

NO. CCL0000

STATE OF TEXAS) IN THE COUNTY COURT
VS.) AT LAW NUMBER 2
JO SMITH) GUADALUPE COUNTY, TEXAS

DEFENDANT'S MOTION TO SET ASIDE THE INFORMATION

TO THE HONORABLE JUDGE OF SAID COURT:

Jo Smith moves that the information 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 information is defective because it wholly fails to allege that Ms. Smith acted "with intent to harass, annoy, alarm, abuse, torment, or embarrass another." This missing allegation - the required culpability for a violation of § 42.07(a)(4) of the Texas Penal Code - is an essential element of the offense prescribed by the legislature, and without it, no offense against the laws of the State of Texas is alleged. *See* TEX. CODE CRIM. PROC. art. 27.08(1).

II.

The information is defective because it alleges that Ms. Smith did "cause" the telephone of another to ring repeatedly, but it fails in any way whatsoever to allege the manner and means by which this was accomplished. *See 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).

III.

The information is defective because its operative word - "repeatedly" - is vague and conclusory, undefined by Texas statute, and subject to a variety of interpretations. Can one violate the statute by making one telephone call and allowing it to ring more than one time? How many rings would meet the definition of "repeated?" Who decides? When must a caller hang up to avoid committing a class B misdemeanor? Are multiple telephone calls required? If so, how many would constitute "repeated?" If more than one call is required, what time period is contemplated? Must the so-called repeated calls be made close enough in time to constitute a single episode, and if so, how close in time is this? Absent more precision on its face with regard to these words, this information 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, 13, and 19 of the Texas Constitution. Nor does it set forth the offense "in plain and intelligible words", in violation of TEX. CODE CRIM. PROC. ANN. art. 21.02(7). And, it 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, 13, and 19 of the Texas Constitution.

IV.

The statute in question here is unconstitutionally vague as applied to Ms. Smith, in violation of the Due Process Of Law Clause of the Fourteenth Amendment to the United States Constitution, and the Due Course of Law Provision of Article I, §§ 13 and 19 of the Texas Constitution. It is well-settled that a statute must be sufficiently clear to do at least two things.

"First, a person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited." *Long v. State*, 931 S.W.2d 285, 287 (Tex. Crim. App.1996). As pointed out in the preceding section of this motion, the operative word in this information, and in the portion of the statute that is alleged to have been violated in this case, is "repeated." This statutory term, though, is vague and conclusory, undefined by Texas statute, and subject to a variety of interpretations. Can one violate the statute by making one telephone call and allowing it to ring more than one time? How many rings would meet the definition of "repeated?" Who decides? When must a caller hang up to avoid committing a class B misdemeanor? Are multiple telephone calls required? If so, how many would constituted "repeated?" If more than one call is required, what time period is contemplated? Must the so-called repeated calls be made close enough in time to constitute a single episode, and if so, how close in time is this? This statute is unconstitutionally vague because no "person of ordinary intelligence" - including Ms. Smith - is "given a reasonable opportunity to know what is prohibited." *Id.*

"Second, the law must establish determinate guidelines for law enforcement." The

problem with this statute is that it gives police unfettered discretion to arrest based on their own entirely subjective definition of the word "repeated." How many rings would justify an arrest? How many different telephone calls? Over what period of time?

V.

Additionally, because of these defects:

1. The information 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 information does not state "[e]verything . . . which is necessary to be proved", in violation of TEX. CODE CRIM. PROC. ANN. Art. 21.03.
4. The information 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 information 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.

Respectfully submitted:

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of defendant's Motion To Set Aside The Information delivered to the District Attorney's Office, Guadalupe County, 113 S. River Street, Seguin, Texas 78155 on this the 25th day of April, 2018.

MARK STEVENS

ORDER

On this the _____ day of _____, 2018, came on to be considered Defendant's Motion to Set Aside the Information, and said Motion is hereby

(GRANTED) (DENIED)

JUDGE PRESIDING