

STATE OF TEXAS ) IN THE DISTRICT COURT  
VS. ) 175th 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 for the following reasons:

**I.**

The indictment in this case alleges that Mr. Smith evaded arrest in a motor vehicle in violation of TEX. PENAL CODE 38.04(b).

**II.**

The indictment in this case fails to give a person reasonable notice of what offense he is charged with in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 13, and 19. Specifically, the statute that criminalizes and punishes evading arrest in Texas is irreconcilably and unconstitutionally ambiguous because it sets forth two entirely different punishments for one convicted of evading arrest in a motor vehicle - one a state jail felony, the other a third degree felony. Clearly these two different punishments cannot both apply, and there is no principled way for a person of reasonable intelligence to discern which punishment range would apply to him. *But see, e.g., Adetomiwa v. State*, 421 S.W.3d 922, 927 (Tex. App.- Fort Worth

2014, no pet.)(evading arrest is a third degree felony if the actor uses a vehicle in flight).

III.

The appropriate remedy is for this Court to set aside the indictment, and this is Mr. Smith's request. Alternatively, the Court should rule, before commencement of trial, that, pursuant to the rule of lenity, the proper punishment range for the primary offense is that of a state jail felony, not a third degree felony, and that any enhancements be calculated from this primary offense. *But see* Salazar v. State, 474 S.W.3d 832, 840 (Tex. App.-Corpus Christi 2015, no pet.)(declining to extend the rule of leniency in this case).

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 Bexar County District Attorney's Office on March 20, 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