were filed in the Senate to enact a RICO law similar to that passed in Florida,[45] but, while these bills would be approved by the full Senate, the bills routinely failed to pass in the House.

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[40] *See* James Clann Minnis, *Clarifying Rico's Conspiracy Provision: Personal Commitment Not Required*, 62 Tul. L. Rev. 1399, 1416 (1988) ("The *Elliott* court, however, seemed to overlook the fact that the multiple conspiracy doctrine is a procedural safeguard designed to protect each defendant's right to a fair trial. It is difficult to believe that Congress could have substantively overcome the procedural prejudice involved in a joint trial of loosely connected multiple conspiracies by attaching the artificial label of 'enterprise' to the whole affair. This procedural problem should be given a procedural remedy. If the court determines that there are multiple conspiracies within the RICO enterprise, and that joint trial might affect 'the substantial rights' of any defendant, it should try the conspiracies separately." (footnote omitted)).

[41] *See* American Bar Association Section of Criminal Justice, Report to the House of Delegates at 12 (1982).

[42] *See* 1986 Tenn. Pub. Acts, ch. 635 (effective July 1, 1986).

[43] *See* Senate Session March 5, 1986 (Senator Person) (noting that, for the past six years, he had being trying "year after year to move" RICO legislation); *see also* House Calendar and Rules Committee March 6, 1986 (Representative Naifeh) (noting that the RICO bill has been in several forms over the past seven or eight years, and that it has failed previously "due to philosophical reasons or due to the scope of the legislation"); House General Welfare Committee February 25, 1986 (Representative Montgomery) (noting that the House Judiciary Committee "had the RICO bill for four years").

[44] *See* House Session March 12, 1986 (Speaker McWherter's comments, noting that the House Judiciary Committee, "in honest conviction" had withheld, and would not allow, a broad bill to come out of the committee); Senate Session March 5, 1986 (Senator Davis) (noting that the Senate's broad RICO legislation passed in the previous session "didn't get out of" the House Judiciary Committee and that the present, limited legislation was possible in this session only because the House assigned the bill to the General Welfare Committee instead of to the Judiciary Committee).

[45] *See* Senate Session March 5, 1986 (Senator Person) (noting that he had previously introduced a RICO bill that was patterned after Florida's law, which he characterized as being "one of the strongest RICO acts in the United States"); *See id.* (Senator Cohen noting that Florida "has the best" RICO legislation).

In 1986, both chambers were finally able to secure passage of a RICO law, though the law was significantly limited, dealing only with major drug offenses and containing other substantive limitations.[46] One of the co-sponsors, Representative Tommy Burnette, who was also the Chair of the House Judiciary Committee, noted that he historically opposed RICO legislation because "it would hurt smaller people" rather than the major dealers. He observed that when providing for "a broad spectrum of liability, you could hurt a lot of innocent people," but that he was supportive of this bill because this was "not the broad-spectrum type of legislation that has been historically passed."[47]

In fact, reflecting the years-long tug-of-war over this issue in the legislature, the limited nature of the 1986 RICO legislation was a significant source of frustration to several legislators. During the floor debates in the House, for example, Representative Chris Turner noted that he had sponsored broad RICO legislation previously, and he voiced his view that "we need something much stronger." He regretted that, with the passage of the limited bill, "I don't think we have done anything."[48] Representative Moore also noted that the bill simply was not strong enough to handle the drug issues in particular.[49]

Against this backdrop, then-Speaker Ned McWherter, who was also a co-sponsor of the limited House legislation, explained why the limited approach was offered: if the legislature wanted a RICO law "on the books" this was the only bill that could pass. He noted that he had "voted for a RICO bill in the early 1970s that covered everything," and that he was "for it then and for it since." He noted that he still personally favored a broad RICO bill, but lamented that "we can't pass broad coverage."[50]

Many of these very concerns as to the limited nature of the RICO legislation were echoed in the Senate as well. Several Senators voiced concerns that the limited bill would not effectively deal with organized crime.[51] Others, however, noted that it was "time to face reality" in that a "[b]roader bill is not coming out of the House."[52] One of the Senate co-sponsors, Senator Jim Kyle, noted that the limited bill was the House's way of "easing into RICO" and that the limited bill would allow the House to ensure that "the district attorneys are not abusing" the authority granted by the law.[53] Even despite these limitations, however, other Senators

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[46] One of the significant limitations was the adoption of what became Tenn. Code Ann. § 39-12-204(e), which the Court has addressed in other orders. Representative Naifeh noted that this provision was to prevent multiple convictions for a crime and a RICO offense, and he noted that this provision was intended to make the RICO law consistent with the limitations in the Habitual Drug Offender law. *See* House Session March 12, 1986 (Representative Naifeh speaking on Amendment No. 2).

[47] *See* House General Welfare Committee February 25, 1986 (Representative Burnette).

[48] *See* House Session March 12, 1986 (Representative Turner's comments following passage of the bill).

[49] *See* House Session March 12, 1986 (Representative Moore's comments both before and following passage of the bill).

[50] *See* House Session March 12, 1986 (Speaker McWherter's comments asking members to vote for the limited RICO bill).

[51] *See* Senate Session March 5, 1986 (Senators Cohen, Dunavant, Kyle).

[52] *See* Senate Session March 5, 1986 (Senator Lashlee).

[53] *See* Senate Session March 5, 1986 (Senator Kyle's comments in response to Senator Dunavant).

expressed concerns with RICO legislation generally, suggesting that the bill tended to presume guilt unless proven innocence.[54]

C. LIMITATIONS IN TENNESSEE'S RICO ACT

With this intention to reject a broad RICO Act, it is unsurprising that our Tennessee anti-racketeering statute contains significant limitations. As this Court has noted in previous orders, these significant limitations were manifested in both substantive and procedural forms.

Like its federal counterpart, the Tennessee RICO Act expressly prohibits conspiracies to engage in a pattern of racketeering activity for prohibited purposes, such as acquiring an interest in an "enterprise."[55] However, the RICO Act places significant limitations on the nature of liability for a RICO conspiracy under Tennessee law:

- The RICO Act specifically requires that, if the indictment charges multiple conspiracies to violate the RICO Act, then it must allege these different conspiracies in separate counts of the indictment.[56]

- The RICO Act also requires that each alleged violation contains the factual basis supporting the charge in the count of the indictment alleging the violation.[57]

- Furthermore, the RICO Act requires that the state "prove that there was a meeting of the minds *between all co-conspirators* to violate" a specific substantive provision of the RICO Act.[58]

The last of these limitations in the anti-racketeering context is unique to Tennessee law. The federal RICO law does not contain any similar limitation that a meeting of the minds exists "between all co-conspirators,"[59] and, insofar as the Court is able to determine, no other state adopting an anti-racketeering statute limits the application of its racketeering conspiracy law in this way. For example, Florida's RICO law, which was frequently cited as a model by the

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[54] *See* Senate Session March 5, 1986 (Senators Lewis).

