NO. 000000

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

DEFENDANT'S FOURTH 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 for the following reasons:

I.
Count One Is Defective For Multiple Reasons

Count One charges a first degree felony, exposing Mr. Smith to imprisonment for the rest of his life. It alleges a course of conduct lasting for 39 days,[1] involving three other named co-defendants, who allegedly "collaborated in carrying on election offenses under Titles 1 through 7 of the Texas Election Code," by committing offenses identified as:

- illegal voting;
- unlawfully acting as an agent;
- purportedly acting as an agent;
- tampering with a governmental record with the intent to harm or defraud;
- fraudulent use of a mail ballot application multiple times in the same election;
- unlawful possession of a ballot or carrier envelope of another multiple times in the same election;

[1] "on or about the 23rd of January A.D., 2018 and continuing until on or about the 2nd day of March A.D., 2018. . . ."

- unlawfully assisting a voter voting ballot by mail.

Count One further alleges that Mr. Smith and the three co-defendants committed said offenses "as the primary actor or by acting with the intent to promote or assist the commission of said offenses by soliciting, encouraging, directing, aiding, or attempting to aid members of said organization to commit said offenses."

A. The indictment is neither plain nor intelligible, and it lacks the certainty required by the Texas Code of Criminal Procedure, and the Texas and United States Constitutions.

Count One fails in myriad ways to provide the notice necessary to give a person of ordinary intelligence notice of what is charged. Specifically:

1. Count One alleges that Mr. Smith and the others collaborated in carrying on election offenses under Titles 1 through 7 of the Texas Election Code, and goes on to generically refer to seven such offenses. One of the offenses generically listed is "tampering with a governmental record with the intent to harm or defraud." Contrary to the claim in Count One, this offense is not an "election offense[] under Titles 1 through 7 of the Texas Election Code. Even if the Attorney General of Texas were constitutionally authorized to prosecute this case,[2] that agency has no authority to prosecute the offense of tampering with a governmental record, because it is not an election law offense. This precise question – "Whether the Attorney General has the authority to prosecute "election law" cases outside of the Election Code, and if so, whether Penal Code § 37.10 is an 'election law' within the meaning of Election Code § 273.021 – is now pending decision in the Texas Court of Criminal Appeals. *See State v. Stephens*, 608 S.W.3d 245, 252 (Tex. App.–Houston [1st Dist.] 2020, pet. granted). We submit that the Court is likely to reverse the decision of the lower Court and resolve the issue to support the argument we now make.

2. Count One does not sufficiently identify the governmental records that were allegedly tampered with. *Swabado v. State*, 597 S.W. 2d 361, 363 (Tex. Crim.

[2] And we maintain he is not. *See* Mr. Smith's First Motion To Set Aside The Indictment, filed this date.

App. 1980)(indictment for tampering with governmental records was defective because it did not sufficiently identify the records, or the names of the persons who were falsely reported as employees); *see generally* TEX. CODE CRIM. PROC. art. 21.09 (indictment should identify personal property, when known, by "name, kind, number, and ownership").

3. Count One alleges that Mr. Smith had the intent to "establish, maintain and participate," in a vote harvesting organization. The quoted words are statutorily undefined, and so broad and vague as to be utterly ineffectual to the purposes of identifying criminal conduct, and providing the defendant notice of what he must defend against. *Cf. Haecker v. State*, 571 S.W.2d 920, 921 (Tex. Crim.App. 1978)(trial court erred in not quashing information for animal cruelty because the general term "torture" did not give defendant adequate notice).

4. Count One alleges that the defendants "collaborated in carrying on" the several named offenses. The word "collaborate," as used in TEX. ELECTION CODE § 276.012(d), is not statutorily defined, and is so broad and vague that it gives no guidance at all to an ordinary defendant what he must do and not do to conform his conduct to the requirements of the law. And how is an ordinary juror to fairly and reliably determine whether one or more of the alleged collaborators violated the law?

