

STATE OF TEXAS ) IN THE DISTRICT COURT  
VS. ) 293RD JUDICIAL DISTRICT  
MARY SMITH ) MAVERICK COUNTY, TEXAS

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

TO THE HONORABLE JUDGE OF SAID COURT:

Mary 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, and 21.11 of the Texas Code of Criminal Procedure for the following reasons:

I.

The indictment is defective because:

1. It does not allege the manner and means by which defendant purportedly removed a government record. E.g., Castillo v. State, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984); Smith v. State, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983); Miller v. State, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983); Jeffers v. State, 646 S.W. 2d 185, 188 (Tex. Crim. App. 1981); Ellis v. State, 613 S.W. 2d 741, 742 (Tex. Crim. App. 1981); Cruise v. State, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979); Haecker v. State, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978); Cook v. State, 824 S.W. 2d 334, 337-341 (Tex. App. -- Houston [1st Dist.] 1992, pet. ref'd); see also M. McCORMICK & T. BLACKWELL, 7 TEXAS PRACTICE §15.06;
2. It does not allege from where defendant purportedly removed a government record;
3. It does not allege the manner and means by which defendant purportedly concealed a government record. E.g., Castillo v. State, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984); Smith v. State, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983); Miller v. State, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983);

Jeffers v. State, 646 S.W. 2d 185, 188 (Tex. Crim. App. 1981); Ellis v. State, 613 S.W. 2d 741, 742 (Tex. Crim. App. 1981); Cruise v. State, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979); Haecker v. State, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978); Cook v. State, 824 S.W. 2d 334, 337-341 (Tex. App. -- Houston [1st Dist.] 1992, pet. ref'd); see also M. McCORMICK & T. BLACKWELL, 7 TEXAS PRACTICE §15.06;

4. It does not allege from whom defendant purportedly concealed a government record;
5. It does not allege the manner and means by which defendant purportedly impaired the availability of a government record. E.g., Castillo v. State, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984); Smith v. State, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983); Miller v. State, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983); Jeffers v. State, 646 S.W. 2d 185, 188 (Tex. Crim. App. 1981); Ellis v. State, 613 S.W. 2d 741, 742 (Tex. Crim. App. 1981); Cruise v. State, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979); Haecker v. State, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978); Cook v. State, 824 S.W. 2d 334, 337-341 (Tex. App. -- Houston [1st Dist.] 1992, pet. ref'd); see also M. McCORMICK & T. BLACKWELL, 7 TEXAS PRACTICE §15.06;
6. The phrase "impair the availability" is unconstitutionally vague, since it does not give a person of ordinary intelligence reasonable notice of forbidden conduct.
7. The term "governmental record" is defined in three different ways in section 37.01(1) of the Texas Penal Code. The indictment does not define "governmental record," or state why the document in question is a government record, or specify which of the three statutory definitions defines the governmental record in our case. See Olurebi v. State, 870 S.W. 2d 58, 62 (Tex. Crim. App. 1994);
8. The indictment does not adequately identify the governmental record 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);
9. The word "harm" has multiple definitions under section 1.07(16) of the Texas Penal Code. However, "harm" is not defined in our indictment, nor does the indictment specify which of the statutory definitions of harm the state contends was suffered or intended to be suffered in this case;

10. The phrase "intent to defraud" is not defined in the indictment or in the Texas Penal Code. As such, the phrase is unconstitutionally vague and does not give a person of ordinary intelligence adequate notice of forbidden conduct;
11. The indictment does not specify in what manner Ernest Mireles could possibly have been harmed or defrauded by the conduct alleged to have been committed by defendant;

## II.

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.

III.

The indictment alleges in a single count that defendant did remove and conceal and impair the availability of a government record. That is, it alleges three different and separate offenses. Allegation of multiple offense in a single count violates article 21.24 of the Texas Code of Criminal Procedure.

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 defendant's Motion To Set Aside The Indictment has been mailed to the Maverick County District Attorney's Office, Eagle Pass, Texas, on this the 18th day of November, 2018.

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MARK STEVENS

**ORDER**

On this the \_\_\_ day of \_\_\_\_\_, 1994, 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