

STATE OF TEXAS ) IN THE DISTRICT COURT  
VS. ) 144TH JUDICIAL DISTRICT  
TERRY SMITH ) BEXAR COUNTY, TEXAS

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

TO THE HONORABLE JUDGE OF SAID COURT:

Terry 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 alleges that Mr. Smith did “recklessly [cause bodily and serious bodily injury to the complainant] “by shooting the complainant with [a] deadly weapon.” The indictment, however, does not allege with reasonable certainty the act or acts relied upon by the state to show that Mr. Smith acted recklessly. There is nothing “inherently reckless” about shooting another with a firearm, so the trier of fact cannot infer recklessness from the acts alleged in the indictment. *Smith v. State*, 2010 WL 625048 (Tex. Crim. App. 2010); *Gengnagel v. State*, 748 S.W.2d 227, 230 (Tex. Crim. App. 1988); *see* Tex. Code Crim. Proc. Ann. art. 21.15.

## II.

The indictment is internally inconsistent. Both counts allege, on the one hand, that Mr. Smith acted "intentionally and knowingly," and on the other, that he acted "recklessly." It is impossible for defendant to have done this same act intentionally, knowingly *and* recklessly. If defendant acted recklessly, then he did not do so intentionally or knowingly, and vice versa. The indictment therefore contains matter that is a legal defense to the prosecution, and should be set aside pursuant to article 27.08(3) of the Texas Code of Criminal Procedure. As written, the indictment is so inconsistent, vague, uncertain, and broad, that it fails to give a person of ordinary intelligence fair notice of what he must defend against. Furthermore, judgment on this indictment would not bar a future prosecution for the same alleged conduct.

## III.

Count I of the indictment alleges that the complainant "was a member of the defendant's family and household and a person with whom the defendant has or has had a dating relationship as described by Section 71.003 of the Family Code." The quoted reference is vague, uncertain, and broad, and fails to give a person of ordinary intelligence fair notice of what he must defend against. Furthermore, judgment on this indictment would not bar a future prosecution for the same alleged conduct. For example, although the state alleges in the conjunctive, does it in fact contend and intend to prove that the complainant and the defendant were members of the same family *and* that they

were members of the same household, *and* that they have or had a dating relationship?” Or does the state intend to prove one, or two, but not all of the possible allegations? If so, which of the allegations does it intend to rely on? What portion of the indictment does the phrase “as described by Section 71.003 of the Family Code” modify? *Cf. Geter v. State*, 779 S.W. 2d 403, 406 (Tex. Crim. App. 1989); *Ferguson v. State*, 622 S.W. 2d 846, 851 (Tex. Crim. App. 1980).

#### IV.

Prosecution of Mr. Smith for the first degree felony offense of aggravated assault, as the state attempts to do with the first count of this indictment, violates his right to equal protection of the laws, guaranteed by the Fourteenth Amendment to the United States Constitution, and Article I, §§ 3 & 3a of the Texas Constitution. There is no basis, rational or otherwise, for subjecting Mr. Smith to enhanced, first degree felony punishment based on the allegation that he recklessly caused serious bodily injury to one who was a member of his family, or his household, or was a person with whom he had a dating relationship. Furthermore, this range of punishment would be excessive and disproportionate, and would violate the Cruel and Unusual Punishment provisions of the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, § 13 of the Texas Constitution.

V.

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 22nd day of April, 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