

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 379TH JUDICIAL DISTRICT
JOE SMITH) BEXAR COUNTY, TEXAS

DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Joe 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, 21.11 and 21.15 of the Texas Code of Criminal Procedure for the following reasons:

I.

Count IA

Securing Execution Of Document By Deception

1. The allegation in Count IA, that defendant deceived the owners “by submitting a fraudulent Cost Certification,” is defective because it fails to sufficiently identify or describe the so-called fraudulent Cost Certification in question, either verbally, or *in haec verba*, and it fails to allege how it is “fraudulent.” *See Swabado v. State*, 597 S.W. 2d 361, 363 (Tex. Crim. App. 1980); *Amaya v. State*, 551 S.W. 2d 385, 387 (Tex. Crim. App. 1977); *See also* TEX. CODE CRIM. PROC. ANN. art. 21.09.
2. Count IA of the indictment is defective because it alleges that defendant submitted a fraudulent Cost Certification, but does not allege the manner and means of this purported submission. *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v.*

State, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978) (information for animal cruelty must allege manner and means by which defendant tortured the animal).

3. Count IA purports to enumerate the sort of deception caused in this case, namely, that Mr. Smith created or confirmed by words or conduct a false impression of fact likely to affect the judgment of another, but it does not allege the “words or conduct” used, or the “false impression of fact” that was created or confirmed, or whose judgment was likely to be affected.
4. Count IA of the indictment alleges that defendant caused John Jones to sign or execute a document, but does not adequately allege the manner and means by which this act was purportedly caused. How does one person cause another, especially another who is represented by a battery of lawyers, to “sign or execute” something? Is there a difference between “sign” and “execute?” *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal).
5. Count IA of the indictment is defective because it alleges “a document, namely a contract, affecting pecuniary interest of Brown Managed Hosting or Brown,” but fails to sufficiently identify or describe the document or contract in question, either verbally, or *in haec verba*. Additionally, the indictment fails to allege in what way or to what extent the document or contract “affect[ed pecuniary interest]” of the named persons. *See Swabado v. State*, 597 S.W. 2d 361, 363 (Tex. Crim. App. 1980); *Amaya v. State*, 551 S.W. 2d 385, 387 (Tex. Crim. App. 1977); *See also TEX. CODE CRIM. PROC. ANN. art. 21.09.*
6. The word "harm" has multiple definitions under § 1.07 (a)(25) of the Texas Penal Code. However, "harm" is not defined in Count IA of our indictment, nor does the indictment specify which of the statutory definitions of harm the state contends

was suffered or intended to be suffered in this case, nor does it give notice whether there is any difference between “defraud” and “harm.”

7. Count IA alleges an intent to defraud or harm “Brown Managed Hosting or Brown” Section 32.46 of the Texas Penal Code requires the intent to defraud or harm a “person.” Section 1.07(a)(38) of the Texas Penal Code defines a “person” as an “individual, corporation, or association.” Is “Brown Managed Hosting or Brown” an individual, a corporation, or an association? Is it one or more than one of these? Is “Brown Managed Hosting” something different than “Brown?” What is the relationship between “John Jones” and “Brown managed Hosting or Brown?” Count IA is defective because it does not answer any of these questions.

(GRANTED) (DENIED)

II.

Count IB

Securing Execution Of Document By Deception

1. The allegation in Count IB, that defendant deceived the owners “by submitting a fraudulent Cost Certification,” is defective because it fails to sufficiently identify or describe the document in question, either verbally, or *in haec verba*, and it fails to allege how the document is “fraudulent.” *See Swabado v. State*, 597 S.W. 2d 361, 363 (Tex. Crim. App. 1980); *Amaya v. State*, 551 S.W. 2d 385, 387 (Tex. Crim. App. 1977); *See also* TEX. CODE CRIM. PROC. ANN. art. 21.09.
2. Count IB of the indictment is defective because it alleges that defendant submitted an inaccurate Cost Certification, but does not allege the manner and means of this purported submission. *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal).
3. Count IB purports to enumerate the sort of deception caused in this case, namely,

that Mr. Smith previously created or confirmed by words or conduct that he did not believe to be true, by not correcting numbers in the Cost Certification after submitting an inaccurate Cost Certification, but it does not allege the “words or conduct” used, or the “numbers” that were not corrected, or how the Cost Certification was “inaccurate.”

