

STATE OF TEXAS ) IN THE DISTRICT COURT  
VS. ) 175TH JUDICIAL DISTRICT  
JOE SMITH ) BEXAR COUNTY, TEXAS

**MOTION TO SUPPRESS EVIDENCE  
OBTAINED AS A RESULT OF A WARRANTLESS SEARCH  
OF JOE SMITH'S JAIL CELL**

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves to suppress all evidence obtained as a result of the warrantless search of his jail cell at the Bexar County Adult Detention Center on April 1, 2016, and for good cause shows the following:

**I.**

**Joe Smith Is A Presumptively Innocent Citizen Who Presently Lives  
In The Bexar County Adult Detention Center,  
But Only Because He Cannot Afford Bond**

Joe Smith has been indicted for murder. He is presently a pretrial detainee, presumptively innocent under our Constitution who resides at the Bexar County Adult Detention Center because he has been financially unable to make bond, which has been set in the amount of \$100,000.

**II.**

**Solely To Prepare For Trial, The Prosecutor Has Caused The Seizure  
Of Mr. Smith's Personal And Private Property  
Without Warrant Or Probable Cause**

Mr. Smith's case is set for trial on June 1, 2016. The lead prosecutor, Mary Johnson issued the following directive on February 1, 2016 to John Garcia, Chief Jailer at

the Bexar County Adult Detention Center:

In preparation for an upcoming trial, I request that you conduct a cell search of inmate Joe Smith's cell/housing area and that you seize and provide the following: Original, non-privileged correspondence, to include: any/all writings, notes, correspondence (inmate and outside mail), drawings, poetry and any contraband found during the search.

A copy of Johnson's directive is attached to this motion as Exhibit A.

On February 1, 2016, as ordered in the directive, two deputies, Mario Del Prado and John Convery, entered Mr. Smith's cell and seized, without warrant, probable cause, reasonable suspicion, or consent, a variety of materials, including photographs, drawings, books, magazines, and assorted writings, some of which were written by Mr. Smith himself. Every thing seized was owned and possessed by Joe Smith. Exhibit B, attached, is the written inventory left with Mr. Smith by deputies Del Prado and Convery.

### **III.**

#### **The Prosecutor Has Confirmed Her Intent To Use Mr. Smith's Private Writings Against Him At Trial Against Mr. Smith At Trial**

When undersigned counsel contacted Johnson she confirmed that the seizure had taken place at her direction, and that she intended to use anything seized from Mr. Smith's cell that she deemed admissible at his upcoming trial. In response to a written motion for discovery from counsel, Ms. Johnson provided photocopies of everything she says was seized from Mr. Smith's cell, and those copies, because of their personal and private nature, have been filed under seal with this as Exhibit D.

#### IV. The Iron Curtain Has Been Torn Down

The “assumption that prisoners or pretrial detainees are without any Fourth Amendment rights is not supported by the Supreme Court.” *State v. Granville*, 423 S.W. 3d 399, 414 (Tex. Crim. App. 2014).

The “central concern underlying the Fourth Amendment” has remained the same throughout the centuries; it is “the concern about giving police officers *unbridled discretion to rummage at will among a person's private effects.*”

*Id.* at 405 (emphasis supplied), *quoting Arizona v. Gant*, 556 U.S. 332, 345 (2009).

But the “unbridled discretion to rummage at will among a person’s private effects” is exactly what the prosecution had when it directed the jail to search Joe Smith’s cell without warrant. With neither probable cause nor warrant, with absolutely no institutional concern for the safety of the jail, its employees, or other inmates, but solely for the purpose of preparing for its upcoming trial, the prosecutor sent deputies to take every non-privileged paper from the living quarters of this indigent, presumptively innocent citizens and took hundreds of pages of writings, drawings, photographs and other materials every bit as personal and private as that found on cell phones.

A number of Courts around the country have condemned the sort of warrantless search for evidence that occurred here. The Court in *Cohen v. United States*, 796 F.2d 20, 23–24 (2d Cir.1986), *cert. denied*, 479 U.S. 854 (1986), held that the prisoner retained an expectation of privacy that was sufficient to challenge the investigatory search undertaken there.

Because his effects were searched at the instigation of non-prison officials for non-institutional security related reasons, the validity of the search may be challenged. An individual's mere presence in a prison cell does not totally strip away every garment cloaking his Fourth Amendment rights, even though the covering that remains is but a small remnant.

*Id.* See also *Rogers v. State*, 783 So. 2d 980, 991-92 (Fla. 2001); *State v. Henderson*, 517 S.E.2d 61, 63-66 (Ga. 1999), *cert. denied*, 528 U.S. 1083 (2000); *State v. Jackson*, 729 A.2d 55, 56 (N.J. Ch. Div. 1999); *McCoy v. State*, 639 So. 2d 163, 166-67 (Fla. Dist. Ct. App. 1994); *State v. Neely*, 462 N.W.2d 105, 112 (Neb. 1990).

One unpublished Texas case disagrees. In *Broadnax v. State*, 2011 WL 6225399 \*10 (Tex. Crim. App. 2011)(not designated for publication), the Court concluded that “a shakedown search of a pretrial detainee's cell does not violate the Fourth Amendment or due process.” Another unpublished civil case from the San Antonio Court of Appeals, *Lutz v. Collins*, is instructive. There the Court recognized *Cohen*, but found two significant distinguishing facts. First, Lutz, unlike the appellant in *Cohen* was not a pretrial detainee. Second, unlike n *Cohen*, the search of Lutz’s cell was in relation to an entirely different crime. 2009 WL 330958, at \*4 (Tex. App.–San Antonio, 2009, pet. denied)(not designated for publication); see also *Willis v. Artuz*, 301 F.3d 65, 68 (2d Cir. 2002)(denying 1983 relief where the plaintiff was a convicted prisoner, not a pre-trial detainee, like Cohen).

## V.

### **This Warrantless Seizure Violated Constitutions and Statutes**

The seizure of items, papers and effects from Joe Smith on February 1, 2016 was

effected without valid warrant, probable cause, reasonable suspicion, or consent, in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Article I § 9 of the Texas Constitution, Article 38.23 of the Texas Code of Criminal Procedure, and Chapter 14 of the Texas Code of Criminal Procedure. All physical evidence seized is inadmissible, as is any evidence that was obtained either directly or indirectly from this illegal seizure.

Joe Smith moves this Court to set the matter for a pretrial hearing pursuant to article 28.01 of the Texas Code of Criminal Procedure, and, after hearing evidence, that the Court suppress all evidence seized as a result of this illegal seizure.

Respectfully submitted:

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MARK STEVENS  
310 S. St. Mary's Street  
Tower Life Building, Suite 1920  
San Antonio, TX 78205-3192  
(210) 226-1433  
State Bar No. 19184200

Attorney for Defendant

### **CERTIFICATE OF SERVICE**

I certify that a copy of this motion has been delivered to the Bexar County District Attorney's Office, on April 1, 2018.

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MARK STEVENS

**ORDER**

The defendant's Motion To Suppress Evidence Obtained As A Result Of A  
Warrantless Search Of Joe Smith's Jail Cell is hereby:

(GRANTED)

(DENIED)

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PRESIDING JUDGE