NO. 2018-CR-0000

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

DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT NUMBER TWO

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, and Article I §§ 10, 13, and 19 of the Texas Constitution, for the following reasons:

I.

The indictment alleges that Mr. Smith murdered Rogelio Ness while in the course of committing and attempting to commit the offense of burglary. Although the indictment as presently written does not specify what Mr. Smith 's alleged culpable mental state was,[1] nothing thus far provided in discovery even suggests that the state believes that he had an intent to commit theft. From discovery, the defense believes that the state's theory is that Mr. Smith entered the residence with the intent to commit some assaultive offense against Rogelio Ness , and that there will be no evidence whatsoever

[1] Mr. Smith 's Motion To Set Aside the Indictment Number One asserts, among other things, that the indictment is defective because it does not specify whether, according to the state, the burglarious entry was made with the intent to commit theft or some other felony offense.

that the entry was motivated by any actual, attempted, or intended theft.

II.

Capital murder, as the state will attempt to prove in this case, requires the state to prove beyond a reasonable doubt that the defendant committed an intentional murder, and that the murder occurred in the course of committing or attempting to commit burglary. TEX. PENAL CODE § 19.03(a)(1). It is apparent, then, that to meet its burden of proving the charged offense, the state will have to use the same act – the alleged murder Rogelio Ness – twice in this trial. First, the state will have to prove that Mr. Smith committed murder, that is, that he intentionally caused Mr. Ness 's death. Second, the state will have to prove that Mr. Smith committed burglary, that is, that he entered the Ness residence and murdered Mr. Ness , or that he entered with the intent to murder or assault him.

III.

The indictment in this case is defective and must be set aside because this double-use of the same act to prove a single offense violates the law against "bootstrapping." The Texas Court of Criminal Appeals seems to have addressed this question three times previously in connection with capital murder in the course of burglary.

In *Fearance v. State*, 771 S.W.2d 486 (Tex. Crim. App. 1988), *cert. denied*, 492 U.S. 927 (1989), the indictment charged two counts of capital murder during the course of burglary. The first count alleged that Fearance entered with the intent to commit theft; the second count charged entry with intent to commit murder. *Id*. at 492, n.1. Fearance

moved to quash the second count, asserting that the "merger doctrine" barred the state's attempt to use the murder to prove both the primary murder and the underlying burglary. The majority of the court disagreed and gave two reasons. First, the merger doctrine applies to felony murder, not capital murder. Second, "even if it can be assumed that the merger doctrine of the felony murder statute applies to capital murder prosecutions, the merger doctrine did not operate in the instant case to bar the appellant from prosecution for capital murder" because count I of the indictment alleged a pure property crime – entry with intent to commit theft. "Therefore, there was a showing of felonious criminal conduct other than the assault which caused the death of [the complainant]." *Id*. at 492-93. *Fearance* is distinguishable from Mr. Smith 's case because there one of the counts explicitly alleged a burglary that did not involve the assault of the complainant. There is no such allegation in the present case. In contrast to *Fearance*, there will be no showing of felonious conduct here, *except* the alleged assault of Mr. Ness which caused his death.

In *Matamoros v. State*, 901 S.W.2d 470 (Tex. Crim. App. 1995), the indictment alleged murder in the course of burglary, and the jury was authorized to convict of capital murder if it believed that the murder had occurred in the course of a burglary in which the defendant had committed or attempted to commit either a felony *or* a theft. *Id*. at 474. *Matamoros* is therefore distinguishable because in Mr. Smith 's case there will be no evidence to authorize a conviction for burglary while committing *theft*. Additionally, the question before the court in *Matamoros* was whether the evidence was sufficient to prove

murder in the course of burglary, and the court held that it was. The holding in *Matamoros* is therefore dicta in our case, since Mr. Smith 's present motion is to set aside the indictment, and not to challenge the sufficiency of the evidence.

Finally, there is *Homan v. State*, 19 S.W. 3d 847 (Tex. Crim. App. 2000). In that case, the court of appeals had held that the evidence was insufficient to prove that the defendant committed capital murder in the course of murder, and that holding was reversed by the court of criminal appeals. *Id*. at 847–849. As with *Matamoros*, then, the *Homan* decision is mere dicta, since we are not now challenging the sufficiency of the evidence. Additionally, *Homan* relied entirely on two previous decisions – *Fearance* and *Matomoros* – and neither case, as we have previously shown in this motion, clearly establishes that the state can lawfully bootstrap a murder case to capital murder by relying exclusively on a single instance of assaultive conduct.

Judge Johnson dissented in *Homan*, first noting, as we have previously in this motion, that *Fearance* is distinguishable because in that case the defendant was also charged with committing burglary during theft. *Id.* at 849-50. Second, Judge Johnson found illogical *Fearance's* reliance on *Barnard v. State*, 730 S.W. 2d 703 (Tex. Crim. App. 1987). *Barnard* was a murder/*aggravated robbery* case, and not a murder/*burglary* case, and it is clear that in the former case, aggravated robbery, unlike burglary, "is a criminal act separate and apart from the murder itself." *Homan v. State*, 19 S.W. 3d at 851 (Johnson, J., dissenting). As the court in *Barnard* recognized, "It is this pecuniary

motive for robbery-murder that renders it more atrocious," and thereby supportive of an aggravated charge of capital murder. Logically, in a case such as Mr. Smith 's, where there is no pecuniary motive, there is no support for the elevation to capital murder. Judge Johnson correctly concluded:

> The majority's decision relies upon case law which has no basis in logic and which misinterprets earlier precedent. Because the court does not take this opportunity to reevaluate this issue and set things right, I dissent.

Id.

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
(210) 223-8708 fax
State Bar No. 19184200
mar@markstevenslaw.com

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of defendant's Motion To Set Aside The Indictment Number Two has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 6th day of January, 2018.

_____

MARK STEVENS

ORDER

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

(GRANTED) (DENIED)

_____

JUDGE PRESIDING