

Docket No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CALVIN GARY WALKER,
PETITIONER,

-v-

THE STATE OF TEXAS,
RESPONDENT.

On petition for writ of certiorari from the
Texas Court of Criminal Appeals

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
VOL. 2 OF 2

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APPENDIX F –

Excerpt from October 1, 2019 Oral Pronouncement of Sentence.

1 Thank you.

2 (Jury Enters Courtroom)

3 THE COURT: And the record shall show
4 that the jury is now in the courtroom. Mr. Brewton, as
5 jury foreperson, we have received a message from the
6 jury that the jury has reached a verdict in this case.
7 Is that so, sir?

8 THE FOREPERSON: Yes, sir.

9 THE COURT: Is this verdict a unanimous
10 one; that is, one that is agreed upon by all members of
11 the jury?

12 THE FOREPERSON: Yes, sir.

13 THE COURT: Do any of the jurors disagree
14 with your foreperson's representation to the Court?
15 There is no disagreement. It does, indeed, appear to
16 be unanimous.

17 If you would be so kind, pass the
18 documents to the bailiff. You may be seated. The
19 Court will review for proper form and publish the
20 verdict.

21 (Documents Tendered to Court)

22 THE COURT: And the defendant shall rise.
23 We, the jury, assess the defendant's punishment at
24 confinement in the Institutional Division of the Texas
25 Department of Criminal Justice for a term of 10 years.

1 We further find the defendant has never before been
2 convicted of a felony in this or any other state and
3 recommend that his punishment be probated. We further
4 assess a fine of \$10,000. That is not suspended or
5 probated. It's signed by the foreperson of the jury.
6 It's made a part of the record for the purposes of this
7 case at this time. You may be seated.

8 Ladies and gentlemen of the jury, at this
9 time, your duty as jurors is completed. At the
10 beginning of the trial, I placed you under a number of
11 instructions; and at this time, I am releasing you from
12 these instructions. One final instruction, however,
13 when you are discharged, you are released from your
14 oath of secrecy. You are free to discuss this case and
15 your deliberations with anyone. Conversely, you are
16 also free to refuse to discuss the case; and you have
17 every right to maintain your silence.

18 Now, a little later, the attorneys will
19 be released; and sometimes they certainly like to talk
20 to jurors, if you're interested in speaking with them.
21 We're going to get, though, some sheets for you which
22 shows your attendance for this trial for work or school
23 or other purposes here in a moment.

24 I want to thank you very much for your
25 public service as jurors. "We, the people," is the way

1 the Constitution starts; and for trials by jurors, jury
2 trials, we have to have the people come forward and
3 make their time available to serve the public. That's
4 the only way it can work or else the right of a trial
5 by jury would be meaningless. So, I want to thank you
6 for your civic duty; and I hope to have the opportunity
7 to work with you again in the future. Until then, may
8 God continue to bless Jefferson County and her
9 residents. You are excused.

10 Those of you who need something, please
11 come forward; and you can get the documentation for
12 work or school or other purposes.

13 (Jury Exits Courtroom)

14 THE COURT: A couple of things before we
15 conclude these proceedings. There was an appeal
16 documentation. Have you signed that, Mr. DeGuerin?

17 MR DEGUERIN: I have signed that, Your
18 Honor. We intend to file a Motion For New Trial within
19 the time allotted; and so, I'm not giving notice of
20 appeal at this time. I want to file a Motion For New
21 Trial first.

22 MR. KNAUTH: Your Honor, also, the State
23 has a request.

24 THE COURT: Okay. What we have is the
25 trial court certification of defendant's right of

1 appeal that has to be filed. It is filed at this time.
2 What I intend to order -- before any of you speak, what
3 we're going to do is go through the formal recitation
4 of the judgment here on the record. I'm going to also
5 order Mr. Walker to report at the probation office
6 tomorrow to do a post sentence report so that the Court
7 can have information that's necessary for supervision
8 of the defendant.

9 As you know, his confinement as assessed
10 by the jury is suspended; but the fine is not
11 suspended. So, that's going to be part of the
12 judgment. Before I go into the oral formal judgment,
13 what does the State ask?

14 MR. KNAUTH: The State would request that
15 a condition of his probation that the defendant be
16 required to serve 6 months upfront day for day.

17 THE COURT: What we're going to do is
18 come back after the post sentence report. We'll have a
19 hearing on what conditions of probation this Court
20 intends to assess, all right? Anything else?

21 MR DEGUERIN: No, Your Honor.

22 THE COURT: If not, Calvin Gary Walker,
23 you came before this Court and a jury, entered a plea
24 of not guilty to the offense as set out in the
25 indictment, the evidence was submitted and the jury was

1 charged and after deliberating, the jury returned a
2 verdict finding you guilty of the offense as alleged in
3 the indictment for securing execution of a document by
4 deception. Thereafter, punishment was assessed at
5 10 years confinement in prison, which was suspended,
6 and a fine of \$10,000 was assessed by the jury's
7 verdict.

8 Is there anything that anyone needs to say
9 before the Court renders its final judgment here?
10 Anything to add?

11 MR DEGUERIN: We intend to file a Motion
12 for New Trial, Your Honor; and based on the outcome of
13 that, we'll then determine whether to file a notice of
14 appeal.