4. Count IB of the indictment alleges that defendant caused John Jones to sign or execute a document, but does not adequately allege the manner and means by which this act was purportedly caused. How does one person cause another, especially another who is represented by a battery of lawyers, to “sign or execute” something? Is there a difference between “sign” and “execute?” *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal).
5. Count IB of the indictment is defective because it alleges “a document, namely a contract, affecting pecuniary interest of Brown Managed Hosting or Brown,” but fails to sufficiently identify or describe the document or contract in question, either verbally, or *in haec verba*. Additionally, the indictment fails to allege in what way or to what extent the document or contract “affect[ed pecuniary interest]” of the named persons. *See Swabado v. State*, 597 S.W. 2d 361, 363 (Tex. Crim. App. 1980); *Amaya v. State*, 551 S.W. 2d 385, 387 (Tex. Crim. App. 1977); *See also* TEX. CODE CRIM. PROC. ANN. art. 21.09.
6. The word "harm" has multiple definitions under § 1.07 (a)(25) of the Texas Penal Code. However, "harm" is not defined in Count IB of our indictment, nor does the indictment specify which of the statutory definitions of harm the state contends was suffered or intended to be suffered in this case, nor does it give notice whether there is any difference between “defraud” and “harm.”
7. Count IB alleges an intent to defraud or harm “Brown Managed Hosting or Brown” Section 32.46 of the Texas Penal Code requires the intent to defraud or harm a “person.” Section 1.07(a)(38) of the Texas Penal Code defines a “person”

as an “individual, corporation, or association.” Is “Brown Managed Hosting or Brown” an individual, a corporation, or an association? Is it one or more than one of these? Is “Brown Managed Hosting” something different than “Brown?” What is the relationship between “John Jones” and “Brown managed Hosting or Brown?” Count IA is defective because it does not answer any of these questions.

(GRANTED) (DENIED)

III.
Count II
Theft

1. Count II of the indictment is defective because it alleges that consent was not "effective" because it was by "deception", but it does not allege which of the multiple statutory definitions of "deception" under TEX. PENAL CODE § 31.01(1) the state intends to rely on. *See Geter v. State*, 779 S.W.2d 403, 406 (Tex. Crim. App. 1989).
2. Count II of the indictment is defective because it omits an essential element of the offense it attempts to allege, namely that the owners were *induced* by deception. TEX. PENAL CODE § 31.01(1).
3. The allegation in Count II, that defendant deceived the owners “by submitting an inaccurate cost certification,” is defective because it fails to sufficiently identify or describe the document in question, either verbally, or *in haec verba*, or how it is “inaccurate.” *See Swabado v. State*, 597 S.W. 2d 361, 363 (Tex. Crim. App. 1980); *Amaya v. State*, 551 S.W. 2d 385, 387 (Tex. Crim. App. 1977); *See also* TEX. CODE CRIM. PROC. ANN. art. 21.09.
4. Count II of the indictment is defective because it purports to allege theft, and it alleges that defendant had an intent to “deprive,” but it does not specify which definition of “deprive” the state intends to rely on, although the statute provides at least three alternative definitions. *Ferguson v. State*, 622 S.W.2d 846, 851 (Tex. Crim. App. 1980)(indictment for delivery of a controlled substance must specify which of the three different statutory types of delivery it intended to rely on).
5. Count II alleges that the owner is “Brown Managed Hosting or Brown” Is “Brown Managed Hosting or Brown” an individual, a corporation, or an association? Is it one or more than one of these? Is “Brown Managed Hosting” something different than “Brown?” Count IAI is defective because it does not answer any of these questions.

(GRANTED) (DENIED)

IV.
Count IIIA
Misapplication Of Fiduciary Property

1. Count IIIA of the indictment is defective because it alleges in a conclusory fashion that defendant misapplied property the held “contrary to an agreement under which the said defendant holds the property” but it does not identify in any way whatsoever the alleged “agreement.” By omitting any reference to the agreement the state intends to rely upon, the indictment fails to state an offense in violation of article 21.01 of the Texas Code of Criminal Procedure, and, it fails to state "everything . . . which is necessary to be proved," in violation of article 21.03 of the Texas Code of Criminal Procedure.
2. Count IIIA of the indictment is defective because the allegation that defendant misapplied property "in a manner that involved a substantial risk of loss" to its owners is vague and over broad, and, without elaboration, does not give defendant the notice required under the statutes and Constitutions of Texas and the United States.
3. Count IIIA alleges that Mr. Smith misapplied property contrary to an agreement and in a manner involving a substantial risk of loss, but does not adequately allege the manner and means by which this act was purportedly caused. *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal).
4. Count IIIA of the indictment is defective because it alleges in a merely conclusory fashion that the amounts were “misapplied pursuant to one scheme and continuing course of conduct," without detailing how or why the acts alleged in this paragraph of the indictment were in any way connected, or constituted "one scheme and

continuing course of conduct."

