

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	226TH 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 recklessly, the charging instrument “must allege, with reasonable certainty, the act or acts relied upon to constitute recklessness . . . .” *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 reckless 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 keep a

proper lookout;” “to apply the brakes in a timely manner;: “to take proper and necessary evasive action to avoid colliding with another motor vehicle;” and “to maintain proper control over the motor vehicle." As alleged, none of these driving events demonstrate that Mr. Smith drove in a reckless manner. None of these acts or omissions are inherently reckless. Without more certainty, the actions and failures alleged do not demonstrate that Mr. Smith drove in a reckless manner, in violation of article 21.15, and the indictment should be set aside because it fails to comply with this article.

## 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 keep a proper lookout,” and “failing to apply the brakes in a timely manner,” and “failing to take proper and necessary evasive action to avoid colliding with another motor vehicle,” and “failing to maintain proper control over the motor vehicle,” and “driving the motor vehicle at a speed that was not reasonable

and prudent under the circumstances then existing.” 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.

The first count of the indictment alleges that defendant acted by “accident and mistake.” The second count alleges that he acted “recklessly.” That is, one count alleges an absence of any culpable mental state, and the other alleges the presence of a culpable mental state. It can be seen, therefore, that Count I’s allegation that defendant acted without culpability is a legal defense and bar to prosecution under Count II. Mr. Smith excepts to this indictment pursuant to article 27.08(3) of the Texas Code of Criminal Procedure.

#### VI.

Count II, Paragraph B is defective because it does not name or in any way identify the complainant, in violation of article 21.07 of the Texas Code of Criminal Procedure.

VII.

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, BexarCounty Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 25th day of February, 2018.

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MARK STEVENS

NO. 2018-CR-0000

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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