

NO. 000001

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 186th 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 to set aside the indictment in this case pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I §§ 10, 13 and 19 of the Texas Constitution, and Articles 21.01, 21.02(7), 21.03, 21.04, 21.11 and 21.24 of the Texas Code of Criminal Procedure for the following reasons:

I.

The indictment does not allege that defendant "murder[ed] a peace officer . . . who is acting in the lawful discharge of an official duty and who the person knows is a peace officer" as required by the Tex. Penal Code Ann. § 19.03(a)(1). Accordingly the indictment does not allege an "act or omission which by law, is declared to be an offense", in violation of Tex. Code Crim. Proc. Ann. art. 21.01.

II.

The indictment does not allege "in plain and intelligible words" that complainant was "acting in the lawful discharge of an official duty" at the time of the alleged shooting, in violation of Tex. Code Crim. Proc. Ann. art. 21.02(7). Nor does this deficient allegation provide defendant with adequate notice of the charges against him as required by the Fifth and Fourteenth Amendments to the United States Constitution, article I, §§ 10, 13 and 19 of the Texas Constitution and Tex. Code Crim. Proc. Ann. art. 21.11. Nor does this deficient allegation possess the requisite "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" as

required by Tex. Code Crim. Proc. Ann. art. 21.04 and the Fifth and Fourteenth Amendments to the United States Constitution and article I, §§ 10 and 19 of the Texas Constitution.

III.

The indictment alleges in a conclusory fashion that complainant was "acting in the lawful discharge of an official duty." In the absence of a more meaningful explanation of this phrase, the indictment fails to provide defendant with adequate notice of the charges against him as required by the Fifth and Fourteenth Amendments to the United States Constitution, article I, §§ 10 and 19 of the Texas Constitution and Tex. Code Crim. Proc. Ann. art. 21.11. Nor does the indictment possess the requisite "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" as required by Tex. Code Crim. Proc. Ann. art. 21.04 and the Fifth and Fourteenth Amendments to the United States Constitution and article I, §§ 10 and 19 of the Texas Constitution. Finally, in omitting an explanation of this phrase, the indictment does not state "[e]verything . . . which is necessary to be proved," in violation of Tex. Code Crim. Proc. Ann. art. 21.03.

IV.

The indictment does not specify what sort of "peace officer" the complainant acted as.

V.

The indictment does not specify the complainant's official duty as a peace officer.

VI.

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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CERTIFICATE OF SERVICE

I certify that a copy of this Motion to Set Aside the Indictment has been delivered to the Bexar County District Attorney's Office, on November 21, 2018.

MARK STEVENS

ORDER

On this the ___ day of _____, 2018, came to be considered Defendant's Motion to Set Aside Indictment Numbe, and said motion is hereby

(GRANTED)

(DENIED)

JUDGE PRESIDING