

NO. 2018-CR-0001

|                |   |                         |
|----------------|---|-------------------------|
| STATE OF TEXAS | ) | IN THE DISTRICT COURT   |
| VS.            | ) | 290th 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, 21.09, 21.11 and 21.24 of the Texas Code of Criminal Procedure for the following reasons:

I.

The indictment is defective because it fails to adequately allege the manner and means by which defendant allegedly started a fire. *Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire).

II.

The indictment is defective because it does not allege the name, kind, number of the habitation allegedly burned, as required by article 21.09 of the Texas Code of Criminal Procedure.

### III.

The indictment is defective because it does not allege the general locality in the county of the habitation allegedly burned, as required by article 21.09 of the Texas Code of Criminal Procedure.

### IV.

The indictment appears to charge more than one offense in a single paragraph. Specifically, the indictment alleges an "intent to damage and destroy a habitation." If, as it appears, the state is alleging two different and independent criminal acts on Mr. Jones's part, this violates article 21.24 of the Texas Code of Criminal Procedure. In addition to violating article 21.24, the manner in which the state has pleaded these offenses will certainly make it difficult, if not impossible, to instruct the jury in such a way as to insure that its verdicts are unanimous, as required by Article V, § 13 of the Texas Constitution and article 36.29(a) of the Texas Code of Criminal Procedure.

### 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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Attorney for Defendant

#### 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 6<sup>th</sup> day of February, 2018.

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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).

SIGNED on the date set forth above.

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JUDGE PRESIDING