15 THE COURT: Okay. Otherwise, finding
16 nothing to bar pronouncement of sentence, it is the
17 judgment of this Court that you are, indeed, found
18 guilty in Cause No. 14-19966 and that you be punished
19 in accordance with the jury's verdict. Therefore, your
20 punishment is assessed at 10 years confinement in
21 prison, which is suspended, and you are placed -- you
22 will be placed on regular probation for 10 years, and
23 you are fined \$10,000. There will be other terms and
24 conditions of probation that the Court will assess, but
25 all of that will be a product of the post sentence

1 report that the Court receives. I want a hearing on
2 that in about four weeks. What is a date? What do
3 you-all want, Monday, Wednesday or Friday?

4 MR DEGUERIN: Not a Friday.

5 THE COURT: Friday it is.

6 MR. DEGUERIN: No, not a Friday.

7 THE COURT: Is Wednesday good?

8 MR DEGUERIN: Yes.

9 MR. KNAUTH: Yes, sir.

10 THE COURT: On a Wednesday.

11 THE COORDINATOR: Wednesday, October the
12 30th.

13 THE COURT: Wednesday, October 30th, at
14 9:00 o'clock.

15 MR DEGUERIN: I don't have my full
16 calendar here.

17 THE COURT: If that's not good, you can
18 get back with me, okay? Bryan, make sure he remembers.

19 MR DEGUERIN: I think that will be all
20 right.

21 THE COURT: We'll set that tentatively.

22 MR DEGUERIN: I have a pretrial
23 conference in federal court on that date, but I'm not
24 sure that that's going to be a problem. I'll get back
25 with the Court or the coordinator.

1 THE COURT: Anything else to add at this
2 time?

3 MR DEGUERIN: No, Your Honor.

4 THE COURT: We're in recess until the
5 next court setting on October 30th. Thank you. We're
6 in recess.

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APPENDIX G –

Excerpt from November 6, 2019 Hearing on Probation Conditions.

1 THE COURT: We call Cause No. 14-19966,
2 the State of Texas versus Calvin Gary Walker, who is
3 present with his attorneys and the State's attorneys.
4 Mr. DeGuerin, you have filed a couple of things and I
5 think the State has filed one or more items here on the
6 eleventh hour here. So, can you review them with me so
7 I can understand the position?

17 So, we have a post sentence report that
18 has been prepared. Hopefully, the parties have had an
19 opportunity to receive it, review it; and are there any
20 objections or changes to that first?

21 MR. KNAUTH: None from the State, Your
22 Honor.

23 MR DEGUERIN: Yes, Your Honor. First, as
24 to page 2 entitled restitution issue, first, the Court
25 did not in its oral pronouncement of sentence or in the

1 written judgment include restitution. So, we believe
2 that under the case law, there can be no restitution
3 ordered; and it is punitive in nature. Secondly, the
4 statement in that presentence report says a total of
5 \$2,900,000 is requested in restitution but it was proven
6 during the defendant's trial -- well, that's a mistake.

7 First, there was no proof of a loss. To
8 the contrary, the testimony was that Mr. Walker
9 performed the jobs at both Regina Howell and South Park
10 as agreed to at an agreed price; and there was never any
11 complaint about the work that was done. So, we object
12 to that. We object to any sort of entry of an order of
13 restitution. There is another part here.

14 THE COURT: And on that portion under
15 restitution issues, page 2, of course, it states,
16 "according to the district attorney's office." That's
17 their view of what the restitution should be, and you
18 certainly have a fair opportunity to sound in. Article
19 42.037, which is entitled restitution, under Chapter 42
20 dealing with judgments, it plainly states that
21 restitution can be ordered as a term of probation and at
22 the time the Court -- when I asked did anybody have any
23 -- is there any reason why judgment should not be
24 pronounced, that formality was done without objection.
25 But the point was made clearly to everyone that we were

1 going to reserve probation terms and conditions until
2 everyone sounded in later at a subsequent time and upon
3 a post sentence report by the probation officer and
4 that's where we are here. I'm going to consider it. It
5 can be considered, but I'm not satisfied that there is
6 -- that the State's position is correct and that's what
7 we're going to allow everybody to be fairly heard on
8 that.

9 So, whatever terms of probation can and
10 should be assessed, that's what we are here for because
11 it wouldn't be practical at the time of the rendering of
12 a verdict when the jury was assessing the punishment
13 that those terms and conditions could be practically
14 dealt with at that time. Every case is unique and in
15 every case, unless there is flat time and all lawyers
16 agree that a presentence report is waived, we always
17 order a presentence report and then finalize any
18 probation terms and that's been 100 percent in the
19 history.

20 I know what the case law has said in
21 terms of probation where probation terms must be geared
22 for the circumstances of each case. It's obviously
23 impractical and that's why Article 42.037 of the Code of
24 Criminal Procedure has been employed to -- under H, "If
25 a defendant is placed on community service or is paroled

1 or released on mandatory supervision, the Court or the
2 parole panel shall order the payment of restitution
3 ordered under this article." It doesn't say, "Got you
4 because you didn't do it at the time of the assessment";
5 and this "shall" is mandatory. So, it was perceived,
6 obviously, by the legislature that there would be a
7 practical issue involved. There is no way on the
8 rendering of a judgment from the jury at that time that
9 we could ever really deal with the issues of probation
10 terms, especially in a case like this one that has
11 certain issues that have been dealt with in-depth.

12 So, anyway, it's a viable issue. It's
13 clear. Restitution can be ordered as a condition of
14 probation but this Court is not ready and does not feel
15 comfortable that an amount, if any, has been cleared yet
16 to this Court but it says it shall be, if restitution is
17 actual. So, we're going to deal with that and any other
18 terms and conditions of probation that are reasonable
19 and necessary. So, that's what we're here for.