(GRANTED) (DENIED)

V.

Count IIIB

Misapplication Of Fiduciary Property

1. Count IIIB of the indictment is defective because it does not allege with reasonable certainty the act or acts relied upon by the state to show that defendant acted recklessly. *Smith v. State*, 309 S.W.3d 10, 16 (Tex. Crim. App. 2010); *Gengnagel v. State*, 748 S.W.2d 227, 230 (Tex. Crim. App. 1988); see TEX CODE CRIM. PROC. art. 21.15.
2. Count III, Paragraph B of the indictment is defective because, by alleging that Mr. Smith acted "recklessly," it irreconcilably conflicts with Count III, Paragraphs A and C, which allege that he acted intentionally or knowingly. Clearly, considering the definitions of these terms, defendant could not have acted intentionally and knowingly on the one hand, and recklessly on the other. If defendant acted recklessly, then he could not have acted intentionally or knowingly. As drafted, the indictment "contains matter which is a legal defense or bar to the prosecution," in violation of article 27.08(3) of the Texas Code of Criminal Procedure.
3. Count IIIB of the indictment is defective because it alleges in a conclusory fashion that defendant misapplied property the held "contrary to an agreement under which the said defendant holds the property" but it does not identify in any way whatsoever the alleged "agreement." By omitting any reference to the agreement the state intends to rely upon, the indictment fails to state an offense in violation of article 21.01 of the Texas Code of Criminal Procedure, and, it fails to state "everything . . . which is necessary to be proved," in violation of article 21.03 of the Texas Code of Criminal Procedure.
4. Count IIIB of the indictment is defective because the allegation that defendant misapplied property "in a manner that involved a substantial risk of loss" to its owners is vague and over broad, and, without elaboration, does not give defendant the notice required under the statutes and Constitutions of Texas and the United States.
5. Count IIIB alleges that Mr. Smith misapplied property contrary to an agreement and in a manner involving a substantial risk of loss, but does not adequately allege the manner and means by which this act was purportedly caused. See *Miller v.*

State, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal). Although this paragraph alleges that defendant deposited “checks made payable to the City of Windcrest in a bank account held by Urban Revitalization Real Estate Group,” there is no indication why this involved a substantial risk of loss to the property.

6. Count IIIB of the indictment is defective because it alleges in a merely conclusory fashion that the amounts were “misapplied pursuant to one scheme and continuing course of conduct,” without detailing how or why the acts alleged in this paragraph of the indictment were in any way connected, or constituted "one scheme and continuing course of conduct."

(GRANTED) (DENIED)

VI.
Count IIIC
Misapplication Of Fiduciary Property

1. Count IIIC of the indictment is defective because it alleges in a conclusory fashion that defendant misapplied property the held “contrary to an agreement under which the said defendant holds the property” but it does not identify in any way whatsoever the alleged “agreement.” By omitting any reference to the agreement the state intends to rely upon, the indictment fails to state an offense in violation of article 21.01 of the Texas Code of Criminal Procedure, and, it fails to state "everything . . . which is necessary to be proved," in violation of article 21.03 of the Texas Code of Criminal Procedure.
2. Count IIIC of the indictment is defective because the allegation that defendant misapplied property "in a manner that involved a substantial risk of loss" to its owners is vague and over broad, and, without elaboration, does not give defendant the notice required under the statutes and Constitutions of Texas and the United States.

3. Count IIIC alleges that Mr. Smith misapplied property contrary to an agreement and in a manner involving a substantial risk of loss, but does not adequately allege the manner and means by which this act was purportedly caused. *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal).

4. Count IIIC of the indictment is defective because it alleges in a merely conclusory fashion that the amounts were “misapplied pursuant to one scheme and continuing course of conduct,” without detailing how or why the acts alleged in this paragraph of the indictment were in any way connected, or constituted "one scheme and continuing course of conduct."

(GRANTED) (DENIED)

VII.
Count IIID
Misapplication Of Fiduciary Property

1. Count IIID of the indictment is defective because it does not allege with reasonable certainty the act or acts relied upon by the state to show that defendant acted recklessly. *Smith v. State*, 309 S.W.3d 10, 16 (Tex. Crim. App. 2010); *Gengnagel v. State*, 748 S.W.2d 227, 230 (Tex. Crim. App. 1988); *see* TEX CODE CRIM. PROC. art. 21.15.

2. Count III, Paragraph D of the indictment is defective because, by alleging that Mr. Smith acted “recklessly,” it irreconcilably conflicts with Count III, Paragraphs A and C, which allege that he acted intentionally or knowingly. Clearly, considering the definitions of these terms, defendant could not have acted intentionally and knowingly on the one hand, and recklessly on the other. If defendant acted recklessly, then he could not have acted intentionally or knowingly. As drafted, the indictment "contains matter which is a legal defense or bar to the prosecution,"

in violation of article 27.08(3) of the Texas Code of Criminal Procedure.

