

NO. 0000000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 226TH 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 be dismissed 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 alleges that Ms. Smith intentionally caused the death of Mary Johnson by shooting her with a firearm while in the course of committing or attempting to commit the offense of robbery.

II.

On its face, the indictment charges that defendant was a principal actor. Counsel submits that the State is in possession of no evidence whatsoever that Ms. Smith shot Ms. Johnson. Is it the State's theory, then, that Ms. Smith acted, not as a principal, but instead as a party?

III.

The indictment, however, fails to allege which theory of party responsibility the State will rely upon at trial, even though several completely different theories are enumerated in § 7.02 of the Texas Penal Code. By failing to notify Defendant how she acted as a party in

this case, the State has failed to give her adequate notice to permit her to prepare a defense in this case, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 13 and 19 of the Texas Constitution.

IV.

This indictment is defective because it does not allege which of the various statutory ways one can potentially be responsible as a party for the conduct of another under § 7.02 of the Texas Penal Code. *Cf. Olurebi v. State*, 870 S.W. 2d 58, 62 (Tex. Crim. App. 1994)(where “there are two ways for a credit card to be ‘fictitious’ under Section 32.31(b)(2), a trial court should grant a motion to quash an indictment that fails to adequately notify the defendant of the manner in which the card is fictitious); *Drumm v. State*, 560 S.W. 2d 944, 945-46 (Tex. Crim. App. 1977)(information should be quashed because it failed to allege which subsection of the statute the state intended to rely upon).

V.

Texas law requires an indictment to state “[e]verything . . . which is necessary to be proved.” TEX. CODE CRIM. PROC. ANN. art. 21.03. Here the State will have to prove, if it can, that defendant was criminally responsible for the conduct of others, pursuant to § 7.02. The indictment is defective because it does not allege how that is true in the present case. *See Cruise v. State*, 587 S.W. 2d 403, 404 (Tex. Crim. App. 1979)(where prosecution cannot prove its case of aggravated assault without adducing facts which describe the way in which appellant caused bodily injury, “the trial court committed reversible error in refusing to order the State to disclose such facts when confronted with appellant’s motion to quash the indictment”); *accord Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1985)(trial court erred under article 21.03 in denying motion to quash where it was “clear that it was necessary for the prosecution to prove the manner and means in which the appellant did ‘start fire’ in order to meet its burden of proof”).

VI.

Counsel acknowledge that Texas case law has held that “a party to an offense may be charged with the offense without alleging the facts which make the defendant a party to the offense and criminally responsible for the conduct of another.” *Pitts v. State*, 569 S.W.2d 898, 900 (Tex. Crim. App. 1978); *accord Linares v. State*, 427 S.W.3d 483, 490 (Tex. App.–San Antonio 2014, no pet.) (“Allegations that a party is guilty under the law of parties need not be specifically pled in the indictment.”). Respectfully, we submit that the arguments we have made in this motion, and the authority we cite, amply support our position that the indictment in this case is defective and should be set aside.

VII.

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 this Motion has been electronically delivered to the Bexar County District Attorney's Office on February 28, 2023.

/s/ Mark Stevens
MARK STEVENS

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ORDER

On this the ___ day of _____, 2023, came on to be considered Defendant's Motion to Set Aside the Indictment, and said Motion is hereby

(GRANTED) (DENIED)

JUDGE PRESIDING