20 MR DEGUERIN: So, on the issue of
21 restitution, Your Honor, so my position is clear, we've
22 cited to the Court Bert versus State, which footnote 32
23 and 33 cites several other cases, all of which stand for
24 the proposition that if the Court at pronouncement of
25 sentence -- which has already happened -- does not order

1 restitution and the judgment is silent on that also,
2 that there should be no restitution.

3 THE COURT: Okay. Well, the statute says
4 restitution shall be ordered when restitution is done.
5 It's clear in subpart H of the Code. So, we're moving
6 forward on that.

7 So, next? Everybody gets to sound in.
8 What should -- you're asking for restitution to be
9 assessed?

10 MR. KNAUTH: Yes, Your Honor. We believe
11 the evidence supports a request for \$2.6 million. How
12 we came up with that number is in evidence. There is --

13 THE COURT: I would like you to work that
14 out with me, please, so I can understand it fully.

15 Thank you.

16 MR. KNAUTH: Yes, sir, I was trying to.

17 MR DEGUERIN: We'd like a hearing on
18 that, Your Honor.

19 THE COURT: I just want to hear his
20 position, okay, and you will get -- we're going to give
21 you an opportunity. So that I know where you're headed,
22 tell me what your proffer is.

23 MR. KNAUTH: Within evidence, within the
24 guilt/innocence phase and during the punishment phase,
25 there was evidence tendered into evidence and testified

APPENDIX H –

**Walker's First Amended Motion to Quash Indictments,
Filed August 27, 2019.**

**Cause Nos. 14-19965, 14-19966, 14-19967, 14-19968,
14-19969; and 14-19970**

THE STATE OF TEXAS § IN THE CRIMINAL DISTRICT COURT
§
§
v. §
§
CALVIN GARY WALKER § FOR JEFFERSON COUNTY, TEXAS

FIRST AMENDED MOTION TO QUASH INDICTMENTS

COMES NOW Dick DeGuerin, counsel of record for Calvin Walker and files this *Motion to Quash Indictment* in the above-styled causes and would respectfully show the Court as follows:

I.

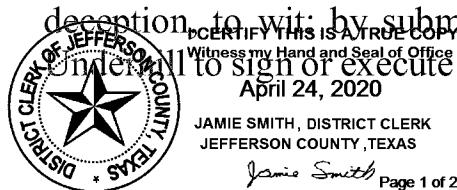
On July 29, 2014, a Grand Jury returned indictments against Mr. Walker for Securing Execution of Document by Deception, alleging in relevant part, that he:

“[W]ith intent to harm or defraud Beaumont Independent School District, by deception, to wit: by submitting fraudulent invoices, cause Jane Kingsley to sign or execute a document affecting the pecuniary interest of Beaumont Independent School District, the value of said pecuniary interest being \$200,000 or more . . .”

See Exhibit A. This language is identical in the indictments for Cause Nos. 14-19965, 14-19966, and 14-19967.

The indictment in Cause No. 14-19968 alleges, in relevant part, that Mr. Walker:

“[W]ith intent to harm or defraud the City of Port Arthur, Texas, by deception, to wit: by submitting fraudulent invoices, cause Rebecca



of the City of Port Arthur, Texas, the value of said pecuniary interest being \$200,000 or more”

See Exhibit B.

Attached to each indictment is a copy of the checks allegedly executed by Ms. Kingsley and Ms. Underhill. What are not attached, or ever identified, are the invoices the State alleges were fraudulently submitted by Mr. Walker.

Additionally, Mr. Walker challenges the constitutionality of TEX. PEN. CODE § 32.46 as being void for vagueness as applied to him in each of these indictments.

These issues are discussed in turn.

II.

These indictments fail to give Mr. Walker sufficient notice pursuant to the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution; pursuant to Art. I, §§ 10 and 19 of the Texas Constitution; and pursuant to Arts. 1.04, 1.05, 21.02, 21.03, 21.04, and 21.11 of the Texas Code of Criminal Procedure.

It is well-established that a defendant has a constitutional right to sufficient notice so as to enable him to prepare a defense. *Kellar v. State*, 108, S.W.3d 311, 313 (Tex.Crim.App. 2003) (citing *Thomas v. State*, 621 S.W.2d 158, 163 (Tex.Crim.App. 1981) (“The motion to quash will be granted where the language concerning the defendant’s conduct is so vague or indefinite as to deny the defendant effective notice of the acts he allegedly committed.”)).



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“A motion to quash should be granted only where the language concerning the defendant’s conduct is so vague or indefinite as to deny the defendant effective notice of the acts he allegedly committed. In the face of [a] timely motion to quash an indictment, the indictment must allege on its face the facts necessary to show that the offense was committed, to bar a subsequent prosecution for the same offense, and to give the defendant notice of precisely what he is charged with. Where the accused has raised the claim of inadequate notice by means of a timely motion to quash, this Court has held: ‘The general rule is that a motion to quash will be allowed if the *facts* sought are *essential* to give notice. However, unless a fact is essential, the indictment need not plead evidence relied on by the State.’”

Bynum v. State, 767 S.W.2d 769, 778-79 (Tex.Crim.App. 1989).

