

NO. 000000

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

DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Jo 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.

The indictment is defective because it attempts to punish defendant for exercising her right to free speech guaranteed by the First and Fourteenth Amendments of the United States Constitution and by the Texas Constitution. Section 38.15(d) provides that it is a defense to prosecution in this section that the action consisted of speech only. This is true in defendant's case.

II.

The indictment alleges that defendant acted with criminal negligence, but does not specify with reasonable certainty the act or acts relied upon to constitute negligence, in violation of article 21.15 of the Texas Code of Criminal Procedure.

III.

The indictment does not adequately specify the manner and means of the alleged

offense. Specifically, the indictment alleges that defendant repeatedly interrupted the officer's attempt to question Rene Robles. If, as we believe, these alleged interruptions consisted of speech only, no offense was committed under §38.15 of the Texas Penal Code. The indictment should specify whether defendant's conduct was by action, or mere words.

IV.

The indictment should be set aside because it does not appear from the face of the indictment that an offense against the law was committed by the defendant, since the indictment does not describe conduct consisting of more than mere speech. *See* Tex. Code Crim. Proc. Ann., art. 27.08(1).

V.

Because it appears from the face of the indictment that it alleges speech only, the indictment contains matter which is a legal defense or bar to the prosecution pursuant to § 38.15(d) of the Texas Penal Code. *See* Tex. Code Crim. Proc. Ann., art. 27.08(3).

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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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 1st day of April, 2018.

MARK STEVENS

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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)

JUDGE PRESIDING