5. The intrinsic vagueness of the word "collaborate" is compounded by the fact that the defendants are alleged to have committed the generic offenses "as the primary actor *or* by acting with the intent to promote *or* assist the commission of said offenses by soliciting, encouraging, directing, aiding, *or* attempting to aid members of said organization to commit said offenses.

6. In sum, Count One alleges that four persons "collaborated in carrying on" some seven imprecisely identified offenses (one of which is not even an election law offense), and that some or all of these persons acted as the primary actor or actors, or as parties to "said offenses." The vagueness of Count One leaves many questions unanswered. How does one collaborate in carrying on an offense? Exactly what offenses did the collaboration involve? Who collaborated with whom to carry on which offenses? Which of the defendants acted as primary actors, and which as parties, and concerning which of the seven generic offenses? Is it legally possible to act as both a collaborator and a party to an offense? *Cf.*, *McIntosh v. State*, 52 S.W.3d 196, 201 (Tex. Crim. App. 2001)("party liability can support a conviction for engaging in organized criminal activity when, as in this case, the offense is alleged and proved as commission of the object offense"). Each of the foregoing questions can only be answered with a guess. Due process

demands more. *E.g., Cotton v. State*, 686 S.W. 2d 140, 142-43 (Tex. Crim. App. 1985)(holding a statute forbidding the sale of beer to one "showing evidence of intoxication" unconstitutionally vague where the server "must simply guess at the standard of criminal responsibility")

7. For the reasons given in items 1 – 6, Count One does not "set forth [the offense] in plain and intelligible words", in violation of TEX. CODE CRIM. PROC. art. 21.02(7). Nor does it "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 that degree of certainty that will give the defendant notice of the particular offense with which he is charged " in violation of TEX. CODE CRIM. PROC. 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.

8. Additionally, the offense is not "set forth in plain and intelligible words", in violation of TEX. CODE CRIM. PROC. ANN. art. 21.02(7).

9. And the indictment does not State "[e]verything . . . which is necessary to be proved", in violation of TEX. CODE CRIM. PROC. ANN. art. 21.03.

10. As Count One is currently worded, it will be impossible for Mr. Smith to gather and present records and witnesses necessary to rebut the charge of engaging in organized election fraud. 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.

B. The indictment's uncertainty will not permit Mr. Smith to plead any judgment given in bar of a subsequent prosecution.

Because of the uncertainties of Count One, as identified in § II.A of this motion, Mr. Smith will not be able 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. 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. Nor will this Court, in the event of conviction, be able "to pronounce the proper judgment." TEX. CODE CRIM. PROC. art. 21.11. *See Ferguson v. State*, 622 S.W.2d 846, 849 (Tex. Crim. App. 1980).

C. Ensuring a unanimous verdict will not be possible.

If this case goes to trial, the Court will be tasked with preparing a jury charge that "distinctly set[s] forth the law applicable to the case." TEX. CODE CRIM. PROC. art. 36.14. Among other things, the Court will have to ensure that any verdict returned by the jury is unanimous. *See* TEX. CONST. Art. V, § 13; TEX. CODE CRIM. PROC. art. 36.29(a). Because of the vagaries in Count One – particularly those as to the offenses allegedly committed, and whether the defendants were primary actors or parties – it will be impossible for this Court to craft a jury instruction that submits this case in a way that ensures the jury unanimity mandated by Texas law.

II.
Counts Two Through Eighteen
Do Not Charge An Offense

Counts Two through Eighteen allege that on or about February 14 and February 20, 2018, Mr. Smith did "knowingly possess the official ballot of official carrier envelope of" seventeen different voters.

Counts Two through Eighteen must be set aside because, in Texas, the act of possessing "the official ballot of official carrier envelope" of a voter is not "declared to be an offense." TEX. CODE CRIM. PROC. ANN. 21.01. The purported charging instrument here does not set forth an offense "in plain and intelligible words." TEX. CODE CRIM.

PROC. ANN. 21.02(7). The indictment does not charge the commission of any 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 that 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." TEX. CODE CRIM. PROC. ANN. 21.11.