It is well-established that *facts essential* to giving notice includes sufficiently identifying the documents alleged in comprising a defendant’s conduct. *Bynum*, 767 S.W.2d 769, 779 (Tex.Crim.App. 1989); *Adams v. State*, 707 S.W.2d 900 (Tex.Crim.App. 1986); *Farabee v. State*, 368 S.W.2d 222 (Tex.Crim.App. 1963).

In *Bynum*, the defendant was charged in a five-count indictment with misapplication of fiduciary property under TEX. PEN. CODE § 32.45. *Bynum*, 767 S.W.2d at 771. The State alleged the defendant, while a county court judge, unlawfully cashed ten contributions checks without providing a proper accounting. *Id.* In his notice-based motion to quash, the defendant raised that the indictment failed to describe the money and checks that were the subject of each count and paragraph of the indictment. *Id.* at 777.

The Texas Court of Criminal Appeals recognized that even though the indictment generally tracked the language of the statute, the indictment failed to give



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adequate notice and the trial court erred in failing to grant the defendant's motion to quash. The Court determined that the documents forming the basis of the defendant's conduct in the indictment – the checks in that particular instance – needed to be adequately described and identified. *Id.*

The indictments made the basis of these actions fail in the same regard. Though the indictments generally track the language of TEX. PEN. CODE § 32.46, they do not in any way describe or identify the allegedly fraudulent invoices the State claims constituted the defendant's conduct. As a result, each of these indictments fails to give Mr. Walker adequate notice under both the U.S. and Texas Constitutions, and under the Texas Code of Criminal Procedure.

III.

Mr. Walker challenges the constitutionality of TEX. PEN. CODE § 32.46 as being void for vagueness as applied to him in each of these indictments.

Mr. Walker is charged under TEX. PEN. CODE § 32.46 (a)(1), which provides:

“(a) A person commits an offense if, with intent to defraud or harm any person, he, by deception:

(1) causes another to sign or execute any document affecting property or service or the pecuniary interest of any person.”

TEX. PEN. CODE § 32.46 (a)(1) (emphasis added).



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The statute creates three distinct categories of affected interests: 1) property; 2) service; and 3) pecuniary interest. Mr. Walker is charged under the pecuniary interest language of this statute.

The punishment affixed to an offense under § 32.46 (a)(1) is provided by subsection (b), which provides (as-applied to the instant indictments):

“(b) An offense under Subsection (a)(1) is a:

(7) felony of the first degree if the value of the property, service, or pecuniary interest is \$300,000 or more.”

TEX. PEN. CODE § 32.46 (b).

The term “value” as used in TEX. PEN. CODE § 32.46 (b) is specifically created and defined by TEX. PEN. CODE § 32.02, in and apart from the definitions section of TEX. PEN. CODE § 32.01. However, § 32.02 wholly fails to contain any definition or instruction as to value related to a pecuniary interest, as is charged in Mr. Walker’s indictments. This is where § 32.46 becomes unconstitutionally vague as applied. This specific statute, which defines “value,” only defines value for “property” and “service” as those terms are used in §§ 32.46 (a)(1) and (b) – and not for “pecuniary interest.”

TEX. PEN. CODE § 32.02 provides:

“Sec. 32.02. VALUE.

(a) Subject to the additional criteria of Subsections (b) and (c), value under this chapter is:



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- (1) the fair market value of the property or service at the time and place of the offense; or
- (2) if the fair market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the offense.

(b) the value of documents, other than those having a readily ascertainable market value, is:

- (1) the amount due and collectible at maturity less any part that has been satisfied, if the document constitutes evidence of a debt; or
- (2) the greatest amount of economic loss that the owner might reasonably suffer by virtue of loss of the document, if the document is other than evidence of a debt.

(c) If property or service has value that cannot be reasonably ascertained by the criteria set forth in Subsections (a) and (b), the property or service is deemed to have a value of \$750 or more but less than \$2,500.

(d) If the actor proves by a preponderance of the evidence that he gave consideration for or had a legal interest in the property or service stolen, the amount of the consideration or the value of the interest so proven shall be deducted from the value of the property or services ascertained under Subsection (a), (b), or (c) to determine value for purposes of this chapter.”

TEX. PEN. CODE § 32.02.

The Fifth Amendment, applicable to the states through the Fourteenth Amendment's due process clause, provides that “no person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend V. The Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice



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of the conduct it punishes, or is so standardless that it invites arbitrary enforcement. *Johnson v. United States*, 135 S.Ct. 2551, 2556 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352 (1983). The prohibition of vagueness in criminal statutes “is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,” and a statute that flouts it “violates the first essential of due process.” *Johnson*, 135 S.Ct. at 2556-57 (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences. *Johnson*, 135 S.Ct. at 2557 (citing *U.S. v. Batchelder*, 442 U.S. 114, 123 (1979)).

Articulating a crime and the corresponding penalty for its commission are indelibly linked. *U.S. v. Under Seal*, 819 F.3d 715, 722 (4th Cir. 2016). The Supreme Court has recognized:

“The defendant’s ability to predict with certainty the judgment from the face of the felony indictment [historically] flowed from the invariable linkage of punishment with crime. *See* 4 Blackstone 369-370 (after verdict, and barring a defect in the indictment, pardon or benefit of clergy, the court must pronounce that judgment, which the law hath annexed to the crime.”)

Apprendi v. New Jersey, 530 U.S. 466 (2000). Indeed, the defining characteristic of a criminal statute is its punitive effect. *U.S. v. Under Seal*, 819 F.3d 715, 722 (4th Cir. 2016). “Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the



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conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” *BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996).

