

STATE OF TEXAS ) IN THE DISTRICT COURT  
VS. ) 226TH 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, 21.09, 21.11, and 21.15 of the Texas Code of Criminal Procedure for the following reasons:

I.

The indictment does not adequately allege the manner and means by which this offense was allegedly committed. *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). Each paragraph alleges either that Mr. Smith tortured the dog, or that he killed or seriously injured the dog "by exposing the dog to elevated temperatures and/or not seeking medical attention." If this is meant to be the so-called "manner and means," it is defective for a number of reasons:

- it does not allege what Mr. Smith did that constituted "exposing" the dog to elevated temperatures;
- it does not allege what is meant by the entirely subjective phrase, "elevated

temperatures;"

- it alleges only vaguely that Mr. Smith did not seek "medical attention" without specifying what attention he should have sought, and when, and from whom;
- it vaguely joins the two allegations by the word "and/or":
- it does not allege how or why exposing the dog to elevated temperatures or not seeking medical attention would constitute "torture," as that word is defined by §49.092(a)(8) of the Texas Penal Code, or a "cruel manner," as that is defined by §49.092(a)(3) of the Texas Penal Code;

*See also 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).

## II.

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.

### III.

Each paragraph in both counts of the indictment charges more than one offense, in violation of article 21.24 of the Texas Code of Criminal Procedure. Specifically, each count alleges that Mr. Smith exposed the dog to elevated temperatures, and that he did not seek medical attention. In addition to violating article 21.24, the manner in which the state has pleaded these offenses will certainly make it difficult, if not impossible, to instruct the jury in such a way as to insure that its verdicts are unanimous, as required by Article V, § 13 of the Texas Constitution and article 36.29(a) of the Texas Code of Criminal Procedure. This problem is exacerbated in the present case by the state's choice to join the two different offenses with "and/or."

### IV.

The indictment is defective because, to the extent it alleges that Mr. Smith did not seek medical attention, it accuses him of omissions, but does not also allege a statute which provides that the omission is an offense, or that defendant had a duty to act. In Texas "[o]mission' means failure to act." Tex. Penal Code Ann. § 1.07(a)(34). Furthermore, "[a] person who omits to perform an act does not commit an offense unless a law as defined by Section 1.07 provides that the omission is an offense or otherwise provides that he has a duty to perform the act." TEX. PENAL CODE § 6.01(c). An indictment alleging crime by omission is "fundamentally defective for failing to include a statutory duty imposing a punishable omission." *Billingslea v. State*, 780 S.W.2d 271,

274 (Tex. Crim. App. 1989).

V.

The indictment is defective because it does not adequately identify the dog in question. *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. art. 21.09 (charging instrument should identify personal property by name, kind, number, and ownership).

VI.

Count II of the indictment is defective because it does not specify how the owner's consent was not effective, even though the term "effective consent" has multiple statutory definitions. *See Geter v. State*, 779 S.W.2d 403, 406 (Tex. Crim. App. 1989).

VII.

Count I, paragraph C, is defective because it omits an essential element of the offense it purports to allege, namely that Mr. Smith caused "serious bodily injury" in a cruel manner." *See* TEX. PENAL CODE § 42.092(b).

VIII.

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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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 delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 14th day of October, 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).

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JUDGE PRESIDING