

NO. 2000-CR-0000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	379TH JUDICIAL DISTRICT
KENNETH SMITH	)	BEXAR COUNTY, TEXAS

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

TO THE HONORABLE JUDGE OF SAID COURT:

Kenneth 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.

Counts I and IIB of the indictment are defective because they purport to charge defendant with denying and impeding a person in custody “in the exercise and enjoyment of any right, power, privilege and immunity,” but they fail to specify which rights, powers, privileges or immunities are involved. Nor does the indictment allege that defendant was in a position to either provide or withhold any right, privilege, power, or immunity to the complainant. To be liable under the statute, defendant must have been in such a position. Absent this specification, these counts and paragraphs do not charge defendant with all the elements of the offense §§ 39.04(a)(1) and 39.03(a)(2) of the Texas Penal Code. Defendant is not fairly or adequately notified of the specific acts or acts that form the basis of the accusations against him and because these terms are not defined,

defendant is not protected from future prosecution for the same acts.

## II.

Counts I and IIB of the indictment allege that defendant denied and impeded the complainant in the exercise of his rights, powers, privileges and immunities, but they do not define or specify "deny" or "impede." A defendant charged with violating another's civil rights or officially oppressing another is entitled to know what he did to deny or impede the complainant's enjoyment or exercise of his rights, privileges or immunities so that he can properly prepare a defense as well as enable him to plead any resulting judgment to bar further prosecution for the same offense.

## III.

Each count and paragraph of the indictment alleges that defendant engaged in conduct by omission, specifically, that he failed to preserve the peace within the defendant's jurisdiction as a peace officer and that he failed to prevent and suppress another's assault on the complainant. Under Texas law, a person who omits to perform an act does not commit an offense unless "a law . . . provides that the omission is an offense or otherwise provides that he has a duty to perform the act." TEX. PENAL CODE ANN. § 6.01(c). Here, the indictment does not allege an essential element of this offense under § 6.01(c), namely that some law provides that the purported omissions were an offense, or that defendant otherwise had a duty to perform the act. Absent these allegations, no offense is alleged. *See Smith v. State*, 603 S.W. 2d 846, 847 (Tex. Crim. App. 1980)("allegation is defective in that it fails to allege that the appellants had any statutory

duty to act").

#### IV.

Each count and paragraph of the indictment is also defective because it fails to notify defendant of what law provides that his alleged omissions were an offense, or that he had a duty to act.

#### V.

Each count and paragraph of the indictment are defective because they allege that defendant failed to preserve the peace in his jurisdiction, without defining this phrase, or otherwise explaining how this allegedly happened. This phrase -- "failing to preserve the peace" -- is so vague and broad that its simple allegation, with nothing in limitation thereof, fails to give defendant reasonable notice of what he must defend against, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Course of Law Provision of Article I, §§ 13 and 19 of the Texas Constitution.

#### VI.

Counts one and two of the indictment are defective because they do not specify which of the several varieties of "assault" complainant allegedly suffered, although several are provided for by the Texas Penal Code.

#### VII.

Count IIA of the indictment is defective because it alleges in conclusory form that defendant subjected complainant to "mistreatment" without further defining or specifying

that term. This term is so vague and broad that its simple allegation, with nothing in limitation thereof, fails to give defendant reasonable notice of what he must defend against, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Course of Law Provision of Article I, §§ 13 and 19 of the Texas Constitution.

#### VIII.

Each count and paragraph of the indictment alleges that defendant engaged in two omissions -- "failing to preserve the peace within the defendant's jurisdiction as a peace officer" *and* "failing to prevent and suppress Officer Robert Taylor's assault on the Complainant." This means of pleading violates article 21.24(b) of the Texas Code of Criminal Procedure which prohibits a single paragraph from charging more than one offense.

#### IX.

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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### **CERTIFICATE OF SERVICE**

I hereby 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 31st day of August, 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