On its face, § 32.46 is unconstitutionally vague because it provides no notice of what “value” means in the context of pecuniary interest. While the legislature provided specific instructions for calculating the value of services rendered or goods sold in the context of § 32.46, it failed to provide such clarification regarding pecuniary interest. As it stands, the defendant is given no notice as to what method or metric will be used to calculate the value that determines both the class of crime and punishment scheme to which he may be subjected.

In § 32.02, the legislature defined “value” in a separate statutory provision, and not just under the standard definitions section, because the complexity of fraud cases brought under § 32.46 can create difficulties in knowing just what was lost as a result of any fraud. With no defined method of valuating pecuniary interest, it is unclear whether that interest refers to, for instance, a total amount of money involved in a transaction, or the specific amount of loss suffered by a victim duped by deception into executing a document. Just as § 32.02(d)’s value off-set provision for services rendered recognizes the inevitability of circumstances when the overall value of a deal is far in excess of the amount of loss, the statute’s pecuniary interest provision must similarly put defendants on notice as to just what calculation will be used to determine the value of a purported victim’s pecuniary interest.



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Practically, one can envision a scenario where a check is executed to the defendant for \$1 million, but because the defendant completed work or provided services valued at \$950,000, the real amount of loss is not the full value of the check but something much lower. With an undefined value component and no framework for determining the actual value of the victim's pecuniary interest, a defendant may face the disproportionate outcome of a higher punishment for an act of deception costing the victim less money. § 32.02(d) recognized this in the context of services and cleared up any vagueness by outlining a specific formula for determining value, thus putting the defendant on notice as to the consequences of his conduct. But the statute failed to anticipate similar circumstances in cases charged under pecuniary interest language. By failing to afford the same clarity in defining the value of a pecuniary interest, the legislature created a statute that is, at least in part, constitutionally void for vagueness.

If the escalating distinctions in § 32.46's punishment provisions are to mean anything, then the statute must provide a framework for properly sifting the amounts of loss to victims of deception. Where the statute leaves value undefined, it leaves the parties and this court to guess at which metric to use in determining the offense level and assessing the requisite punishment. Additionally, it places this Court in the position where it would need to step into the role of the legislature, and create a definition of the word "value," though that word is already specifically defined by



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the Texas Penal Code. The principles of due process demand that this sort of situation be avoided through statutes that fully provide notice to defendants as to the conduct being criminalized and the eventual consequences of that conduct.

Section 32.46 is impermissibly vague on its face, as it provides no notice to the defendant of the mechanism through which value of a pecuniary interest will be determined. The statute fails to do for pecuniary interest what it did for goods and services—clarifying value to give notice in what can be a complicated fraud context. As such, the statute fails to meet constitutional muster.

Wherefore, counsel prays that this motion be in all things granted, and that the indictments in the above-styled actions be quashed.

Respectfully submitted,

/s/ *Dick DeGuerin*
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I CERTIFY THIS IS A TRUE COPY
Witness my Hand and Seal of Office

April 24, 2020

JAMIE SMITH, DISTRICT CLERK
JEFFERSON COUNTY, TEXAS

Jamie Smith Page 10 of 23

APPENDIX I –

**Excerpt from August 28, 2019 Hearing on
First Amended Motion to Quash Indictment.**

1 prosecution after acquittal or a conviction, we
2 wouldn't know, just on the face of the indictment,
3 which invoice or invoices to which each indictment
4 would relate. And I think that's one of the failures
5 and I think one of the cases the State cites.

6 THE COURT: Well, I would say what you
7 want to do is make copies of what is given to you and
8 then confirm that with the State in some written form,
9 and then y'all have got a written product that could be
10 admitted later. That's collegiality and
11 professionalism at work.

12 MR. DEGUERIN: Well, certainly, your
13 Honor, we'll accept whatever they give us; but I don't
14 believe that that satisfies the faulty indictment.

15 THE COURT: All right. But you still --
16 you're not -- you're not turning away from this
17 opportunity?

18 MR. DEGUERIN: No, not at all.

19 THE COURT: All right. What else?

20 MR. DEGUERIN: We have a constitutional
21 challenge to the statute.

22 THE COURT: Go ahead.

23 MR. GARRIS: And Judge, we raise this as
24 it relates to -- and I think the State's response
25 focused on the definition of the term "pecuniary

1 interest." Our issue is not with any definition of
2 pecuniary interest, which is undefined by the code.
3 Our issue is with the definition of value, which is
4 defined by the code. What is criminalized under 32.46,
5 which pretty plainly states is a person commits an
6 offense if it's intended to fraud, causes another to
7 sign or execute a document that affects property or
8 service or the pecuniary interest of any person. So,
9 there's three distinct interests that can be at stake.

10 The indictment in our present case deals
11 specifically and only with pecuniary interest. If you
12 were to look at 32.02, which is the statutory
13 definition of value as it applies throughout the
14 entirety of Chapter 32, there is at no point in that
15 statute any definition or metric or calculus or formula
16 by which to calculate value of pecuniary interest.
17 Only value of property or service.

18 And that's where we think the statute
19 failed to provide -- or the statute is
20 unconstitutionally vague. It doesn't provide any
21 calculus in a complex fraud allegation to determine
22 what the actual amount and value of the fraud is.

