

NO. 00000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 218TH JUDICIAL DISTRICT
RAUL BROWN) KARNES COUNTY, TEXAS

DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Raul Brown 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.

The indictment purports to charge the offense of escape, described in the caption as a second degree felony.

II.

The indictment alleges that defendant acted “as a party.”

III.

The indictment fails to allege which theory of party responsibility the state will rely upon at trial, even though several completely different theories are enumerated in § 7.02 of the Texas Penal Code. By failing to notify defendant how he acted as a party in this case, the state has failed to give him adequate notice to permit him to prepare a defense in this case, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 13 and 19 of the Texas Constitution.

IV.

This indictment is defective because it does not allege which of the various statutory ways one can potentially be responsible as a party for the conduct of another under § 7.02 of the Texas Penal Code. *Cf. Olurebi v. State*, 870 S.W. 2d 58, 62 (Tex. Crim. App. 1994)(where “there are two ways for a credit card to be ‘fictitious’ under Section 32.31(b)(2), a trial court should grant a motion to quash an indictment that fails to adequately notify the defendant of the manner in which the card is fictitious); *Drumm v. State*, 560 S.W. 2d 944, 945-46 (Tex. Crim. App. 1977)(information should be quashed because it failed to allege which subsection of the statute the state intended to rely upon).

V.

Texas law requires an indictment to state “[e]verything . . . which is necessary to be proved.” TEX. CODE CRIM. PROC. ANN. art. 21.03. Here the state will have to prove, if it can, that defendant was criminally responsible for the conduct of others, pursuant to § 7.02. The indictment is defective because it does not allege how that is true in the present case. *See Cruise v. State*, 587 S.W. 2d 403, 404 (Tex. Crim. App. 1979)(where prosecution cannot prove its case of aggravated assault without adducing facts which describe the way in which appellant caused bodily injury, “the trial court committed reversible error in refusing to order the State to disclose such facts when confronted with appellant’s motion to quash the indictment”); *accord Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1985)(trial court erred under article 21.03 in denying motion to quash where it was “clear that it was necessary for the prosecution to prove the manner and means in which the appellant did ‘start fire’ in order to meet its burden of proof”).

VI.

The indictment wholly fails to allege the manner and means by which defendant allegedly acted as a party, thus failing to give defendant adequate notice to permit him to prepare a defense, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 13 and 19 of the Texas Constitution.

VII.

The indictment makes several references to “escape.” This word “escape” has various statutorily defined meanings in Texas. *See* TEX. PENAL CODE ANN. 38.01 (2). The indictment here is defective because it fails to specify which of the several enumerated statutory definitions of “escape” the state will attempt to rely on to prove its case against the defendant. *See Olurebi v. State*, 870 S.W. 2d 58, 62 (Tex. Crim. App. 1994)(where “there are two ways for a credit card to be ‘fictitious’ under Section 32.31(b)(2), a trial court should grant a motion to quash an indictment that fails to adequately notify the defendant of the manner in which the card is fictitious); *Drumm v. State*, 560 S.W. 2d 944, 945-46 (Tex. Crim. App. 1977)(information should be quashed because it failed to allege which subsection of the statute the state intended to rely upon); *White v. State*, 50 S.W. 3d 31, 39 (Tex. App.--Waco 2001, pet. ref’d)(trial court erred in denying motion to quash information which failed to specify which statutory definition of abuse the state intended to prosecute appellant for failing to report).

VIII.

The indictment makes reference to “custody.” The word “custody” is defined statutorily in various ways in TEX. PENAL CODE ANN. § 38.01 (1). This indictment is

defective because it fails to specify which of the various statutory definitions of “custody” that the state intends to rely on in this case against the defendant. *See Olurebi v. State*, 870 S.W. 2d at 62.

IX.

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:

MARK STEVENS

310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200
mark@markstevenslaw.com

By _____
MARK STEVENS

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of defendant's Motion To Set Aside The Indictment has been mailed to the District Attorney's Office, 21 Courthouse, Circle Drive, Jourdanton, TX 78026, on this the _____ day of August, 2018.

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)

JUDGE PRESIDING