

NO. 000000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 198th JUDICIAL DISTRICT
JOE SMITH) BANDERA COUNTY, TEXAS

DEFENDANT'S THIRD MOTION TO SET ASIDE THE INDICTMENT

[Manner and Means]

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves that the indictment filed in this case be set aside for the following reasons:

**I.
Possession Is Not Sufficienged**

Counts Two through Eighteen allege that Mr. Smith did “possess” items, but fail to allege the manner and means of possession, or whether that possession was actual or constructive.

A. If there is a trial, the State will have to prove its case beyond a reasonable doubt, and doing this will require proof of the manner and means of possession, as well as whether there was actual or constructive possession. These counts – which allege none of those things that will have to be proven – are defective and must be set aside. *See Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also 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); *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979)(indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal); *see also* TEX. CODE CRIM. PROC. ANN. 21.03(“Everything should be stated in an indictment which is necessary to be proved.”); TEX. CODE CRIM. PROC. ANN. 21.11 (to be sufficient, charging instrument must charge “the commission of the offense in such a manner as to enable a person of common understanding to know what is meant, and with the 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”).

- B. As Counts Two through Eighteen are currently worded, it will be impossible for Mr. Smith to gather and present records and witnesses necessary to rebut the accusations that he unlawfully possessed the ballots and carrier envelopes of others. Nor will he or his lawyers be able to confront and cross-examine the witnesses and documents the State will call and introduce at trial. Forcing Joe Smith to trial on a vague, bare-bones, and defective indictment like this will render

him defenseless, and will deny him the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Texas Constitution.

II.
Assistance Is Not Sufficiently Alleged

Counts Nineteen through Thirty-Five allege that Mr. Smith assisted certain voters, but fail to allege what assistance he provided, or the manner and means of his assistance.

A. If there is a trial, the State will have to prove its case beyond a reasonable doubt, and doing this will require proof of the manner and means by which the voters were assisted. These counts – because they allege none of this – are defective and must be set aside. *See Miller v. State*, 647 S.W. 2d at 267 (indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d at 449 (indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d at 173 (indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d at 405 (indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d at 922 (information for animal cruelty must allege manner and means by which defendant tortured the animal); *see also* TEX. CODE CRIM. PROC. ANN.

21.03(“Everything should be stated in an indictment which is necessary to be proved.”); TEX. CODE CRIM. PROC. ANN. 21.11 (to be sufficient, charging instrument must charge “the commission of the offense in such a manner as to enable a person of common understanding to know what is meant, and with the 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”).

B. As Counts Nineteen through Thirty-Five are currently worded, it will be impossible for Mr. Smith to gather and present records and witnesses necessary to rebut the accusations that he unlawfully assisted other voters. Nor will he or his lawyers be able to confront and cross-examine the witnesses and documents the State will call and introduce at trial. Forcing Joe Smith to trial on a vague, bare-bones, and defective indictment like this will render him defenseless, and will deny him the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Texas Constitution.

III. Prayer

Joe Smith prays that the Court set aside the indictment in this case, for the reasons given in this motion.

Respectfully submitted:

/s/ Mark Stevens

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Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of defendant's Third Motion To Set Aside The Indictment has been electronically delivered to assistant Attorneys General, on August 3, 2021.

/s Mark Stevens

MARK STEVENS

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ORDER

On this the _____ day of _____, 2021, came on to be considered Defendant's Third Motion to Set Aside the Indictment, and said Motion is hereby

(GRANTED) (DENIED).

JUDGE PRESIDING