23 THE COURT: Okay. Anything the State
24 wants to say? You can make it brief?

25 MR. KNAUTH: Yes, sir. It's contained

1 within our brief. We believe that the statute is
2 constitutional, has been discussed at -- quite a few
3 times by the Court of Criminal Appeals; and they found
4 it adequate. And we -- we feel if there's not a
5 definition, it's covered under the regularly -- what
6 the normal definition of a particular word is, your
7 Honor.

8 THE COURT: I was kind of interested in
9 that when I read the briefs on this issue and you
10 obviously are -- have -- you can't help but respond to
11 what he just said and you may. Go ahead.

12 MR. GARRIS: Sure, Judge. And I think --
13 I understand the State's argument, but the statute
14 defines value. And so, it would really violate the
15 separation of powers for this Court to have to step in
16 and provide an alternative definition.

17 THE COURT: Well, I don't -- I really
18 don't intend to because I wondered why the Legislature,
19 when it enacted the statute, would have -- take time to
20 define property and service and not pecuniary and then
21 kind of -- when you think about it, when you look at
22 the definitions of pecuniary, we all kind of feel like
23 we know what it is; but it's in the Black's Law
24 Dictionary -- monetary, relating to money, consisting
25 of money, which can be valued in money.

1 In Roget's International Thesaurus,
2 pecuniary is often considered a synonym of the word
3 money. Pecuniary is also defined in other dictionaries
4 the same way. It's money.

5 And I got to thinking, well, you look at
6 the face of the coin, you look at the dollar bill that
7 says one on it, you look at the check that says a
8 number on the check and they -- I guess they probably
9 thought about it in the committee -- I don't know this,
10 but I'm just -- the committee that devised the statute,
11 Let's define this.

12 And somebody got to saying, Well, how
13 would you define it any differently than what money and
14 numbers that are financial instruments that set the
15 value pecuniary on its face?

16 And I got to thinking, well, maybe they
17 were wiser than we sometimes give them credit for
18 because I've helped write statutes; and you get bogged
19 down sometimes in minutia. And maybe the reason they
20 didn't was because it doesn't need to be detailed
21 because it's a universal definition. It's the value of
22 the money. And the money has numerical identifications
23 to them, whether it's a check written out -- and
24 remember, this statute says any affect of a pecuniary
25 nature, which is so global that it really doesn't need

1 the definition unless you just feel like it needs to be
2 uniform with the other definitions. But I'm reminded
3 with Shakespeare, uniformity for the sake of uniformity
4 is the hobgoblin of little minds. So, they probably
5 figured out it was unnecessary; and your request is
6 denied on that.

7 Pecuniary is its own definition; and as
8 it was stated in the Goldstein case here, the term
9 pecuniary interest is not defined under Section 32.46.
10 It is, therefore, to be given its plain and ordinary
11 meaning, according to Floyd Vs. State in the Texas
12 Court of Criminal Appeals in '78.

13 So, that's what we'll go on, the ordinary
14 understanding and definition of money; but if somebody
15 disagrees with that, I'm happy to pay you \$2 on any
16 10-dollar bill you might have in your pocket.

17 MR. DEGUERIN: I don't have a
18 10-dollar --

19 THE COURT: I'm just showing that
20 metaphorically how you're going to defend, Well, no, it
21 says a big 10 here. And so, that's what I feel like
22 I'm comfortable with and my reasoning on that.

23 MR. DEGUERIN: The other problem with the
24 vagueness of the pecuniary value -- in affecting the
25 pecuniary value, clearly, if they meet their burden of

1 proof showing that some fraudulent invoice affected the
2 pecuniary value, the question then becomes, for
3 punishment purposes, what value.

4 THE COURT: Uh-huh.

5 MR. DEGUERIN: And it doesn't -- for
6 instance, the example we use in our motion -- let's say
7 that there's a check for \$1 million but only \$900,000
8 of work was done. Does that mean the loss is 100,000
9 or is it the million dollars?

10 THE COURT: I think that's interesting,
11 but is loss what matters?

12 MR. DEGUERIN: I think for punishment
13 purposes, it certainly is.

14 THE COURT: Is it?

15 MR. DEGUERIN: Sure.

16 THE COURT: I don't know.

17 MR. DEGUERIN: If -- for instance, let's
18 just not use Mr. Walker. Lets say a building
19 contractor gets a contract to build a building for the
20 County and the building gets built but it's not quite
21 up to specifications and the contractor charges a
22 million dollars for the building but the building is
23 only worth \$950,000. What's the loss?

24 THE COURT: Once again, I don't think --
25 I don't see the word "loss" here. It says, under

1 32.46, an offense under Section (a)(1) is a blank
2 misdemeanor or felony if the value of the property,
3 service, or pecuniary interest is blank --

4 MR. DEGUERIN: But -- it doesn't say
5 that. "If the value of the property or service." It
6 doesn't say anything about pecuniary interest.

7 THE COURT: No. It says "the value of
8 the property, service, or pecuniary interest."

9 MR. DEGUERIN: That's in the 32 --

10 THE COURT: In Subpart (b) under the
11 punishment section under 32.46. And it goes all the
12 way from Class C up to a first degree felony. It is a
13 -- like No. 7, a felony of the first degree, if the
14 value of the property, service, or pecuniary interest
15 is \$300,000 or more.

16 So, really, the essence is not the loss.
17 That's in theft. And it's been clear that what we're
18 talking about is -- deception is the crime, deceiving.
19 And I don't think loss is the key thing for the
20 determination. It's how -- it's what did the deception
21 affect? How much -- what is the value of the property,
22 service, or pecuniary interest affected?