III.
Counts Nineteen Through Thirty-Five Misjoin Multiple Offenses

Counts Nineteen through Thirty-Five allege that on or about February 14, 20, 21, and 26, 2018, Mr. Smith did "knowingly fail to sign the required written oath and enter his signature, name, and residence address on the official carrier envelope of " seventeen different voters.

Each of Counts Nineteen through Thirty-Five alleges two separate offenses, namely, that Mr. Smith assisted a voter but did not sign the required written oath, (in violation of TEX. ELECTION CODE §86.010(c)) *and* that he assisted a voter but did not enter his signature, name, and address on the official carrier envelope (in violation of TEX. ELECTION CODE §86.010(e)). The indictment is defective and must be set aside because Counts Nineteen through Thirty-Five improperly misjoin multiple offenses in the following ways:

A. TEX. CODE CRIM. PROC. ANN. art. 21.24 is violated.

Article 21.24 of the Texas Code of Criminal Procedure allows joinder of separate offenses in a single indictment provided that the offenses are Stated in separate counts.

Each count may also contain as many paragraphs as necessary to properly charge the offense or offenses. Counts Nineteen through Thirty-Five violate article 21.24. When article 21.24 is violated, a defendant "may object to the charging instrument on the ground that the State has misjoined offenses. The trial court should then grant the motion to quash, or it may force the State to elect the offense upon which it will proceed." *Sifford v. State*, 741 S.W. 2d 440, 441 (Tex. Crim. App. 1987).

B. Charging two different offenses in a single count will make it impossible to ensure that the jury's verdict is unanimous.

If this case goes to trial, the Court will be tasked with preparing a jury charge that "distinctly set[s] forth the law applicable to the case." TEX. CODE CRIM. PROC. art. 36.14. Among other things, the Court will have to ensure that any verdict returned by the jury is unanimous. *See* TEX. CONST. Art. V, § 13; TEX. CODE CRIM. PROC. art. 36.29(a). The manner in which the State has pleaded these offenses will make it impossible to instruct the jury in such a way as to ensure 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. If the two offenses charged in each count are submitted disjunctively, and the jury returns a general verdict, it will be impossible to know whether the jurors unanimously agreed on one offense or the other. *See Ngo v. State*, 175 S.W.3d 738, 744 (Tex. Crim. App. 2005)("When the State charges different criminal acts, regardless of whether those acts constitute violations of the same or different statutory provisions, the jury must be instructed that it cannot return a guilty verdict unless it unanimously agrees

upon the commission of any one of these criminal acts.”).

C. This Court will be unable to pronounce judgment upon this uncertain indictment.

It will be impossible for the Court to pronounce the proper judgment given the misjoinder in Counts Nineteen through Thirty-Five. TEX. CODE CRIM. PROC. art. 21.11. *See Ferguson v. State*, 622 S.W.2d 846, 849 (Tex. Crim. App. 1980).

IV.

The Indictment Makes Inconsistent Allegations Concerning The Proper Venue For This Prosecution

This 35-Count indictment was returned by a grand jury impaneled in Bandera County, Texas and commences by alleging that Mr. Smith committed the crimes charged “in the County and State aforesaid” (that is, in Bandera County). In each of the 35 Counts, though, it is claimed that the offenses were committed “in Medina County, Texas, a county adjoining Bandera County, Texas.” These allegations are inconsistent; did the alleged offenses occur in Medina County, Bandera County, or both? This indictment must be set aside because:

1. The offense alleged is not "set forth in plain and intelligible words", in violation of TEX. CODE CRIM. PROC. art. 21.02(7). Nor does it “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 that degree of certainty that will give the defendant notice of the particular offense with which he is charged . . ." in violation of TEX. CODE CRIM. PROC. 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.

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 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.

V.
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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CERTIFICATE OF SERVICE

I certify that a copy of Defendant's Fourth 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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STATE OF TEXAS	)	IN THE DISTRICT COURT
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JOE SMITH	)	BANDERA COUNTY, TEXAS

ORDER

On this the_______day of______________________, 2021, came on to be considered Defendant's Fourth Motion to Set Aside the Indictment, and said Motion is hereby

(GRANTED) (DENIED).

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JUDGE PRESIDING