

NO. 200000

STATE OF TEXAS) IN THE COUNTY COURT
VS.) AT LAW NUMBER FIVE
JAMES SMITH) BEXAR COUNTY, TEXAS

DEFENDANT'S MOTION TO SET ASIDE THE INFORMATION

TO THE HONORABLE JUDGE OF SAID COURT:

James 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, 21.11, and 21.24 of the Texas Code of Criminal Procedure for the following reasons:

I.

The information alleges that Mr. Smith “did destroy, remove, conceal, alter, substitute, or otherwise impair the verity, legibility, or availability of a writing,” but does not allege the manner and means by which he did so. *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); *Ridgley v. State*, 756 S.W. 2d 870, 871 (Tex. App.–Fort Worth 1988, no pet.)(indictment for murder must allege the manner and means of the killing); *Mullinax v. State*, 756 S.W. 2d 40, 43 (Tex. App.–Texarkana 1988, no pet.)(indictment for desecration of cemetery must allege the manner and means).

II.

What exactly does the state contend that Mr. Smith did? Did he destroy, did he remove, did he conceal, did he alter, did he substitute, or did he otherwise impair the verity of a writing? This disjunctive manner of alleging offense is vague and multiplicitous, and fails to "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. Nor does the information "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.

III.

The information alleges in the disjunctive that Mr. Smith “did destroy, [or] remove, [or] conceal, [or] alter, [or] substitute, or otherwise impair the verity, [or] legibility, or availability of a writing. . . .” The information is defective because it alleges multiple separate offenses – namely, destruction, concealment, alteration, substitution, or impairment of the verity, or the legibility, or the availability of a writing – in a single paragraph, in violation of article 21.24(b) of the Texas Code of Criminal Procedure.

IV.

The information describes the writing involved in this way: “a writing, other than a governmental record, to-wit: UNIVERSAL PRODUCT CODES, LABELS, PRICE TAGS, AND MARKINGS ON GOODS.” This description of the writing involved is both vague and multiplicitous, and fails to "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. Nor does the information "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. Nor does it adequately describe the personal property alleged in the information by name, kind, and number as required by article 21.09 of the Texas Code of Criminal Procedure. Nor does it adequately identify the writing in question. *See Swabado v. State*, 597 S.W. 2d 361, 363 (Tex. Crim. App. 1980); *Amaya v. State*, 551 S.W. 2d 385, 387 (Tex. Crim. App. 1977).

V.

The word "harm" has multiple definitions under section 1.07(25) of the Texas Penal Code. However, "harm" is not defined in our information, nor does the information specify which of the statutory definitions of harm the state contends was suffered or intended to be suffered in this case.

VI.

The phrase "intent to defraud" is not defined in the indictment or in the Texas Penal Code. As such, the phrase is unconstitutionally vague and does not give a person of ordinary intelligence adequate notice of forbidden conduct.

VII.

The information alleges that Mr. Smith intended to defraud and harm “another,” but it does not name or otherwise identify this other person.

VIII.

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.

WHEREFORE, premises considered, the defendant prays that the Court set aside the information in the above-numbered and entitled cause.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of defendant's Motion To Set Aside The Information has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 1st day of May, 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