23 MR. DEGUERIN: That's in 32.46.

24 THE COURT: Is that what -- this was what
25 he was indicted for, right?

1 MR. DEGUERIN: 32.46. But then value,
2 32.02, is the statute that controls on value.

3 THE COURT: For that section?

4 MR. DEGUERIN: Well, for what --

5 THE COURT: For 32 section.

6 MR. DEGUERIN: Chapter 32. And nowhere
7 in 32.02 does it speak to pecuniary interest.

20 MR. GARRIS: If I may, Judge.

21 | THE COURT: Sure.

22 MR. GARRIS: And that would generally be
23 right -- that that would be the common accepted
24 definition, except the Legislature --

25 THE COURT: It is the common accepted

1 definition.

2 MR. GARRIS: Of course, Judge. But
3 that's not what the Legislature chose and how the
4 Legislature chose to -- determining -- defined the word
5 "value" as used in this chapter. They gave a specific
6 definition that does not include what was stated.

7 THE COURT: Again, I'm surmising that it
8 was unnecessary.

9 MR. GARRIS: And one other part of this
10 statute, under 32.02 with respect to value, under
11 portion -- I guess, under Subsection (d) there is, as
12 it relates to property or services, if you had some
13 interest in the property or if you had some interest in
14 the service, there is a deduction for your interest.

15 So, if it's a million-dollar property and
16 you had an interest of 900,000 in it but not an issue
17 in 100,000, there is -- within this definition of
18 value, there is that carve out. So, your fraudulent
19 conduct would only rise to and be valued at 100,000.

20 As it relates to pecuniary interest,
21 there is no formula for a deduction like that; and
22 that's one of the problems with the statute. It
23 doesn't provide any guidance whatsoever as to how to
24 calculate this value metric. If it's a million dollar
25 check, one dollar of which is fraudulent, is it one

1 dollar that is the fraud or is it the million dollars
2 that is the focus of the statute? And that is what is
3 completely silent, and the problem that I get -- the
4 vagueness of the issue with this statute.

5 THE COURT: Just one second.

6 (DISCUSSION OFF THE RECORD)

7 THE COURT: All right. Anything else we
8 would want to add? Just one more thought. If that --
9 in your last statement, if that is a constitutional
10 issue that you say and it's fatal because -- you
11 contend it's fatal because it doesn't define it, like
12 property and --

13 MR. DEGUERIN: Service.

14 THE COURT: -- service are defined, then
15 I guess the logical analysis, if that were true, then,
16 in the history of the statute, no one ever convicted of
17 that should have ever been convicted?

18 MR. DEGUERIN: Neither the State nor we
19 could come up with a challenge on pecuniary interest,
20 your Honor. So, it hasn't been litigated. And the
21 statute goes only back to '73.

22 THE COURT: Again, I just tend to think
23 that the -- the Court's decision in it is not defined.
24 They took it up in Goldstein and they made a statement
25 that it was a -- they noted in this -- in the

1 allegation by the appellant that the evidence was
2 insufficient to support the conviction since the term
3 "pecuniary interest" was -- is not defined. So, they
4 went to say that -- it satisfied the Court -- in one
5 case it was Court of Appeals, Dallas -- that its plain
6 and ordinary meaning was satisfactory, and they didn't
7 seem to have much of a problem in that interrupting
8 their -- their flow in the decision-making on the case.

9 MR. DEGUERIN: In Goldstein the Court did
10 not consider the value of the pecuniary interest.

11 THE COURT: Well, did y'all want to say
12 anything --

13 MR. KNAUTH: No, your Honor. I believe
14 y'all have covered it.

15 THE COURT: -- because I'm standing by
16 pecuniary, and its affect is the key. It's what it
17 says. And its absence of definition, we'll just refer
18 to its common usage.

19 All right. Anything else? If not --

20 MR. KNAUTH: Mr. DeGuerin, did you want
21 to cover the questionnaire?

22 MR. DEGUERIN: We have the questionnaire
23 that we both agreed on, your Honor.

24 THE COURT: Okay. Do y'all have a copy
25 for me, please?

1 MR. KNAUTH: Yes, sir. I'm assuming
2 everybody is on the same page. We just need some
3 guidance from the Court.

88 MR. KNEELAND: Combined, your Honor.

9 | THE COURT: Huh?

10 MR. KNEELAND: Combined.

11 THE COURT: Why don't they just read *War*
12 *and Peace*?

13 I'm just going to look at this. Is this a
14 copy for me?

15 | MR. KNAUTH: Yes, sir.

16 THE COURT: Thank you. I'll look at it.
17 Y'all are going to go up there. Can we take a moment
18 downstairs to go --

19 MR. KNAUTH: Yes, sir. Of course.

20 (COURT ADJOURNED FOR THE DAY AT 2:45 P.M.)

APPENDIX J –

**Order Denying First Amended Motion to Quash Indictment,
Entered September 12, 2019.**

IN THE CRIMINAL DISTRICT COURT
OF JEFFERSON COUNTY, TEXAS

STATE OF TEXAS
v.
CALVIN GARY WALKER

*
*
* TRIAL CAUSE 14-19966

ORDER

I.

On August 22, 2019, the defendant, Calvin Gary Walker, filed a motion to quash the indictments in his six felony causes now pending in this Court. On August 27, 2019, defendant filed an amended motion to quash limited to the indictments in four of the six pending causes: Trial Causes 14-19965, 14-19966, 14-19967, 14-19968.

