NO. CR0000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	33RD JUDICIAL DISTRICT
SAMUEL SMITH	)	BLANCO COUNTY, TEXAS

DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Samuel 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.
The Defects In The First Count

1. Count I alleges that Mr. Smith did "induce" a child to engage in sexual conduct or a sexual performance, but it does not state the manner and means by which this alleged inducement was done, in violation of the principles stated in *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); *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) ; *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); *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).

2. Count I alleges that Mr. Smith induced the complainant "to engage in sexual conduct or a sexual performance, to-wit: cause said child to contact the sexual organ of William Edwards . . . ." This allegation is defective for several reasons:

   a. First, inducing a child to engage in sexual conduct, and inducing a child to engage in a sexual performance, are two separate offenses. *See Dornbusch v. State*, 156 S.W. 3d 859, 870 (Tex. App.--Corpus Christi 2005, pet. ref'd); *Ex parte Anderson*, 902 S.W. 2d 695, 697 (Tex. App.--Austin 1995, pet. ref'd). Separate offenses may be joined in the same indictment, but no paragraph or count may contain more than one offense. TEX. CODE CRIM. PROC. ANN. art. 21.24. The first Count impermissibly joins two offenses in violation of article 21.24.

   b. Second, the Count alleges that Mr. Smith caused the child to contact Edward's sexual organ, but does not state the manner and means by which he caused this contact. Elsewhere in this motion we have cited cases establishing the manner and means requirement, and those cases also apply here.

c. Third, the penal code provides multiple meanings for the phrase "sexual conduct." *See* TEX. PENAL CODE ANN. § 43.25(a)(2). This Count is defective because it fails to specify any of the multiple types of "sexual conduct" the state intends to prove in this case. Where a statute provides for more than one way in which an offense may be committed, the charging instrument must specify which of the several ways the defendant's conduct violated the statute. *Cf. Ferguson v. State*, 622 S.W.2d 846, 851 (Tex. Crim. App. 1981); *see also Olurebi v. State*, 870 S.W.2d 58, 62 (Tex. Crim. App. 1994).

d. Fourth, the Count does not allege "an offense against the law was committed by the defendant." TEX. CODE CRIM. PROC. ANN. art. 27.08(1). Specifically, it alleges that Mr. Smith induced the complainant to engage in sexual conduct or sexual performance in a wholly conclusory fashion, but, when it attempts to describe just what he did, it alleges only that he caused the complainant to contact the sexual organ of Hughes. But this alleged action does not constitute either "sexual conduct," or "sexual performance," as those two terms were defined under the version of § 43.25 that was in effect on December 31, 1994. At that time, TEX. PENAL CODE ANN. § 43.25(a)(1) defined "sexual performance" as "any performance or part thereof that includes sexual conduct by a child younger than 18 years of age." TEX. PENAL CODE ANN. § 43.25(a)(2) defined "sexual conduct" as

"actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals."

3. Count I is defective because it identifies the complainant only by the pseudonym "A1." Mr. Smith cannot defend himself unless the complainant's true identity and his or her date of birth are revealed. Nor can counsel render effective assistance of counsel, or confront or cross examine this witness unless he knows the missing information.

4. Count I purports to allege that Mr. Smith committed the offense of sexual performance of a child, apparently in violation of TEX. PENAL CODE ANN. § 43.25, on or about December 31, 1994. The statute of limitations for this offense is three years. *See* TEX. CODE CRIM. PROC. ANN. art. 12.01(6). This Count should be set aside because "it appears from the face thereof that a prosecution for the offense is barred by a lapse of time." TEX. CODE CRIM. PROC. ANN. art. 27.08(2).

5. Count I alleges that the offense occurred "on or about the 31st day of December, 1994." This Count should be set aside because the allegation of the date is so vague it does not permit Mr. Smith to prepare a defense to the charges against him, or to protect himself against a subsequent prosecution for the same offense, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Course of Law provision of Article I, §§ 10, 13, and 19 of the Texas Constitution.

II.
The Defects In The Second Count

1. Count II alleges that Mr. Smith did "cause the penetration" of the complainant's mouth by his sexual organ, but it does not state the manner and means by which this alleged penetration was caused, in violation of the principles stated in *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); *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); *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); *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).