3. Count IIID of the indictment is defective because it alleges in a conclusory fashion that defendant misapplied property the held “contrary to an agreement under which the said defendant holds the property” but it does not identify in any way whatsoever the alleged “agreement.” By omitting any reference to the agreement the state intends to rely upon, the indictment fails to state an offense in violation of article 21.01 of the Texas Code of Criminal Procedure, and, it fails to state "everything . . . which is necessary to be proved," in violation of article 21.03 of the Texas Code of Criminal Procedure.
4. Count IIID of the indictment is defective because the allegation that defendant misapplied property "in a manner that involved a substantial risk of loss" to its owners is vague and over broad, and, without elaboration, does not give defendant the notice required under the statutes and Constitutions of Texas and the United States.
5. Count IIID alleges that Mr. Smith misapplied property contrary to an agreement and in a manner involving a substantial risk of loss, but does not adequately allege the manner and means by which this act was purportedly caused. *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal). Although this paragraph alleges that defendant deposited “checks made payable to the City of Windcrest in a bank account held by Urban Revitalization Real Estate Group,” there is no indication why this involved a substantial risk of loss to the property.
6. Count IIID of the indictment is defective because it alleges in a merely conclusory fashion that the amounts were “misapplied pursuant to one scheme and continuing course of conduct,” without detailing how or why the acts alleged in this paragraph of the indictment were in any way connected, or constituted "one scheme and continuing course of conduct."

(GRANTED) (DENIED)

VIII.
Count IV
Theft

1. Count IV of the indictment is defective because it alleges that consent was not "effective," but it does not allege which of the multiple statutory definitions of "effective consent" under TEX. PENAL CODE § 31.01(3) the state intends to rely on. *See Geter v. State*, 779 S.W.2d 403, 406 (Tex. Crim. App. 1989).
2. Count IV of the indictment is defective because it purports to allege theft, and it alleges that defendant had an intent to "deprive," but it does not specify which definition of "deprive" the state intends to rely on, although the statute provides at least three alternative definitions. *Ferguson v. State*, 622 S.W.2d 846, 851 (Tex. Crim. App. 1980)(indictment for delivery of a controlled substance must specify which of the three different statutory types of delivery it intended to rely on).
3. Although Count IV has aggregated the amounts of the property for jurisdictional purposes, it has not alleged that the "amounts are obtained . . . pursuant to one scheme or continuing course of conduct . . ." which is required before these can be considered as "one offense." TEX. PENAL CODE § 31.09. In omitting this language the State has failed to allege in its information "everything which is necessary to be proved" in violation of TEX. CODE CRIM. PROC. art. 21.03.
4. Count IV of the indictment is defective because it alleges that "the property came into the defendant's custody, possession, or control, by virtue of the defendant's status as a public servant," but it does not allege the manner and means by which it did so. *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979)(indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal).

(GRANTED) (DENIED)

IX.
Count VA
Misapplication Of Fiduciary Property

1. Count VA of the indictment is defective because it alleges in a conclusory fashion that defendant misapplied property the held “contrary to an agreement under which the said defendant holds the property” but it does not identify in any way whatsoever the alleged “agreement.” By omitting any reference to the agreement the state intends to rely upon, the indictment fails to state an offense in violation of article 21.01 of the Texas Code of Criminal Procedure, and, it fails to state "everything . . . which is necessary to be proved," in violation of article 21.03 of the Texas Code of Criminal Procedure.
2. Count VA of the indictment is defective because the allegation that defendant misapplied property "in a manner that involved a substantial risk of loss" to its owners is vague and over broad, and, without elaboration, does not give defendant the notice required under the statutes and Constitutions of Texas and the United States.
3. Count VA alleges that Mr. Smith misapplied property contrary to an agreement and in a manner involving a substantial risk of loss, but does not adequately allege the manner and means by which this act was purportedly caused. *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal).

(GRANTED) (DENIED)

X.