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

[56] *See* Tenn. Code Ann. § 39-12-204(e) ("Multiple and alternative violations of this section [-204] shall be alleged in multiple separate counts . . . .").

[57] *See* Tenn. Code Ann. § 39-12-204(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.").

[58] *See* Tenn. Code Ann. § 39-12-204(f) ("In order to convict a person or persons under this part, based upon a conspiracy to violate any subsection of this section, the state must prove that there was a *meeting of the minds between all co-conspirators* to violate this part and that an overt act in furtherance of the intention was committed." (emphasis added)).

[59] *See* 18 U.S.C. § 1962(d) ("It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.").

General Assembly in the years leading up to the 1986 passage of our RICO Act,[60] has never included any such limitation.

Moreover, the limitation that there be a meeting of the minds "between all co-conspirators" is also unique within Tennessee conspiracy law itself. No other statute permitting conspiracy liability in any context contains this express limitation, and our courts have not imposed such a limitation on conspiracies to violate Tennessee law. Nevertheless, as is discussed more fully below, these limitations greatly impact the allegations of the superseding presentment.

D. Effect of Prior RICO Limitations on the 2012 RICO Amendments

Following the passage of the RICO Act in 1986, these limitations may not have had a significant impact. As part of its original enactment in 1986, the General Assembly limited application of the RICO Act only to significant drug offenses, and the newly passed RICO Act was not originally intended to apply to organized crime more generally. Indeed, the original 1986 House sponsors repeatedly announced that any attempt to amend the bill to include broader application to other aspects of organized crime, including gambling, prostitution, or pornography, would result in the bill being withdrawn from consideration.[61]

In the limited context of drug trafficking, it may not be a difficult proposition to allege facts showing the presence of an agreement existing "between all co-conspirators." However, when the General Assembly amended the RICO Act in 2012 to add criminal-gang offenses to the types of prohibited racketeering activity, it significantly broadened the scope of criminal activity to which a substantive RICO liability could apply. And, as the plain language of these 2012 amendments show, multiple different types of crimes may be committed as part of the pattern of racketeering activity.

In broadening the application of the RICO Act, though, the legislature did not account for how the original 1986 limitations would affect its 2012 legislation. This resulted in a mismatch between the later intention to broaden criminal RICO exposure and the earlier mechanisms meant to restrict that very exposure.

To their credit, perhaps, the sponsors of the 2012 RICO legislation recognized this mismatch almost immediately, and in 2013, the sponsors again came forward with legislation to specifically eliminate three of the more significant limitations from 1986, including the

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[60] *See* Senate Session March 5, 1986 (Senator Person) (noting that he had previously introduced a RICO bill that was patterned after Florida's law, which he characterized as being "one of the strongest RICO acts in the United States"); *see also id.* (Senator Cohen noting that Florida "has the best" RICO legislation).

[61] *See* House General Welfare Committee February 25, 1986 (Representative Naifeh noting that he had given this commitment to others in order to gain support for a limited RICO bill addressing only drug trafficking); *see also* House Session March 12, 1986 (during debates on Amendment No. 9 proposed by Representative Moore to add obscenity and pornography to the scope of RICO predicate acts, Representative Naifeh reiterating that, if the amendment passed, he would withdraw the RICO bill from consideration).

limitations expressed in Tenn. Code Ann. § 39-12-204(e) and -204(f).[62] However, this 2013 attempt to remove these limitations failed, and although this defeat was likely due to the presence of an unrelated fiscal note attached to other unrelated aspects of the legislation,[63] the General Assembly has nevertheless left these limitations in place ever since.

Of course, it goes without saying that this Court, which is charged with applying the law as it exists, is not free to "alter or amend statutes or substitute [its] policy judgment for that of the Legislature."[64] As our Supreme Court has recognized,

> We note that even were we to agree that the State's position represents the more appropriate view regarding the scope and extent of criminal attempt liability, this Court "does not typically function as a forum for resolution of public policy issues when interpreting statutes." Consequently, we are bound by the law as it is, not as we would have it be, and to that end, we are not free to adopt constructions that are plainly contrary to the language of the statute.[65]

As such, whatever limitations may exist in the RICO Act, particularly with respect to conspiracy liability, the Court must take these limitations at face value, saying *sic lex scripta* and obeying the law's command.[66]

III. ALLEGATIONS OF THE SUPERSEDING PRESENTMENT

With these basic principles in mind, the Court now looks to the allegations of the superseding presentment. The RICO Act itself does not create a single overall "racketeering crime."[67] Rather, the RICO Act substantively creates three separate and independent crimes, each of which involves a pattern of racketeering activity that is used to achieve different goals and objects. Importantly, with respect to each of the crimes, the purpose of the racketeering

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

[63] As the Court has noted in an earlier opinion, it seems likely that the rejection of HB1025 in the House during the 2013 session was due to a late-filed fiscal note. The fiscal note was attached to the House bill on April 15, 2013, and it projected an increase in state expenditures of $743,900 for new incarceration as a result of the expanded predicate acts consisting of the new sexual offenses. *That same day*, April 15, 2013, the bill was tabled in the House of Representatives, and the next day, the Senate recalled SB291 which had previously passed that body.

[64] *See Coleman v. Olson*, 551 S.W.3d 686, 694 (Tenn. 2018) (citing *Armbrister v. Armbrister*, 414 S.W.3d 685, 704 (Tenn. 2013)).

[65] *See State v. Mateyko*, 53 S.W.3d 666, 677 (Tenn. 2001) (citations omitted).

[66] *See Kradel v. Piper Indus., Inc.*, 60 S.W.3d 744, 749 (Tenn. 2001) ("When the language contained within the four corners of a statute is plain, clear, and unambiguous, the duty of the courts is simple and obvious, to say *sic lex scripta*, and obey it." (quoting *ATS Southeast, Inc. v. Carrier Corp.*, 18 S.W.3d 626, 630 (Tenn. 2000) (citation and internal quotation marks omitted))).

[67] *Cf. Beck v. Prupis*, 529 U.S. 494, 512 (2000) (Stevens, J, dissenting) ("Racketeering activities, however, are not 'independently wrongful under RICO.' They are, of course, independently wrongful under other provisions of state and federal criminal law, but RICO does not make racketeering activity itself wrongful under the Act. The only acts that are 'independently wrongful under RICO' are violations of the provisions of § 1962.").

activity differs, as does the nature and function of the enterprise itself. As under federal law, the Tennessee RICO Act provides that:

1. no person may receive money from a pattern of racketeering activity and then invest those monies in any property or in an enterprise[68];

2. no person may use a pattern of racketeering activity to then acquire or maintain an interest in, or control, of an enterprise[69]; and

3. no person may participate in an enterprise through a pattern of racketeering activity.[70]

And, for present purposes, the RICO Act also prohibits conspiracies or agreements to violate one or more of these substantive racketeering crimes.[71]

A. WHAT IS THE AGREEMENT OR THE OBJECT OF THE GRAND JURY'S RICO CONSPIRACY?

Because the essence of any conspiracy is its object, or the nature of the agreement to violate the law,[72] and because the object of a RICO conspiracy is to violate a substantive RICO provision,[73] any analysis of Count 2 must first consider what the Grand Jury alleges is the object

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[68] *See* Tenn. Code Ann. § 39-12-204(a) ("It is unlawful for any person who has, with criminal intent, received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of the proceeds or the proceeds derived from the use or investment thereof, in the acquisition of any title to or any right, interest, or equity in, real or personal property or in the establishment or operation of any enterprise.").

[69] *See* Tenn. Code Ann. § 39-12-204(b) ("It is unlawful for any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, an interest in or control of any enterprise of real or personal property.").

[70] *See* Tenn. Code Ann. § 39-12-204(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 or the collection of any unlawful debt.").

[71] *See* Tenn. Code Ann. § 39-12-204(d) ("It is unlawful for any person to conspire or endeavor to violate subsection (a), (b) or (c).").

[72] *See State v. Smith*, 273 S.W.2d 143, 146 (Tenn. 1954) (recognizing that "it is easily seen that the object of any conspiracy is the crime which the defendants conspire to commit").

[73] *See United States v. Leoner-Aguirre*, 939 F.3d 310, 316 (1st Cir. 2019) ("The government's burden in proving a violation of the conspiracy offense, section 1962(d), is to show that the defendant 'knew about and agreed to facilitate' a substantive RICO violation."); *United States v. Jones*, 873 F.3d 482, 489 (5th Cir. 2017) ("To prove a RICO conspiracy, the government must establish (1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendant knew of and agreed to the overall objective of the RICO offense." (citations omitted)); *Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 539 (3d Cir. 2012) ("RICO conspiracy is not a mere conspiracy to commit the underlying predicate acts. It is a conspiracy *to violate RICO*—that is, to conduct or participate in the activities of a corrupt enterprise." (emphasis in original and (citations omitted)); *United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012) ("We caution that the RICO conspiracy statute does not 'criminalize mere association with an enterprise.' Rather, as with traditional conspiracy, criminal liability will attach only to the knowing 'agreement to participate in an endeavor which, if completed would constitute a violation of the substantive statute.'" (citations omitted)); *United States v. Castro*, 89 F.3d 1443, 1450 (11th Cir. 1996) ("In order to

of its RICO conspiracy. In this case, the Grand Jury alleged the object of its conspiracy in the introductory paragraph of Count 2. In that paragraph, the Grand Jury alleged that all of the Defendants, including Mr. Mayes, "unlawfully conspired or endeavored to violate *any of the provisions* of Tennessee Code Annotated § 39-12-204 subsections (a), (b) *or* (c) in violation of Tennessee Code Annotated § 39-12-204(d) . . . ."[74]

The Grand Jury's allegations as to the object of its conspiracy are curious. Although it could have done so, the Grand Jury ***did not*** allege that Mr. Mayes agreed to violate "each" of the substantive RICO prohibitions, subsection (a), (b), *and* (c). Instead, the Grand Jury identified the objects of its alleged conspiracy in the disjunctive, or in the alternative. Although it may have been trying to track the statutory language of the RICO Act, the Grand Jury nevertheless has alleged that Mr. Mayes may have conspired to violate "any" of three separate criminal statutes.

With the allegations phrased in the disjunctive, it is not clear what the objects of the Grand Jury's RICO conspiracy are actually alleged to be. From the Grand Jury's own allegations, it could be that several different conspiracies are alleged to exist. Indeed, from a fair reading of the superseding presentment, at least four possibilities exist:

- **Possibility of a Subsection -204(a) Conspiracy.** It could be that Mr. Mayes agreed to commit the substantive crime of obtaining money from a pattern of racketeering activity and then using that money in the operation of an enterprise. The possibility of such an agreement, which could constitute a conspiracy to violate section -204(a), is supported by the allegations in paragraph 3(k) of Count 2's "Means and Methods" section.[75]

- **Possibility of a Subsection -204(b) Conspiracy:** It could also be that Mr. Mayes agreed to commit the *separate* substantive crime of maintaining an interest in an enterprise through a pattern of racketeering activity. The possibility of such an agreement, which could constitute a conspiracy to violate section -204(b), is supported by the allegations in paragraph 3(b) of Count 2's "Means and Methods" section.[76]

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prove a RICO conspiracy, the government must show an agreement to violate a substantive RICO provision."); *United States v. Sinito*, 723 F.2d 1250, 1260 (6th Cir. 1983) ("In order to prove a RICO conspiracy under 18 U.S.C. § 1962(d), the government must establish, in addition to the aforementioned elements, the existence of an illicit agreement to violate the substantive RICO provision.").

74 *See* Superseding Presentment, Count 2, introductory paragraph (emphasis added).

75 In paragraph 3(k) of the superseding presentment, the Grand Jury alleges that members of the Athens Park Bloods used proceeds of illegal activity, which may be proceeds from a pattern of racketeering activity, in the operation of the criminal-gang enterprise. *See* Superseding Presentment, § 2, ¶ 3(k); Tenn. Code Ann. § 39-12-204(a) (prohibiting any person who has received any proceeds derived from a pattern of racketeering activity to use any part of those proceeds "in the establishment or operation of any enterprise.").

76 In paragraph 3(b) of the superseding presentment, the Grand Jury alleges that defendants "maintained" their interest in the criminal-gang enterprise through a pattern of racketeering activity. *See* Superseding Presentment, § 2, ¶ 3(b); Tenn. Code Ann. § 39-12-204(a) (prohibiting any person, through a pattern of racketeering activity, to maintain an interest in, or control of, any enterprise).

- **Possibility of a Subsection -204(c) Conspiracy:** It could also be that Mr. Mayes agreed to commit the *separate* substantive crime of participating in an enterprise through a pattern of racketeering activity. The possibility of such an agreement, which could constitute a conspiracy to violate section -204(c), is supported by many of the allegations in Count 2's "Means and Methods" section.[77]

- **Possibility of Multiple RICO Agreements:** It also could be that Mr. Mayes simultaneously agreed to racketeer in multiple different ways, such as, for example, that he agreed to commit the crime of purchasing real property with racketeering money and that he also agreed to commit the separate substantive crime of obtaining an interest in an enterprise through a pattern of racketeering activity. These actions could constitute a conspiracy to violate both section -204(a) and section -204(b), as an example.

Other combinations and possibilities exist as well, and in each of these possibilities, there exists the possibility of a different substantive agreement. After all, the nature of the enterprise works differently in the various substantive RICO crimes, as does the purpose of the predicate acts and the pattern of racketeering activity. It is not sufficient simply to allege that the co-conspirators agreed to "violate RICO," as the RICO Act creates three very different substantive crimes.[78]

Because Mr. Mayes is entitled to know "the nature and cause of the accusation" brought against him, one must ask: which of the different racketeering crimes did Mr. Mayes conspire to commit? One of them? More than one of them? All of them?

One simply cannot know on the face of the Grand Jury's own presentment. And, this is a problem.

B. Is there Duplicity in the Indictment?

The fact that the superseding presentment possibly alleges more than one object, or more than one agreement, in its allegations of a RICO conspiracy gives rise to serious issues of fair notice and due process. Tennessee law has long prohibited duplicitous indictments,[79] which are

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[77] Many of the paragraphs in Count 2's "Means and Methods" section suggest the possibility of a conspiracy to violate section -204(c). For example, paragraph 3(m) alleges that defendants participated in the affairs of the criminal-gang enterprise through a pattern of racketeering activity consisting of selling controlled substances. *See* Superseding Presentment, § 2, ¶ 3(m); Tenn. Code Ann. § 39-12-204(c) (prohibiting any person associated with an enterprise to knowingly participate in the enterprise through a pattern of racketeering activity).

[78] Of course, it is possible to have a single RICO conspiracy where the object is to violate all of the substantive RICO provisions. This is why the superseding presentment would have identified an object if it alleged that the co-conspirators agreed to violate "*each* of the provisions of Tenn. Code Ann. § 39-12-204(a), (b), *and* (c)." However, this is not what the Grand Jury alleged. In alleging that the object was any/or of these possibilities, the accused is left to guess what the Grand Jury intended or as to the crime that the Grand Jury found to have been committed.

[79] *See State v. Jones*, No. E2017-00535-SCR-11-CD, 2019 WL 5956361, at *6 (Tenn. Nov. 13, 2019) (citing *State v. Lindsey*, 208 S.W.3d 432, 438 (Tenn. Crim. App. 2006) ("Generally, it is impermissible to charge two distinct offenses in a single count of an indictment."); Tenn. R. Crim. P. 8 (providing that, whether

indictments that "charge two or more distinct and separate offenses in a single-count indictment."[80] The reason for this long-standing prohibition is clear: to ensure that a defendant is provided adequate notice of the allegations; to prevent a violation of double jeopardy principles; and to ensure a unanimous jury verdict."[81]

The requirement of a unanimous jury verdict is fundamental to our protections of liberty in our Republic, and "there should be no question that the unanimity of twelve jurors is required in criminal cases under our state constitution."[82] As the United States Court of Appeals for the Sixth Circuit has recognized,

> The vice of duplicity is that a jury may find a defendant guilty on the count without having reached a unanimous verdict on the commission of any particular offense. By collapsing separate offenses into a single count, duplicitous indictments prevent the jury from convicting on one offense and acquitting on another. Therefore, duplicitous indictments implicate the protections of the Sixth Amendment guarantee of jury unanimity.[83]

Thus, where a single statute contains more than one offense, a citation generally to the statute without reference to the elements of the offense will not suffice to provide notice to the accused of the nature of the charges to be brought against him.[84] Nor may a grand jury include within a single count of an indictment all methods of committing an alleged offense.[85]

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offenses are joined in a single indictment by requirement or by permission, each offense is to be stated in a separate count)).

[80] *See State v. Johnson*, No. M2018-01216-CCA-R3-CD, 2019 WL 3074071, at *7 (Tenn. Crim. App. July 15, 2019) (quoting *State v. Burnette*, No. E2005-00002-CCA-R3-CD, 2006 WL 721306, at *2 (Tenn. Crim. App. Mar. 22, 2006)).

[81] *See State v. Lee*, No. E2017-00368-CCA-R3-CD, 2018 WL 934534, at *4 (Tenn. Crim. App. Aug. 16, 2018)) (citing *State v. Burnette*, No. E2005-00002-CCA-R3-CD, 2006 WL 721306, at *3 (Tenn. Crim. App. Mar. 26, 2006), *perm. app. denied* Sept. 5, 2006); *State v. Weilacker*, No. M2016-00546-CCA-R3-CD, 2018 WL 5099779, at *13 (Tenn. Crim. App. Oct. 19, 2018), *opinion after remand from Sup. Ct.* (same); *State v. Johnson*, No. M2018-01216-CCA-R3-CD, 2019 WL 3074071, at *7 (Tenn. Crim. App. July 15, 2019) ("[T]he purpose behind the prohibition of a duplicitous indictment is the avoidance of the following dangers: (1) failure to give the defendant adequate notice of the charges against him; (2) exposure of the defendant to the possibility of double jeopardy; and (3) conviction of the defendant by less than a unanimous jury verdict." (citations omitted)).

[82] *See State v. Brown*, 823 S.W.2d 576, 583 (Tenn. Crim. App. 1991).

[83] *See United States v. Campbell*, 279 F.3d 392, 398 (6th Cir. 2002) (citations and internal quotation marks omitted).

[84] *See State v. Sharp*, No. W2018-00156-CCA-R3-CD, 2019 WL 960431, at *7 (Tenn. Crim. App. Feb. 26, 2019) ("The reference to Tennessee Code Annotated section 39-15-402 in count one was of no assistance because that statute defines both aggravated child abuse and aggravated 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.").

[85] *See State v. Weilacker*, No. M2016-00546-CCA-R3-CD, 2018 WL 5099779, at *13 (Tenn. Crim. App. Oct. 19, 2018), *opinion after remand from Sup. Ct.* ("The cause of all the problems related to this issue is the State's drafting of Count 2 as an impermissible duplicitous count in the indictment. Count 2 alleges that Defendant committed false imprisonment, by unlawfully and knowingly removing and confining the victim, and (pick your choice) accomplished it by use of a deadly weapon (especially aggravated kidnapping); in order to facilitate

These fundamental principles also apply in a prosecution under the RICO Act, as the RICO Act itself expressly prohibits duplicitous indictments. Rather, if multiple racketeering violations are alleged, the statute specifically commands that the grand jury allege each violation in a separate count and then to set forth the factual basis for that violation in that same count.[86] As such, the Grand Jury here was obliged, both as a matter of common law and by express statutory requirement, to give the Defendant fair notice of the allegations against him by alleging the presence of only one RICO conspiracy in Count 2.

It is not clear that this has occurred, however. Had the Grand Jury alleged that Mr. Mayes violated *each/all* of the RICO subsections, no duplicity issue would exist, as a single conspiracy to violate multiple statutes is clearly permissible.[87] However, by alleging that Mr. Mayes violated *any/or* of the RICO subsections, the superseding presentment appears to allege the presence of multiple different conspiracies, particularly when factual allegations exist that could support conspiracies under each theory.

If this occurred, the Grand Jury violated the express provision of the RICO Act requiring that separate racketeering violations be alleged in separate counts of the indictment, each with its own factual basis alleged.[88] Thus, if the Grand Jury intended to allege the possibility of multiple violations of the RICO Act, as it appears to have done, then it could not, consistent with the RICO Act itself, bring an amalgam of allegations supporting the commission of different substantive conspiracies in Count 2. This principal should not be controversial, and federal courts also appear to follow this same rule.[89]

Of course, when an indictment contains an ambiguity or otherwise lacks necessary information, the indictment may be found valid if other parts of the indictment can resolve the issue.[90] To this end, other parts of Count 2 could be read to limit the objective of the Grand Jury's RICO conspiracy to violate section -204(c).[91] However, because the superseding presentment expressly alleges that Mr. Mayes could have conspired to violate each one of the substantive provisions of the RICO Act, and because the Grand Jury has alleged facts that would

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commission of aggravated robbery of a person other than the victim (aggravated kidnapping); and, caused the victim to suffer serious bodily injuries (a type of especially aggravated kidnapping different than the first charge of especially aggravated kidnapping). These three charges should have been set forth in three separate counts of the indictment.").

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

[87] *See* Tenn. Code Ann. § 39-12-103(c).

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

[89] *See United States v. Tocco*, 200 F.3d 401, 410 (6th Cir. 2000) (charging in different counts separate RICO conspiracies with separate objectives, including collection of unlawful debt and engaging in a pattern of racketeering activity).

[90] *See Romero v. State*, No. E2018-00404-CCA-R3-PC, 2019 WL 2173545, at *8 (Tenn. Crim. App. May 20, 2019) (citing *State v. Nixon*, 977 S.W.2d 119, 121-22 (Tenn. 1997) (finding that the omission of the defendants' names in the body of a single-count indictment was not fatal because the defendants' names appeared on the cover sheet); *Mullins*, 571 S.W.2d at 854 (recognizing that "our Supreme Court has held that in a multi-count indictment, references in one count may be used in aid of identification allegations made in another count") (citing *Chapple v. State*, 135 S.W. 321 (1910)).

[91] For example, in paragraph 2 of Count 2's introductory paragraph, the allegations speak in the language of a conspiracy to violate section -204(c).

support a conspiracy to violate each of the substantive provisions of the RICO Act, the language in other parts of Count 2 cannot be read to eliminate the ambiguity.

Ultimately, by joining the possibility of separate and alternate conspiracies into one subsection—with the factual basis for each alleged type of conspiracy also combined and commingled with each other—the Grand Jury's allegations expressly violate subsection -204(e). In other words, the RICO Act itself *expressly prohibits* the very type of combined allegations that the Grand Jury has attempted in this case. Moreover, by failing to identify the object, or the racketeering crime(s), that Mr. Mayes agreed to commit, the Grand Jury has not performed its most essential task of providing notice to Mr. Mayes of "the nature and cause of the accusation" brought against him.[92] As such, because the manner in which the Grand Jury has brought Count 2 has itself ignored and violated the express terms of the RICO Act, Count 2 cannot stand in its present form.

C. Is a "Meeting of the Minds Between All Co-Conspirators" Properly Alleged?

The Grand Jury's failure to clearly identify the object or objects of its RICO conspiracy has a more fundamental issue: Count 2 has failed to allege that all Defendants alleged to be part of its RICO conspiracy reached "a meeting of the minds" as to the object of their conspiracy. In other words, the Grand Jury has not alleged that a meeting of the minds existed "between all" fifty-five co-defendants as to the object of the alleged conspiracy.

As recognized above, the RICO Act itself expressly provides that

> [i]n order to convict a person or persons under this part, based upon a conspiracy to violate any subsection of this section, the state must prove that there was *a meeting of the minds between all co-conspirators* to violate this part and that an overt act in furtherance of the intention was committed.[93]

No party disputes that a meeting of the minds "between all co-conspirators" is an essential element of a RICO conspiracy offense, as the statute requires proof of this fact before criminal liability may be imposed on any person in the first instance. As such, where an

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[92] *See* U.S. Const. amend. VI; *see also* Tennessee Const. art. I, § 9 (providing that "in all criminal prosecutions, the accused hath the right to . . . demand the nature and cause of the accusation against him, and to have a copy thereof . . . ."). Importantly, the Court does not hold or suggest that the trial jury ultimately seated in this case must agree as to the means used to accomplish the objects of the conspiracy, such as the commission of particular predicate acts existing as part of a pattern of racketeering activity. *See, e.g.*, *United States v. Rios*, 830 F.3d 403, 434 (6th Cir. 2016) ("But a jury need not agree on which overt act, among several, was the means by which a crime was committed. And the RICO conspiracy statute contains no requirement of some overt act or specific act at all. For that reason, we have suggested that to convict a defendant of RICO conspiracy, the jury need not be unanimous as to the specific predicate acts that the defendant agreed someone would commit." (citations and internal quotation marks omitted)). Nevertheless, the Grand Jury's allegations must be sufficiently and simply stated such that the ultimate trial jury can agree as to what the objective of the conspiracy was, or what *racketeering crime or crimes* the Defendant actually conspired to commit.

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

indictment fails to allege the presence of this essential element, the indictment will also fail to state a RICO conspiracy offense. In such a case, this Court would not have jurisdiction to hear and decide the case.

As noted above, this essential element is unique, both *to* and *in*, Tennessee law, and it compels conclusions that are fundamentally different from, and far more restrictive than, those compelled under federal racketeering principles. As noted above, the Fifth Circuit recognized in *Elliott* that the power of the RICO conspiracy lies in the conception that the "enterprise supplies a unifying link between all the predicate acts charged, since all the predicate acts [in a subsection (c) conspiracy] must be committed in the conduct of the affairs of an enterprise."[94] This legal theory under federal law thus permits different actors to conspire with different people to commit different predicate acts, so long as all people involved are participating in the same enterprise.

However, the Tennessee requirement that a meeting of the minds must exist "between all co-conspirators" effectively eliminates the possibility, which is permitted under federal law, that separate, unrelated agreements to violate the RICO Act can be wrapped into a single RICO conspiracy. This conclusion follows because, when a meeting of the minds must exist "between all" co-conspirators, the individuals comprising the RICO conspiracy must necessarily know of, and reach an agreement with, *each and every one*[95] of the other co-conspirators as to the object of the conspiracy.[96] Indeed, if this provision were not intended to prevent the prosecution of separate objects and different participants under the umbrella of a single large RICO conspiracy, the language itself would have no meaning or purpose. And, our courts never presume that the General Assembly would enact a statute with meaningless or useless language.[97]

When a grand jury fails to allege the object of a RICO conspiracy, or the particular racketeering crime or crimes that the co-conspirators agreed to commit, it will inevitably fail to allege facts showing that a meeting of the minds existed "between all co-conspirators." That is what happened here. By not identifying the goal of its alleged conspiracy, and by expressly alleging that Mr. Mayes alternatively violated "any" of the substantive RICO prohibitions, the Grand Jury has specifically allowed for the possibility that some co-conspirators agreed to

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[94] *See United States v. Welch*, 656 F.2d 1039, 1052 (5th Cir. 1981).

[95] The phrase "between all co-conspirators" is a significant limitation. Our Supreme Court has recognized generally that the term "all" means "all." *See Culbreath v. First Tennessee Bank Nat. Ass'n*, 44 S.W.3d 518, 524 (Tenn. 2001) ("[W]e conclude that 'all liabilities' means all liabilities. We reach this conclusion not only based upon the ordinary meaning of the word 'all' but also upon consideration of the whole statute."). Indeed, the term "all" does not mean "not some, or a part, or a portion, or a few." *See State v. Good Times, Ltd.*, No. E2007-1172-COA-R3-CV, 2008 WL 4334894, at *4 (Tenn. Ct. App. Sept. 23, 2008).

As such, it would not be enough for a RICO conspirator to reach a meeting of the minds only with a central person in a hub-and-spoke conspiracy. He or she also needs to have a meeting of the minds with all other co-conspirators, including each of the members who are on different spokes of the conspiracy. This limitation is a clear departure from federal law, where the enterprise itself could form the basis of a hub conspiracy under a subsection (c) RICO conspiracy and where the RICO co-conspirators may not even know of each other.

[96] One way to avoid the practical consequences of this language, of course, is for a grand jury to allege the presence of multiple conspiracies involving a small number of participants.

[97] *See Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 526 (Tenn. 2010) ("This Court may presume that the legislature used every word deliberately and that each word has a specific meaning and purpose, did not intend to enact a useless statute . . . ." (citations and internal quotation marks omitted)).

racketeer for one or more objects—such as using racketeering funds to invest in an enterprise, for example—while other co-conspirators agreed to racketeer to achieve completely different objects—such as participation in an enterprise, as another example. If the Grand Jury cannot identify the objective(s) of its RICO conspiracy, except as being among one or more of several possible alternatives, how could it possibly allege that a meeting of the minds was reached "between all" of the alleged co-conspirators as to these objects?

In this case, the Grand Jury did not specifically allege that Mr. Mayes reached a meeting of the minds with all fifty-four of his alleged co-conspirators as to the object(s) of a RICO conspiracy.[98] It is true, as the Court has noted above, that agreements in the real world of conspiracy crimes are rarely formalized. It is more often that the actions of conspirators will reveal the object of the conspiracy and the facts of the parties' agreement.[99] There is no doubt that this is one of the reasons that the RICO Act itself specifically requires that the factual basis for the RICO conspiracy be set forth in the indictment.[100]

To that end, and in the absence of a specifically-pled allegation as to a meeting of the minds "between all" co-conspirators, it could be that the factual basis set forth by the Grand Jury could fairly allege the existence of this essential element. However, even on a fair and objective reading, the Court makes the following observations:

1. Count 2 makes no mention of Mr. Mayes at all, except to name him as one of the alleged co-conspirators in its introduction.

2. Count 2 does not allege that Mr. Mayes agreed with anyone, much less that he agreed with everyone, about what the object of any RICO conspiracy may be.

3. Count 2 does not allege that Mr. Mayes agreed with anyone, much less that he agreed with everyone, that *he* would engage in a pattern of racketeering activity for one or more of the prohibited purposes under the RICO Act.

4. Count 2 does not allege that Mr. Mayes agreed with anyone, much less that he agreed with everyone, that he would support *another person* or persons engaging in a pattern of racketeering activity for one of the prohibited purposes under the RICO Act.

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[98] This is an important point. The language of the superseding presentment does allege that the Defendants "conspired," and if the object of the conspiracy were identified, these combined allegations likely would be sufficient to establish this essential element for purposes of the indictment. In the absence of these allegations, however, the Court further identifies the factual basis set forth by the Grand Jury to determine whether the superseding presentment fairly alleges a meeting of the minds "between all" co-conspirators.

[99] *See State v. Marsh*, No. M2017-02360-CCA-R3-CD, 2019 WL 413678, at *4 (Tenn. Crim. App. Feb. 1, 2019); *see also State v. Pike*, 978 S.W.2d 904, 915 (Tenn. 1998) ("While the essence of the offense of conspiracy is an agreement to accomplish a criminal or unlawful act, the agreement need not be formal or expressed, and it may be proven by circumstantial evidence." (internal citation omitted)); *State v. Clayton*, No. W2018-00386-CCA-R3-CD, 2019 WL 3453288, at *7 (Tenn. Crim. App. July 31, 2019) ("'The unlawful confederation may be established by circumstantial evidence and the conduct of the parties in the execution of the criminal enterprise.'" (quoting *Randolph v. State*, 570 S.W.2d 869, 871 (Tenn. Crim. App. 1978))).

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

5. Count 2 does not allege that Mr. Mayes agreed with anyone, much less that he agreed with everyone, that he would participate himself in any of the "means and methods" alleged to evidence the Grand Jury's RICO conspiracy.

6. Count 2 does not allege that Mr. Mayes agreed with anyone, much less that he agreed with everyone, that he would support others participating in any of the "means and methods" alleged to evidence the Grand Jury's RICO conspiracy.

In fairness, the allegations of Count 2 also incorporate the factual allegations contained in Count 1 of the superseding presentment,[101] and Count 1 does allege that Mr. Mayes and others committed various criminal-gang offenses alleged to be part of a pattern of racketeering activity.[102] Therefore, it could be that these allegations of fact are sufficient, at this stage, to support the existence of an agreement "between all" defendants to violate the RICO Act.

