

NO. 2018-CR-0000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	186TH JUDICIAL DISTRICT
KENNETH SMITH	)	BEXAR COUNTY, TEXAS

**DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

Kenneth Smith prior to announcing ready, 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 does not specify how the complainant'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).

II.

Paragraph B of the indictment alleges that Mr. Smith attempted and committed an assault against Crystal Soto, but does not allege the elements of the offense of assault, or otherwise describe what sort of assault was allegedly committed or attempted. *Cf. DeVaughn v. State*, 749 S.W.2d 62 (Tex. Crim. App. 1988).

### III.

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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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, Cadena-Reeves Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 30th day of June, 2018.

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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