Count VB
Misapplication Of Fiduciary Property

1. Count VB of the indictment is defective because it does not allege with reasonable certainty the act or acts relied upon by the state to show that defendant acted recklessly. *Smith v. State*, 309 S.W.3d 10, 16 (Tex. Crim. App. 2010); *Gengnagel v. State*, 748 S.W.2d 227, 230 (Tex. Crim. App. 1988); see TEX CODE CRIM. PROC. art. 21.15.
2. Count V, Paragraph B of the indictment is defective because, by alleging that Mr. Smith acted “recklessly,” it irreconcilably conflicts with Count V, Paragraphs A and C, which allege that he acted intentionally or knowingly. Clearly, considering the definitions of these terms, defendant could not have acted intentionally and knowingly on the one hand, and recklessly on the other. If defendant acted recklessly, then he could not have acted intentionally or knowingly. As drafted, the indictment "contains matter which is a legal defense or bar to the prosecution," in violation of article 27.08(3) of the Texas Code of Criminal Procedure.
3. Count VB of the indictment is defective because it alleges in a conclusory fashion that defendant misapplied property the held “contrary to an agreement under which the said defendant holds the property” but it does not identify in any way whatsoever the alleged “agreement.” By omitting any reference to the agreement the state intends to rely upon, the indictment fails to state an offense in violation of article 21.01 of the Texas Code of Criminal Procedure, and, it fails to state "everything . . . which is necessary to be proved," in violation of article 21.03 of the Texas Code of Criminal Procedure.
4. Count VB of the indictment is defective because the allegation that defendant misapplied property "in a manner that involved a substantial risk of loss" to its owners is vague and over broad, and, without elaboration, does not give defendant the notice required under the statutes and Constitutions of Texas and the United States.
5. Count VB alleges that Mr. Smith misapplied property contrary to an agreement and in a manner involving a substantial risk of loss, but does not adequately allege the manner and means by which this act was purportedly caused. See *Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); see also *Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App.

1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal).

6. Count VB of the indictment is defective because it alleges that Mr. Smith misapplied property “by authorizing payment to DDPZ which had a name substantially similar to DPZ.
 - a. Who are DDPZ and DPZ?
 - b. What payment was authorized? *See Swabado v. State*, 597 S.W. 2d 361, 363 (Tex. Crim. App. 1980); *Amaya v. State*, 551 S.W. 2d 385, 387 (Tex. Crim. App. 1977); *See also* TEX. CODE CRIM. PROC. ANN. art. 21.09.
 - c. By what manner and means was it authorized? *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal).
 - d. Why did this constitute a substantial risk of loss to the property?

(GRANTED) (DENIED)

XI.
Count VC
Misapplication Of Fiduciary Property

1. Count VC of the indictment is defective because it alleges in a conclusory fashion that defendant misapplied property the held “contrary to an agreement under which

the said defendant holds the property” but it does not identify in any way whatsoever the alleged “agreement.” By omitting any reference to the agreement the state intends to rely upon, the indictment fails to state an offense in violation of article 21.01 of the Texas Code of Criminal Procedure, and, it fails to state "everything . . . which is necessary to be proved," in violation of article 21.03 of the Texas Code of Criminal Procedure.

2. Count VC of the indictment is defective because the allegation that defendant misapplied property "in a manner that involved a substantial risk of loss" to its owners is vague and over broad, and, without elaboration, does not give defendant the notice required under the statutes and Constitutions of Texas and the United States.
3. Count VC alleges that Mr. Smith misapplied property contrary to an agreement and in a manner involving a substantial risk of loss, but does not adequately allege the manner and means by which this act was purportedly caused. *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal).

(GRANTED) (DENIED)

XII.

Count VD

Misapplication Of Fiduciary Property

1. Count VD of the indictment is defective because it does not allege with reasonable certainty the act or acts relied upon by the state to show that defendant acted recklessly. *Smith v. State*, 309 S.W.3d 10, 16 (Tex. Crim. App. 2010); *Gengnagel v. State*, 748 S.W.2d 227, 230 (Tex. Crim. App. 1988); *see TEX CODE CRIM. PROC.* art. 21.15.
2. Count V, Paragraph D of the indictment is defective because, by alleging that Mr.

Smith acted “recklessly,” it irreconcilably conflicts with Count V, Paragraphs A and C, which allege that he acted intentionally or knowingly. Clearly, considering the definitions of these terms, defendant could not have acted intentionally and knowingly on the one hand, and recklessly on the other. If defendant acted recklessly, then he could not have acted intentionally or knowingly. As drafted, the indictment "contains matter which is a legal defense or bar to the prosecution," in violation of article 27.08(3) of the Texas Code of Criminal Procedure.