Upon examination, however, the incorporation of Count 1 is not particularly helpful, and it may actually further highlight the deficiencies in Count 2. Prior to July 1, 2012, which was the effective date of the RICO Act, the law did not criminalize racketeering conspiracies involving criminal-gang offenses. Nevertheless, the Grand Jury has included within its RICO conspiracy at least five people whose alleged criminal-gang activity ceased *years* before that time,[103] and Mr. Mayes is not alleged to have any connection with these persons, particularly after July 1, 2012:

- The last act alleged to have been committed by co-conspirator Countess Clemons is alleged to have been committed in October 2010.[104] Mr. Mayes is not alleged to be involved at all with Ms. Clemons in 2010 or at any time after July 1, 2012.

- The last act alleged to have been committed by co-conspirator Dutchess Lykes is alleged to have been committed in 2011.[105] Mr. Mayes is not alleged to be involved at all with Ms. Lykes in 2009 or at any time after July 1, 2012.

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[101] *See* Superseding Presentment, Count 2, § 1 ("All previous gang offenses which are further defined in Count One of this presentment are herein incorporated into Count Two by reference."). Of course, such pleading is perfectly permissible. *See State v. Duncan*, 505 S.W.3d 480, 490 (Tenn. 2016) ("It has long been settled that, to determine whether a single count in an indictment provides adequate notice to the defendant, the court may read that count together with other counts in the indictment. '[I]f it is reasonably clear from the averments ... that [they are] connected with and a part of the preceding count ... such a count may be considered good.'" (quoting *State v. Youngblood*, 199 Tenn. 519, 287 S.W.2d 89, 91 (Tenn. 1956))).

[102] *See* Superseding Presentment, Count 1, § 2, ¶ 37.

[103] Or, more properly, none of these co-conspirators is alleged to have participated in a criminal-gang offense or in a pattern of racketeering activity after these dates.

[104] *See* Superseding Presentment, Count 1, § 2, ¶ 16.

[105] *See* Superseding Presentment, Count 1, § 2, ¶ 35. Of course, two years prior to these acts, Ms. Lykes is also alleged to have conspired with Courtney High and others to commit arson in 2009. *See* Superseding Presentment, Count 2, ¶ 3(n)(2). Although there may be some question as to whether the crime of arson can constitute racketeering activity if it did not involve actual or threatened death or serious bodily injury, *see* Tenn. Code Ann. § 39-12-203(9), the nature of those acts is immaterial for analysis of Count 2. At worst, the arson allegations are surplusage, and they would not otherwise affect the validity of the indictment. *See State v. March*, 293 S.W.3d 576, 588 (Tenn. Crim. App. 2008) (citing *State v. Culp*, 891 S.W.2d 232, 236 (Tenn. Crim. App.

- The last act alleged to have been committed by co-conspirator Broderick Lay is alleged to have been committed in 2009.[106] Mr. Mayes is not alleged to be involved at all with Mr. Lay in 2009 or at any time after July 1, 2012.

- The last act alleged to have been committed by co-conspirator Darrius Sneed is alleged to have been committed in 2007.[107] Mr. Mayes is not alleged to be involved at all with Mr. Sneed in 2007 or at any time after July 1, 2012.

- The last act alleged to have been committed by co-conspirator Andre Thomas is alleged to have been committed in 2007.[108] Mr. Mayes is not alleged to be involved at all with Mr. Thomas in 2007 or at any time after July 1, 2012.

The inclusion of these five people in an alleged RICO conspiracy with Mr. Mayes is problematic. Although Count 2 alleges that these five people "conspired" with each other, these five people are as completely absent from any conspiracy allegations as if they did not exist in the first instance. With respect to these five people, no allegation shows even as much as their knowledge, acquiescence, or approval of the acts of others, much less their cooperation or agreement to cooperate with others to commit a violation of the RICO Act after July 1, 2012.[109]

Because the Grand Jury has not alleged any facts showing that a meeting of the minds existed "between all" co-conspirators, including these five people, to violate the RICO Act in any way after July 1, 2012, Count 2 cannot stand in its present form.[110] Importantly, this conclusion is the consequence of the limitation in section -204(f) of our RICO Act that there must be "a meeting of the minds between all co-conspirators." As such, while different arguments could be presented if these five Defendants were not part of the Grand Jury's RICO conspiracy, the fact remains that the Grand Jury specifically included these defendants within the scope of its conspiracy.

Accordingly, because the Grand Jury has not alleged facts showing that Mr. Mayes reached a meeting of the minds with each of these five other co-conspirators—or they with

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1994)); *Smith v. Myers*, No. 2005-01732-CCA-R3-HC, 2005 WL 3681656, at *2 (Tenn. Crim. App. Jan. 18, 2006) ("It is well-settled that an indictment is not defective because of the inclusion of surplusage if, after eliminating the surplusage, the offense is still sufficiently charged."). The more important issues relate to whether a meeting of minds is alleged to exist "between all" co-conspirators to violate the RICO Act.

106 *See* Superseding Presentment, Count 1, § 2, ¶ 32.

107 *See* Superseding Presentment, Count 1, § 2, ¶ 51.

108 *See* Superseding Presentment, Count 1, § 2, ¶ 53.

109 *See State v. Cook*, 749 S.W.2d 42, 44 (Tenn. Crim. App. 1987) ("Mere knowledge, acquiescence, or approval of the act, without cooperation or agreement to cooperate, is not enough to constitute one a party to a conspiracy." (citing *Solomon v. State*, 76 S.W.2d 331, 334 (Tenn. 1941))).

110 To the contrary, the superseding presentment gives no indication whatsoever that the Grand Jury found *any* facts supporting probable cause to believe that Mr. Mayes discussed with anyone, much less that he agreed with everyone, that someone would engage in a pattern of racketeering activity for a prohibited purpose. To be clear, the Court is not looking for evidence or proof to support any allegations at this stage. Rather, because the RICO Act itself contains special pleading requirements, it requires the Grand Jury to set forth the factual basis for its alleged RICO conspiracy to be alleged in this same count. *See* Tenn. Code Ann. § 39-12-204(e). The Grand Jury simply has not done so with respect to Mr. Mayes.

him—to violate the RICO Act after 2012,[111] an essential element of a RICO conspiracy is missing. Without this essential element, no RICO conspiracy has been properly alleged, and this Court lacks jurisdiction to adjudicate the claim.[112] Mr. Mayes's motion is well taken and should be granted.