The State filed responses to defendant's motions on August 26, 2019 and August 28, 2019.

In his motion to quash, defendant complained that in each case, the indictment in question fails to specifically identify which invoice(s) the State alleges to be fraudulent, and in what specific manner is the invoice in question fraudulent.

II.

On August 28, 2019, this Court conducted a pretrial hearing in Trial Cause 14-19966 with respect to defendant's motion to quash. At said hearing, this Court heard arguments from counsel for defendant and for the State. This Court proposed a solution to the defendant's inadequate-notice claim, instructed the State to specifically identify the "fraudulent invoices" at issue in the indictments, and inform the Court if additional assistance was needed.

On August 29, 2019, the defendant filed his "Objection To State's Production Following Court Order On First Amended Motion To Quash Indictments." On September 3, 2019, the Court received "State's Response To Defendant's Objection To State's Production Following Court Order On First Amended Motion To Quash Indictments." On September 4, 2019, defendant filed his "Reply To State's Response To Defendant's Objection To State's Production Following Court Order On First Amended Motion To Quash Indictments"

III.

On September 10, 2019, the defendant, his counsel, and counsel for the State met with this Court with respect to defendant's motions and the State's responses.

Upon examining the State's response filed September 3, 2019, this Court notes that the State, for the first time, attaches a copy of a document it describes as a "check skirt" which specifically lists two invoice-numbers, 2210 and 2211, and

appears to relate each invoice-number to a BISD-check for a specific amount and to a specific payee, to-wit: "Walker's Electric Co."

This response from the State also contains copies of the two invoices identified, 2210 and 2211, and includes additional documents [delivery receipts, purchase orders, and checks from Walker Electric business account].

IV.

From the facts and law presented, it now appears to this Court that the documents attached to the State's response of September 3, 2019, specifically Invoice No. 2210 and Invoice No. 2211, represent the "fraudulent invoices" referred to in the indictment in Trial Cause 14-19966, which the State alleges were submitted to BISD by the defendant, thereby allegedly causing the document affecting BISD's pecuniary interest to have been executed [as allegedly shown by the information appearing on the "check skirt."]

From the documents provided to defendant in the State's September 3, 2019 written response, this Court now concludes that defendant, Calvin Gary Walker, has been provided constitutionally and statutorily sufficient notice of (a) specific facts necessary to show that the alleged offense was committed; (b) specific facts necessary to bar a subsequent prosecution for the same offense; and, specific facts that give defendant notice of precisely what he is charge with in Trial Cause 14-19966. *See* Texas Code of Criminal Procedure Articles 21.11; 21.19. *See also*

Kellar v. State, 108 S.W.3d 311, 313-314 (Tex. Crim. App. 2003) (observing that when a motion to quash is overruled, the defendant is not harmed unless he does not, in fact, receive notice of the State's theory against which he will have to defend [theft in aggregate amount of \$100,000 or more], and pointing to the record-evidence indicating the State provided defendant with extensive amount of information relating to the individual transactions that were aggregated in the indictment.].

Additionally, this Court notices the following conclusion with respect to the offense of Securing Execution of a Document by Deception, as set out in *Stone v. State*, 662 S.W.2d 620, 622 (Tex. App. - Houston [14th Dist.] 1983, pet. ref'd), to-wit:

The statute under which Appellant was charged and convicted [Texas Penal Code § 32.46(a)] does not require the allegation of a particular method of deception, and attachment of the warranty deed to the indictment gave Appellant notice of the claimed deception.

V.

It is therefore Ordered that in Trial Cause 14-19966 only, defendant's "First Amended Motion To Quash Indictments" be, in all things, DENIED.

TRANSMITTAL ORDER: TRIAL CAUSE 14-19966

THE CLERK OF THIS COURT IS ORDERED to immediately transmit a copy of this Order to trial counsel, Dick DeGuerin, and to transmit same to Jefferson County Assistant Criminal District Attorney, Kory Kneeland.

Entered this day, the 12th of September, 2019.



John B. Stevens, Jr., Presiding Judge
The Criminal District Court
Jefferson County, Texas

Appendix K –

Indictment

7/29/2014 10:13 AM

Jane Birge
JANE BIRGE
DISTRICT CLERK

A000098775

DATE OF INDICTMENT

July 29, 2014

(002) (DA NO. 709283)

THE STATE OF TEXAS

VS.

CALVIN GARY WALKER
(BML) (DOB: 10-09-60)
5475 ADA AVE
BEAUMONT TEXAS

CAUSE NO _____

OFFENSE

**SECURE EXECUTION OF A
DOCUMENT BY DECEPTION
SEC. 32.46**

FIRST DEGREE FELONY

INDICTMENT

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURORS for the County of Jefferson, State aforesaid, duly organized as such at the May Term, A.D., 2014, of the Criminal District Court of Jefferson County, in said County and State, upon oath in said Court present that **CALVIN GARY WALKER**, hereafter styled the Defendant, on or about the 29TH day of MAY, TWO THOUSAND AND NINE, and anterior to the presentment of this indictment, in the County of Jefferson and State of Texas, did then and there, with intent to harm or defraud **Beaumont Independent School District**, by deception, to-wit: **by submitting fraudulent invoices**, cause **Jane Kingsley** to sign or execute a document affecting the pecuniary interest of **Beaumont Independent School District**, the value of said pecuniary interest being \$200,000 or more, and said document is of the tenor following: