

NO. CR0000

STATE OF TEXAS ) IN THE DISTRICT COURT  
VS. ) OF  
JOE SMITH ) COMAL COUNTY, TEXAS

**DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves to set aside his indictment for the following reasons:

I.

The indictment alleges that Mr. Smith did “use” identifying information, but it does not allege the manner and means of this usage, in violation of the principles stated in *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).

## II.

The indictment alleges an intent to harm Herbert G. Martin and Margaret D. Martin, but does not state what harm was intended or in any way specify which definition of harm the state intends to prove under § 1.07(a)(25) of the Texas Penal Code.

## III.

The indictment alleges that contracts were entered but it does not set forth the contracts in question "in haec verba." *See Swabado v. State*, 597 S.W. 2d 361, 364 (Tex. Crim. App. 1980)(suggesting that state might avoid pleading problems by setting forth governmental records *in haec verba*).

## IV.

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 Criminal District Attorney's Office, 150 N. Seguin Ave., New Braunfels, Texas 78130 on this the 23rd day of May, 2008.

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MARK STEVENS

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**ORDER**

On this the \_\_\_\_\_ day of \_\_\_\_\_, 2008, 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