

NO. 00000

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 to set aside the indictment in the above styled and numbered cause, pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I §§ 10 and 19 of the Texas Constitution, and Articles 21.01, 21.02(7), 21.03, 21.04, 21.11 and 21.24 of the Texas Code of Criminal Procedure for the following reasons:

I.

Paragraph I of the indictment alleges that defendant murdered Beth Johnson while in the course of committing and attempting to commit the offense of robbery. Under the statute, a person can commit the offense of robbery in two different ways. Tex. Penal Code Ann. § 29.02. Count I of the indictment merely alleges robbery without stating the particular type of robbery, the specific acts defendant allegedly committed, or the constituent elements of robbery.

II.

Paragraph I of the indictment does not allege a culpable mental state for the component offense of robbery.

III.

Paragraph I of the indictment does not state the manner and means by which the alleged robbery was committed.

IV.

Paragraph I of the indictment alleges that defendant committed murder by hitting Ms. Johnson "with an instrument, the exact nature of which is to the Grand Jury unknown, or with his hands and fists." As such, the allegation is internally inconsistent. Either death was caused by an unknown instrument, or by someone's hands.

V.

Paragraph II of the indictment alleges that defendant murdered Beth Johnson while in the course of committing and attempting to commit the offense of kidnapping. Paragraph II of the indictment merely alleges kidnapping, without specifying its constituent elements.

VI.

Paragraph II of the indictment does not allege a culpable mental state for the component offense of kidnapping.

VII.

Paragraph II of the indictment does not state the manner and means by which the alleged kidnapping was committed.

VIII.

Paragraph II of the indictment alleges that defendant committed murder by hitting Ms. Johnson "with an instrument, the exact nature of which is to the Grand Jury unknown, or with his hands and fists." As such, the allegation is internally inconsistent. Either death was caused by an unknown instrument, or by someone's hands.

IX.

Paragraph III of the indictment alleges that defendant murdered Beth Johnson while in the course of committing and attempting to commit the offense of aggravated sexual assault. Under the statute, a person can commit the offense of sexual assault in some six different ways. Tex. Penal Code Ann. § 22.011(a) and § 22.011(b). And, sexual assault may become aggravated sexual assault in five different circumstances. Tex. Penal Code Ann. § 22.021(a). When one considers these two statutes together, it can be seen that there is an almost endless combination of ways a person could commit the offense of aggravated sexual assault. Paragraph III of the indictment merely alleges "aggravated sexual assault" without stating the particular type of aggravated sexual assault, the specific acts defendant allegedly committed, or the constituent elements of aggravated sexual assault.

X.

Paragraph III of the indictment does not allege a culpable mental state for the component offense of aggravated sexual assault.

XI.

Paragraph III of the indictment does not state the manner and means by which the alleged aggravated sexual assault was committed.

Because of these defects:

XII.

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:

---

MARK STEVENS  
310 S. St. Mary's, Ste 1920  
San Antonio, TX 78204  
(210) 226-1433  
State Bar No. 19184200  
mark@markstevenslaw.com

Attorney for Defendant

#### CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing Motion to Set Aside the Indictment Number Five has been delivered to the Bexar County District Attorney's Office on this the 1st day of November, 2018.

---

MARK STEVENS

NO. 00000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	186th JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

ORDER

On this the \_\_\_\_ day of \_\_\_\_\_, 2018, came to be considered Defendant's Motion to Set Aside Indictment, and said motion is hereby

(GRANTED)

(DENIED)

\_\_\_\_\_  
JUDGE PRESIDING