3. Count VD of the indictment is defective because it alleges in a conclusory fashion that defendant misapplied property he held “contrary to an agreement under which the said defendant holds the property” but it does not identify in any way whatsoever the alleged “agreement.” By omitting any reference to the agreement the state intends to rely upon, the indictment fails to state an offense in violation of article 21.01 of the Texas Code of Criminal Procedure, and, it fails to state "everything . . . which is necessary to be proved," in violation of article 21.03 of the Texas Code of Criminal Procedure.
4. Count VD of the indictment is defective because the allegation that defendant misapplied property "in a manner that involved a substantial risk of loss" to its owners is vague and over broad, and, without elaboration, does not give defendant the notice required under the statutes and Constitutions of Texas and the United States.
5. Count VD alleges that Mr. Smith misapplied property contrary to an agreement and in a manner involving a substantial risk of loss, but does not adequately allege the manner and means by which this act was purportedly caused. *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal).
6. Count VD of the indictment is defective because it alleges that Mr. Smith misapplied property “by authorizing payment to DDPZ which had a name substantially similar to DPZ.

- a. Who are DDPZ and DPZ?
- b. What payment was authorized? *See Swabado v. State*, 597 S.W. 2d 361, 363 (Tex. Crim. App. 1980); *Amaya v. State*, 551 S.W. 2d 385, 387 (Tex. Crim. App. 1977); *See also* TEX. CODE CRIM. PROC. ANN. art. 21.09.
- c. By what manner and means was it authorized? *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal).
- d. Why did this constitute a substantial risk of loss to the property?

(GRANTED) (DENIED)

XIII
Count VIA
Theft

1. Count VIA of the indictment is defective because it alleges that consent was not "effective" because it was by "deception", but it does not allege which of the multiple statutory definitions of "deception" under TEX. PENAL CODE § 31.01(1) the state intends to rely on. *See Geter v. State*, 779 S.W.2d 403, 406 (Tex. Crim. App. 1989).
2. Count VIA of the indictment is defective because it omits an essential element of the offense it attempts to allege, namely that the owners were *induced* by deception. TEX. PENAL CODE § 31.01(1).
3. The allegation in Count VIA, that defendant deceived the owner “by authorizing payment to DDPZ” is defective:

- a. Because it does not identify who are DDPZ and DPZ?
 - b. Because it does not specify the payment that was authorized? *See Swabado v. State*, 597 S.W. 2d 361, 363 (Tex. Crim. App. 1980); *Amaya v. State*, 551 S.W. 2d 385, 387 (Tex. Crim. App. 1977); *See also* TEX. CODE CRIM. PROC. ANN. art. 21.09.
 - c. Because it does not specify by what manner and means it was authorized? *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983) (indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal).
4. Count VIA of the indictment is defective because it purports to allege theft, and it alleges that defendant had an intent to “deprive,” but it does not specify which definition of “deprive” the state intends to rely on, although the statute provides at least three alternative definitions. *Ferguson v. State*, 622 S.W.2d 846, 851 (Tex. Crim. App. 1980)(indictment for delivery of a controlled substance must specify which of the three different statutory types of delivery it intended to rely on).

XIV.
Count VIB
Theft

1. Count VIB of the indictment is defective because it alleges that consent was not "effective," but it does not allege which of the multiple statutory definitions of "effective consent" under TEX. PENAL CODE § 31.01(3) the state intends to rely on. *See Geter v. State*, 779 S.W.2d 403, 406 (Tex. Crim. App. 1989).
2. Count VIB of the indictment is defective because it purports to allege theft, and it alleges that defendant had an intent to “deprive,” but it does not specify which

definition of “deprive” the state intends to rely on, although the statute provides at least three alternative definitions. *Ferguson v. State*, 622 S.W.2d 846, 851 (Tex. Crim. App. 1980)(indictment for delivery of a controlled substance must specify which of the three different statutory types of delivery it intended to rely on).

(GRANTED) (DENIED)

XV.

Count VIIA

Misapplication Of Fiduciary Property

1. Count VIIA of the indictment is defective because it alleges in a conclusory fashion that defendant misapplied property the held “contrary to an agreement under which the said defendant holds the property” but it does not identify in any way whatsoever the alleged “agreement.” By omitting any reference to the agreement the state intends to rely upon, the indictment fails to state an offense in violation of article 21.01 of the Texas Code of Criminal Procedure, and, it fails to state "everything . . . which is necessary to be proved," in violation of article 21.03 of the Texas Code of Criminal Procedure.
2. Count VIIA of the indictment is defective because the allegation that defendant misapplied property "in a manner that involved a substantial risk of loss" to its owners is vague and over broad, and, without elaboration, does not give defendant the notice required under the statutes and Constitutions of Texas and the United States.
3. Count VIIA alleges that Mr. Smith misapplied property contrary to an agreement and in a manner involving a substantial risk of loss, but does not adequately allege the manner and means by which this act was purportedly caused. *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal).
4. Count VIIA refers to two checks, numbers 2072 and 2073, but does not make

reference to them *in haec verba* or otherwise adequately identify them by bank account, owner, payor, or payee. *See Swabado v. State*, 597 S.W. 2d 361, 363 (Tex. Crim. App. 1980); *Amaya v. State*, 551 S.W. 2d 385, 387 (Tex. Crim. App. 1977); *See also* TEX. CODE CRIM. PROC. ANN. art. 21.09.

