

STATE OF TEXAS ) IN THE DISTRICT COURT  
VS. ) 227TH JUDICIAL DISTRICT  
KENNETH SMITH ) BEXAR COUNTY, TEXAS

**DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

Kenneth Smith moves that the indictment filed in this case be set aside by virtue of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I §§ 10 and 19 of the Texas Constitution, and Articles 1.05, 21.01, 21.02, 21.03, 21.04, and 21.11 of the Texas Code of Criminal Procedure for the following reasons:

I.

Count one of the indictment is defective because it purports to charge defendant with denying and impeding a person in custody “in the exercise and enjoyment of any right, power, privilege and immunity,” however, these terms are not further defined or explained. Defendant is not fairly or adequately notified of the specific acts or acts that form the basis of the accusation against him and because these terms are not defined, defendant is not protected from future prosecution for the same acts. A defendant charged with violating another’s civil rights is entitled to know what he did to deny or impede the complainant’s enjoyment or exercise of his rights, privileges or immunities so that he can properly prepare a defense as well as enable him to plead any resulting judgment to bar further prosecution for the same offense.

## II.

Counts one and two of the indictment are defective because they do not specify which of the several varieties of “assault” complainant allegedly suffered, although several are provided for by the Texas Penal Code.

## III.

Counts one and two of the indictment are also defective because they fail to state the alleged rights, privileges, powers, and immunities of the complainant’s that were allegedly denied and impeded.

## IV.

Count two is defective because it alleges that defendant acted under color of his office or employment, but does not specify which of the manner and means specified by § 39.03(b) of the Texas Penal Code.

## V.

1. The indictment does not accuse defendant of an "act or omission which, by law, is declared to be an offense", in violation of TEX. CODE CRIM. PROC. ANN. Art. 21.01.
2. The offense is not "set forth in plain and intelligible words", in violation of TEX. CODE CRIM. PROC. ANN. Art. 21.02(7).
3. The indictment does not state "[e]verything . . . which is necessary to be proved", in violation of TEX. CODE CRIM. PROC. ANN. Art. 21.03.
4. The indictment does not possess "[t]he certainty . . . such as will enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offense," in violation of TEX. CODE CRIM. PROC. ANN. art. 21.04 and the Fifth, Sixth and Fourteenth

Amendments to the United States Constitution and Article I §§ 10 and 19 of the Texas Constitution.

5. The indictment does not "charge[] the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant and with what degree of certainty that will give the defendant notice of the particular offense with which he is charged, and enable the court, on conviction, to pronounce the proper judgment . . ." in violation of TEX. CODE CRIM. PROC. ANN. art. 21.11 and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, §§ 10 and 19 of the Texas Constitution.

WHEREFORE, premises considered, the defendant prays that the Court set aside the indictment in the above-numbered and entitled cause.

Respectfully submitted:

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### **CERTIFICATE OF SERVICE**

I certify that a copy of defendant's Motion To Set Aside The Indictment has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 1st day of July, 2018.

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MARK STEVENS

**ORDER**

On this the \_\_\_\_\_ day of \_\_\_\_\_, 2018, came on to be considered Defendant's Motion to Set Aside the Indictment, and said Motion is hereby

(GRANTED) (DENIED)

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JUDGE PRESIDING