IV. PUBLIC POLICY CONSEQUENCES OF TENNESSEE'S NARROW LAW

As it has done in previous orders, the Court reflects upon the practical policy decisions evident in both the limitations found in Tenn. Code Ann. § 39-12-204(e) and Tenn. Code Ann. § 39-12-204(f). 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, the conclusions reached here today would not necessarily follow under the federal RICO law or under the RICO acts of other states, such as Florida. In those latter examples, a subsection (c) conspiracy could properly proceed even if Mr. Mayes did not reach a meeting of the minds "between all" of his alleged co-conspirators, at least so long as each of these persons had agreed, through participation in the enterprise itself, to commit a racketeering offense in violation of the RICO Act. As the Eleventh Circuit has recognized with respect to federal law,

> [I]n proving the existence of a single RICO conspiracy, the government does not need to prove that each conspirator agreed with every other conspirator, knew of his fellow conspirators, was aware of all of the details of the conspiracy, or contemplated participating in the same related crime. A mere [a]greement to participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity brings a defendant within the conspiracy regardless of the unrelatedness of the acts of other members of the conspiracy.[113]

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[111] Given the allegations of unlawful activity among these five people existing as early as 2001 in one case, it may be that the Grand Jury believed that some agreement existed prior to 2012 and continued after a "change in the law" with the effective date of the RICO amendments at that time. Even if so, the Grand Jury did not allege any participation by these five people in the RICO conspiracy after 2012. *See Agee v. State*, 111 S.W.3d 571, 577 (Tenn. Crim. App. 2003) ("If evidence exists that Petitioner participated in the conspiracy after the effective date of the change in the law, the amended law may be applied to Petitioner's criminal conduct without violating the constitution.").

[112] Other issues also exist with respect to Count 2 as well, though full analysis is not necessary to the Court's holding. To constitute a RICO conspiracy, the nature of the agreement is not simply one to commit individual or isolated offenses, even if these offenses qualify as criminal-gang offenses. Rather, the prohibited agreement is one to engage in a pattern of racketeering activity for a prohibited purpose. By statutory definition, a pattern of racketeering activity involves the *interrelation* of the crimes such that the crimes have "the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics." The legislature made clear that to constitute a "pattern," the racketeering activity "cannot consist of 'isolated incidents.'" *See* Tenn. Code Ann. § 29-12-202(b)(1).

Yet, this is all that the Grand Jury has alleged in Count 2—isolated incidents of conduct without facts showing any interrelation. In other words, the State could prove every fact actually alleged by the Grand Jury in Count 2 and still not prove the conspiracy offense with respect to any co-defendant. Proof of the Grand Jury's allegations would still fail to prove a meeting of the minds "between all" co-conspirators, and it would not show interrelation between the crimes by distinguishing characteristics.

[113] *See United States v. Godwin*, 765 F.3d 1306, 1324 (11th Cir. 2014) (internal quotation marks and citations omitted).

Applying these federal principles to Mr. Mayes's case, so long as Mr. Mayes agreed to participate in the criminal gang through a pattern of racketeering activity, it would not be particularly relevant that he did not know of others in the gang; that he was unaware of all details of the gang activity; or that his own actions were unrelated to the acts of others. With our own RICO Act limitations, however, these concerns become more relevant.

One may or may not prefer these public policy consequences today, but these consequences are the natural result of the unique requirements of our Tennessee legislation that was heavily debated and carefully considered in 1986. In 2013, legislation was proposed that would have repealed both sections -204(e) and -204(f).[114] Although this Court will not ascribe particular motivations to the ultimate defeat of this 2013 legislation,[115] 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.

Ultimately, if the General Assembly does not intend the consequence of this statutory language, it has the sole power to reconsider these limitations 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.[116] After all, the General Assembly "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."[117]

CONCLUSION

For the foregoing reasons, the Court finds that Count 2 of the superseding presentment is not consistent with key limiting provisions of the RICO Act. First, by alleging the possible existence of at least four RICO conspiracies with different substantive objects and agreements, the Grand Jury has failed to provide notice of "the nature and cause of the accusation" brought against the accused.

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

[115] *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 . . . .").

[116] *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))).

[117] *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)).

Second, the Grand Jury's alternate pleading raises concerns that the superseding presentment does not comply with Tenn. Code Ann. § 39-12-204(e). This provision requires that multiple conspiracies must be alleged in "separate counts," with the factual basis for each conspiracy set forth in that count.[118] By combining possible alternative conspiracies into a single count, the Grand Jury has failed to comply with these express provisions meant to ensure the unanimity of a jury verdict at trial; to preserve due process; and to protect against double jeopardy concerns.

Finally, by alleging the objects of the RICO conspiracy in the alternative, the Grand Jury did not comply with Tenn. Code Ann. § 39-12-204(f). By not identifying the objective(s) of its RICO conspiracy, except as being among one or more of several possible alternatives, it has failed to allege that a meeting of the minds was reached "between all" of fifty-five members of the conspiracy as to its object(s).

Because the manner in which the Grand Jury has brought Count 2 has itself violated the express terms of the RICO Act on each of these grounds, Count 2 cannot stand in its present form. As such, the Court has no choice but to **GRANT** Mayes Motion No. 13. Although the Court grants the motion, it does so without prejudice to the Grand Jury's reconsideration of an indictment or presentment that alleges each of the essential elements of a RICO conspiracy offense and that is in the form required by the RICO Act.

"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."[119] The same flaws that exist with respect to Mr. Mayes's case also exist in every other case in which Count 2 has been brought. Noticing, therefore, the absence of its jurisdiction in each of the other consolidated cases as well—both in those formally joining, and in those not joining, in Mayes Motion No. 13[120]—the Court also dismisses Count 2 in all remaining cases.

A separate order will enter that formally resolves this Count in each of the consolidated *Allen* cases.

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[118] *See* Tenn. Code Ann. § 39-12-204(e) (emphasis added). The Grand Jury may have supposed that the statutory language describing "[m]ultiple and alternative violations of this section" refers only to the substantive RICO provisions in subsections (a), (b), and (c) and not the conspiracy provisions in subsection (d). If so, it was in error. The phrase "violations of this section" refers to the entirety of section -204, and each one of the subsections (a) through (d) similarly begin with phrase "it is unlawful for any person" to commit the acts described therein. The conspiracy provisions contained in section -204(d) describing conduct made unlawful are as much a part of "this section" as are the other RICO violations.

[119] *See Wilson v. Sentence Info. Services*, No. M1998-00939-COA-R3-CV, 2001 WL 422966, at *4 (Tenn. Ct. App. Apr. 26, 2001) (citing *Edwards v. Hawks*, 222 S.W.2d 28, 31 (Tenn. 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)).

[120] 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)).

It is so ordered.

Enter, this the 7th day of February, 2020.

TOM GREENHOLTZ, Judge

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