5. Count VIIA of the indictment is defective because it alleges in a merely conclusory fashion that the amounts were “misapplied pursuant to one scheme and continuing course of conduct,” without detailing how or why the acts alleged in this paragraph of the indictment were in any way connected, or constituted “one scheme and continuing course of conduct.”

(GRANTED) (DENIED)

XVI.

Count VIIB

Misapplication Of Fiduciary Property

1. Count VIIB of the indictment is defective because it does not allege with reasonable certainty the act or acts relied upon by the state to show that defendant acted recklessly. *Smith v. State*, 309 S.W.3d 10, 16 (Tex. Crim. App. 2010); *Gengnagel v. State*, 748 S.W.2d 227, 230 (Tex. Crim. App. 1988); *see* TEX CODE CRIM. PROC. art. 21.15.
2. Count VII, Paragraph B of the indictment is defective because, by alleging that Mr. Smith acted “recklessly,” it irreconcilably conflicts with Count VII, Paragraphs A and C, which allege that he acted intentionally or knowingly. Clearly, considering the definitions of these terms, defendant could not have acted intentionally and knowingly on the one hand, and recklessly on the other. If defendant acted recklessly, then he could not have acted intentionally or knowingly. As drafted, the indictment “contains matter which is a legal defense or bar to the prosecution,” in violation of article 27.08(3) of the Texas Code of Criminal Procedure.
3. Count VIIB of the indictment is defective because it alleges in a conclusory fashion that defendant misapplied property the held “contrary to an agreement under which the said defendant holds the property” but it does not identify in any way whatsoever the alleged “agreement.” By omitting any reference to the agreement the state intends to rely upon, the indictment fails to state an offense in violation of article 21.01 of the Texas Code of Criminal Procedure, and, it fails to state “everything . . . which is necessary to be proved,” in violation of article 21.03 of the Texas Code of Criminal Procedure.

4. Count VIIB of the indictment is defective because the allegation that defendant misapplied property "in a manner that involved a substantial risk of loss" to its owners is vague and over broad, and, without elaboration, does not give defendant the notice required under the statutes and Constitutions of Texas and the United States.
5. Count VIIB alleges that Mr. Smith misapplied property contrary to an agreement and in a manner involving a substantial risk of loss, but does not adequately allege the manner and means by which this act was purportedly caused. *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal).
6. Count VIIB alleges that Mr. Smith authorized two payments to Urban Revitalization Group, while also entering an agreement with RHYA which was an entity associated with Gary Smith, but:
 - a. does not allege by what manner and means the payments were authorized, or the agreement was entered? *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal);
 - b. does not allege why this constituted a substantial risk of loss to the

property;

- c. does not identify who are Urban Revitalization Real Estate Group, RHYA, or Gary Smith;
 - d. does not make reference to the two checks *in haec verba* or otherwise adequately identify them by owner, bank account, payor, or payee. *See Swabado v. State*, 597 S.W. 2d 361, 363 (Tex. Crim. App. 1980); *Amaya v. State*, 551 S.W. 2d 385, 387 (Tex. Crim. App. 1977); *See also* TEX. CODE CRIM. PROC. ANN. art. 21.09;
 - e. uses the necessarily vague phrase “and/or” to connect the two payments.
7. Count VIIB of the indictment is defective because it alleges in a merely conclusory fashion that the amounts were “misapplied pursuant to one scheme and continuing course of conduct,” without detailing how or why the acts alleged in this paragraph of the indictment were in any way connected, or constituted “one scheme and continuing course of conduct.”

(GRANTED) (DENIED)

XVII.
Count VIIC
Misapplication Of Fiduciary Property

1. Count VIIC of the indictment is defective because it alleges in a conclusory fashion that defendant misapplied property the held “contrary to an agreement under which the said defendant holds the property” but it does not identify in any way whatsoever the alleged “agreement.” By omitting any reference to the agreement the state intends to rely upon, the indictment fails to state an offense in violation of article 21.01 of the Texas Code of Criminal Procedure, and, it fails to state “everything . . . which is necessary to be proved,” in violation of article 21.03 of the Texas Code of Criminal Procedure.
2. Count VIIC of the indictment is defective because the allegation that defendant misapplied property “in a manner that involved a substantial risk of loss” to its owners is vague and over broad, and, without elaboration, does not give defendant the notice required under the statutes and Constitutions of Texas and the United States.
3. Count VIIC alleges that Mr. Smith misapplied property contrary to an agreement

and in a manner involving a substantial risk of loss, but does not adequately allege the manner and means by which this act was purportedly caused. *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal).

