

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

DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

John 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 adequately identify the payment 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);
2. It does not allege the manner and means by which defendant purportedly received the payment in question. 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).
3. It does not adequately specify the value of the benefits, sometimes stating only that the value is less than \$750.00 and other times stating that it is \$750.00 or more, but less than \$10,000.00.

4. The allegation that defendant "knew he was not legally entitled to receive" the benefits is unconstitutionally vague since it does not give a person of ordinary intelligence reasonable notice of forbidden conduct.

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 personal property allegedly received by defendant is described as "a claim payment for said defendant from the Texas Municipal League Workers' Compensation

Joint Insurance Fund." This does not sufficiently describe the property by name, kind, number and ownership, in violation of article 21.09 of the Texas Code of Criminal Procedure. See also Amaya v. State, 551 S.W.2d 385, 387 (Tex. Crim. App. 1977).

IV.

The statute under which defendant is charged was repealed, effective September 1, 1994. All allegations in this indictment occurring on or after this date therefore fail to allege an offense against the laws of Texas. See TEX. CODE CRIM. PROC. ANN. ART. 21.01.

V.

The indictment alleges "amounts were obtained as alleged in one scheme and continuing course of conduct. . ." but does not define that phrase, such that a person of ordinary intelligence would have reasonable notice of that which he is charged with committing.

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

JUDGE PRESIDING