2. Count II is defective because it identifies the complainant only by the pseudonym "A1." Mr. Smith cannot defend himself unless the complainant's true identity and his date of birth are revealed. Nor can counsel render effective assistance of counsel, or confront or cross examine this witness unless he knows the missing information.

3. Count II alleges that the offense occurred "on or about the 25th day of November, 1993. This Count should be set aside because the allegation of the date is so vague it does not permit Mr. Smith to prepare a defense to the charges against him, or to protect himself against a subsequent prosecution for the same offense, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Course of Law provision of Article I, §§ 10, 13, and 19 of the Texas Constitution.

III.
The Defects In The Third Count

1. To prove a violation of the organized criminal activity statute, the state must prove that the defendant collaborated in carrying on criminal activities. This, in turn, requires proof of more than an "agreement to jointly commit a *single* crime." *Nguyen v. State*, 1 S.W. 3d 694, 697 (Tex. Crim. App. 1999)(emphasis supplied). But here Count III alleges that Mr. Smith committed a single crime -- sexual assault against A1 in Blanco County on or about November 25, 1993, and then adds in a completely conclusory way, that he committed "said offense with the intent to establish, maintain, or participate in a combination or in the profits of a combination who collaborated in carrying on said criminal activity." On its face then, Count III fails to allege an offense against Texas law, in violation of TEX. PENAL CODE ANN. § 1.03(a) and TEX. CODE CRIM. PROC. ANN. arts. 21.01 and 27.08(1).

2. Count III fails in multiple ways to give Mr. Smith the notice he requires to understand the charge against him so that he might prepare an adequate defense or protect himself against subsequent prosecutions for the same offense. Specifically:

a. The Count alleges that Mr. Smith committed the offense of sexual assault "with the intent to establish, maintain, or participate in a combination or in the profits of a combination who collaborated in carrying on said criminal activity," but it fails to name or in any way to identify the other members of the combination who allegedly collaborated with him. Who makes up the combination, and how is Mr. Smith a member of it? An effective defense is impossible without this information.

b. Count III contains words such as "establish, maintain or participate," words which are statutorily undefined, as well as intrinsically vague and ambiguous. At the very least the state should be required to detail the specific acts it contends which show defendant's intent to establish, maintain and participate in the combination.

c. Count III fails to enumerate the "profits" of the alleged combination.

d. Count III fails to specify whether defendant collaborated in the combination, and, if so, the nature and extent of his alleged collaboration. What were the manner and means of the collaboration?

e. The word "collaborate" as used in Tex. Penal Code Ann. 71.01(a) is not statutorily defined and is intrinsically vague, ambiguous, and incapable of

understanding by ordinary persons in the context of its use in the statute.

f. The *scienter* elements of Tex. Penal Code Ann. § 71.01 and 71.02 fail to provide adequate notice of what conduct is criminal.

g. Because of these defects, this Count fails to “set forth in plain and intelligible words” the offense charged, in violation of article 21.02(7) of the Texas Code of Criminal Procedure. The indictment does not state "[e]verything . . . which is necessary to be proved", in violation of TEX. CODE CRIM. PROC. ANN. Art. 21.03. 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 and 19 of the Texas Constitution. It 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.

3. Count III alleges that Mr. Smith did "cause" the complainant's sexual organ to contact his mouth, but it does not state the manner and means by which this alleged contact was caused, in violation of the principles stated in *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); *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); *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); *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).

4. Count III is defective because it identifies the complainant only by the pseudonym "A1." Mr. Smith cannot defend himself unless the complainant's true identity and his date of birth are revealed. Nor can counsel render effective assistance of counsel, or confront or cross examine this witness unless he knows the missing information.

5. Count III alleges that the offense occurred "on or about the 25th day of November, 1993. This Count should be set aside because the allegation of the date is so vague

it does not permit Mr. Smith to prepare a defense to the charges against him, or to protect himself against a subsequent prosecution for the same offense, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Course of Law provision of Article I, §§ 10, 13, and 19 of the Texas Constitution.

IV.
The Law

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 information in the above-numbered and entitled cause.

Respectfully submitted:

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

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of defendant's Motion To Set Aside The Indictment has been delivered to the Blanco County District Attorney's Office; P.O. Box 725; Llano, Texas 78643-0725, on this the 29th day of September, 2018.

MARK STEVENS

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)

JUDGE PRESIDING