

STATE OF TEXAS ) IN THE DISTRICT COURT  
VS. ) 144TH 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.

When a defendant is accused of acting negligently, the charging instrument “must allege, with reasonable certainty, the act or acts relied upon to constitute negligence. . . .” *See Smith v. State*, 309 S.W.3d 10, 16 (Tex. Crim. App. 2010); *Gengnagel v. State*, 748 S.W.2d 227, 230 (Tex. Crim. App. 1988); *see also* TEX. CODE CRIM. PROC. ANN. art. 21.15.

The indictment against Mr. Smith is defective because it does not allege, with reasonable certainty, the acts or circumstances that demonstrate that his driving was done in a negligent manner. Instead, the indictment alleges that Mr. Smith drove and operated a vehicle and that he did so "at a speed that was not reasonable and prudent under the

circumstances then existing," and that he failed to do certain things, such as: "to maintain a single lane of travel"; and "to maintain such a lookout as a person of ordinary prudence would have maintained under the same and similar circumstances." As alleged, none of these driving events demonstrate that Mr. Smith drove in a negligent manner. None of these acts or omissions are inherently negligent; drivers regularly do or fail to do all these things without being negligent. For example, drivers speed regularly. Drivers might not maintain a single lane of travel intentionally, as when passing another vehicle. Or, a driver might accidentally fail to maintain a single lane. A vehicle might malfunction and cause the failure to maintain a single lane. Drivers do not always see everything that is on the road in front of them, but this such failure to perceive is not inherently negligent. Without more certainty, the actions and failures alleged do not demonstrate that Mr. Smith drove in a negligent manner, in violation of article 21.15.

The indictment should be set aside because it fails to comply with article 21.15 of the Texas Code of Criminal Procedure. Alternatively, those portions of the indictment which purport to allege actions or failures to act on Mr. Smith's part, which do not in fact allege that he acted or failed to act in a negligent manner should be stricken from the indictment, and not submitted to the jury in a way that authorizes Mr. Smith's conviction for non-criminal conduct.

## II.

As pointed out in the preceding section of this motion, the indictment is based,

with a single exception, on allegations that Mr. Smith *failed* to do certain things. The Texas Penal Code expressly distinguishes “acts” and “omissions. *Compare* TEX. PENAL CODE ANN. § 1.07(a)(1) *with* TEX. PENAL CODE ANN. § 1.07(a)(34). Article 21.15 of the Texas Code of Criminal Procedure requires that when an indictment charges the defendant with negligence, it “must allege, with reasonable certainty, the act or acts relied upon to constitute recklessness. . . .” To the extent that it relies upon omissions, rather than acts, Mr. Smith’s indictment violates article 21.15.

The indictment should be set aside because it fails to comply with article 21.15 of the Texas Code of Criminal Procedure. Alternatively, those portions of the indictment which purport to allege omissions by Mr. Smith should be stricken from the indictment, and not submitted to the jury in a way that authorizes Mr. Smith’s conviction for non-criminal conduct.

### III.

The indictment is defective because it accuses defendant of omissions, but does not also allege a law which provides that the omission in question is an offense, or that defendant has a duty to act. In Texas, “[o]mission’ means failure to act.” TEX. PENAL CODE ANN. § 1.07(a)(34). Furthermore, “[a] person who omits to perform an act does not commit an offense unless a law as defined by Section 1.07 provides that the omission is an offense or otherwise provides that he has a duty to perform the act.” TEX. PENAL CODE ANN. § 6.01(c). An indictment alleging crime by omission is “fundamentally

defective for failing to include a statutory duty imposing a punishable omission.”

*Billingslea v. State*, 780 S.W. 2d 271, 274 (Tex. Crim. App. 1989).

The indictment should be set aside. Alternatively, those portions of the indictment which purport to allege omissions by Mr. Smith should be stricken from the indictment, and not submitted to the jury in a way that authorizes Mr. Smith’s conviction for non-criminal conduct.

#### IV.

The indictment relies contains words and phrases which are inherently vague, accusing Mr. Smith of driving "at a speed that was not reasonable and prudent under the circumstances then existing," and “failing to maintain "such a lookout as a person of ordinary prudence would have maintained under the same and similar circumstances.” This vague and conclusory language fails to give a person of ordinary intelligence adequate notice that his conduct is forbidden by law. A defendant is unable to prepare a defense to such charges, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Course of Law provisions of the Texas Constitution.

The indictment should be set aside. Alternatively, those portions of the indictment which contain these constitutionally vague and conclusory words and phrases should be stricken from the indictment, and not submitted to the jury in a way that authorizes Mr. Smith’s conviction for non-criminal conduct.

## V.

Both counts of the indictment charge more than one offense, in violation of article 21.24 of the Texas Code of Criminal Procedure. Specifically, each count alleges that Mr. Smith drove and operated a vehicle "at a speed that was not reasonable and prudent under the circumstances then existing," and that he failed "to maintain a single lane of travel"; and "to maintain such a lookout as a person of ordinary prudence would have maintained under the same and similar circumstances." 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.

## VI.

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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By \_\_\_\_\_  
MARK STEVENS

Attorneys for Defendant

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 \_\_\_\_\_ day of January, 2018.

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MARK STEVENS

NO. 2010-CR-00000

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

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