

NO. 000000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 186th 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 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 alleges agreement "among themselves and with each other," in vague and non-specific terms, without specifying who "each other" or "themselves" are;
2. It alleges simply a conspiracy to commit the unlawful delivery of methamphetamine, without alleging sufficient facts to put defendant on notice of what specific conduct of acts by him upon which the state will rely for conviction. Specifically, there is no allegation of the specific act or acts which were the basis of his agreement to engage in conduct constituting the offense of delivery of methamphetamine. Additionally, there is no allegation of the manner and means of this alleged conspiracy, whether the alleged delivery was to be actual or constructive, how much methamphetamine was to be delivered, to whom it was to be delivered to, when the alleged deliveries were to take place, and which of the alleged co-conspirators specifically collaborated on which alleged delivery. Accordingly, it cannot fairly be said that this summary allegation was factually sufficient to apprise defendant of what his role was to have been or his specific involvement in the offense of delivery of methamphetamine which he allegedly agreed to commit. *Lindsay v. State*, 588 S.W.2d 570,

572 (Tex. Crim. App. 1979);

3. It alleges in conclusory terms that "said defendants performed overt acts," but it does not specifically list any such acts which were actually committed by defendant himself.
4. It alleges in overt act number 51 the date "December, 1984," without specifying the exact date which the state intends to prove;
5. It contains words such as "establish, maintain and participate," when such words are statutorily undefined and intrinsically vague and ambiguous. At the very least the state should be required to detail the specific acts it contends which show defendant's intent to establish, maintain and participate in the combination;
6. It alleges the existence of a "combination" without specifying the membership of said combination, or whether defendant himself was a member;
7. It fails to enumerate the "profits" of the alleged combination;
8. It fails to specify whether defendant collaborated in the combination, and, if so, the nature and extent of his alleged collaboration;
9. The word "collaborate" as used in Tex. Penal Code Ann. 71.01(a) is not statutorily defined and is intrinsically vague, ambiguous, and incapable of understanding by ordinary persons in the context of his use in the statute.
10. It alleges a conspiracy and agreement to delivery methamphetamine, but does not allege either the persons who were to receive the deliveries, or that these persons were unknown to the grand jury.
11. The scienter element of Tex. Penal Code Ann. § 71.01 and 71.02 fail to provide adequate notice of what conduct is criminal. *Cf. Lucario v. State*, 677 S.W.2d 693, 696 (Tex. App. Houston [1st Dist] 1984, rev. ref'd);
12. Said statutes do not require that a person know that his actions are aiding an unlawful combination; *Cf. Lucario v. State, supra*.
13. Said statutes allow a prosecutor to act with unbridled discretion in determining whether to prosecute persons for organized criminal activity as opposed to the predicate offense. *Cf. Lucario v. State, supra*.

14. Said statutes contain no guidelines to determine the point at which participation in a combination is distinguished from incidental assistance. *Cf. Lucario v. State, supra.*

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.

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 1st day of April, 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