4. Count VIIC refers to two checks, numbers 2072 and 2073, but does not make reference to them *in haec verba* or otherwise adequately identify them by bank account, owner, payor, or payee. *See Swabado v. State*, 597 S.W. 2d 361, 363 (Tex. Crim. App. 1980); *Amaya v. State*, 551 S.W. 2d 385, 387 (Tex. Crim. App. 1977); *See also* TEX. CODE CRIM. PROC. ANN. art. 21.09.
5. Count VIIA of the indictment is defective because it alleges in a merely conclusory fashion that the amounts were “misapplied pursuant to one scheme and continuing course of conduct,” without detailing how or why the acts alleged in this paragraph of the indictment were in any way connected, or constituted “one scheme and continuing course of conduct.”

(GRANTED) (DENIED)

XVIII.
Count VIID
Misapplication Of Fiduciary Property

1. Count VIIB of the indictment is defective because it does not allege with reasonable certainty the act or acts relied upon by the state to show that defendant acted recklessly. *Smith v. State*, 309 S.W.3d 10, 16 (Tex. Crim. App. 2010); *Gengnagel v. State*, 748 S.W.2d 227, 230 (Tex. Crim. App. 1988); *see* TEX CODE CRIM. PROC. art. 21.15.
2. Count VII, Paragraph D of the indictment is defective because, by alleging that Mr. Smith acted “recklessly,” it irreconcilably conflicts with Count VII, Paragraphs A and C, which allege that he acted intentionally or knowingly.

Clearly, considering the definitions of these terms, defendant could not have acted intentionally and knowingly on the one hand, and recklessly on the other. If defendant acted recklessly, then he could not have acted intentionally or knowingly. As drafted, the indictment "contains matter which is a legal defense or bar to the prosecution," in violation of article 27.08(3) of the Texas Code of Criminal Procedure.

3. Count VIID of the indictment is defective because it alleges in a conclusory fashion that defendant misapplied property the held "contrary to an agreement under which the said defendant holds the property" but it does not identify in any way whatsoever the alleged "agreement." By omitting any reference to the agreement the state intends to rely upon, the indictment fails to state an offense in violation of article 21.01 of the Texas Code of Criminal Procedure, and, it fails to state "everything . . . which is necessary to be proved," in violation of article 21.03 of the Texas Code of Criminal Procedure.
4. Count VIID of the indictment is defective because the allegation that defendant misapplied property "in a manner that involved a substantial risk of loss" to its owners is vague and over broad, and, without elaboration, does not give defendant the notice required under the statutes and Constitutions of Texas and the United States.
5. Count VIID alleges that Mr. Smith misapplied property contrary to an agreement and in a manner involving a substantial risk of loss, but does not adequately allege the manner and means by which this act was purportedly caused. *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal).
6. Count VIID alleges that Mr. Smith authorized two payments to Urban Revitalization Group, while also entering an agreement with RHYA which was an entity associated with Gary Smith, but:

- a. does not allege by what manner and means the payments were authorized, or the agreement was entered? *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979) (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal);
 - b. does not allege why this constituted a substantial risk of loss to the property;
 - c. does not identify who are Urban Revitalization Real Estate Group, RHYA, or Gary Smith;
 - d. does not make reference to the two checks *in haec verba* or otherwise adequately identify them by owner, bank account, payor, or payee. *See Swabado v. State*, 597 S.W. 2d 361, 363 (Tex. Crim. App. 1980); *Amaya v. State*, 551 S.W. 2d 385, 387 (Tex. Crim. App. 1977); *See also* TEX. CODE CRIM. PROC. ANN. art. 21.09;
 - e. uses the necessarily vague phrase “and/or” to connect the two payments.
7. Count VIIB of the indictment is defective because it alleges in a merely conclusory fashion that the amounts were “misapplied pursuant to one scheme and continuing course of conduct,” without detailing how or why the acts alleged in this paragraph of the indictment were in any way connected, or constituted "one scheme and continuing course of conduct."

(GRANTED) (DENIED)

XIX.

Because of these defects:

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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Attorneys for Defendant

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 8th day of July, 2018.

ADAM KOBS

ORDER

On this the ___ day of _____, 2018, came on to be considered Defendant's Motion to Set Aside the Indictment, and the rulings of the Court are as expressed in the body of the motion

JUDGE PRESIDING