

NO. 1000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	216TH JUDICIAL DISTRICT
JOE SMITH	)	KENDALL COUNTY, TEXAS

**DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves that the indictment filed in this case be set aside by virtue of the Fourteenth Amendment to the United States Constitution, and Article I §§ 13 and 19 of the Texas Constitution, for the following reasons:

I.

The indictment alleges, in pertinent part, that Mr. Smith did “intentionally and knowingly and without the consent of [the complainant] cause the penetration of the female sexual organ of [the complainant], a female child then and there younger than seventeen (17) years of age . . . .”

II.

Neither § 22.011 of the Texas Penal Code, nor Mr. Smith’s indictment, on its face, requires the state to prove that he knew, or should have known, that the complainant was under 17 years of age at the time of the events alleged in the indictment. This statute is unconstitutional for the following reasons:

1. Section 22.011 of the Texas Penal Code is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, due to its failure to require the state to prove that defendant had a culpable mental state, or a "mens rea," relating to the complainant's age when engaging in the conduct alleged.

2. Section 22.011 of the Texas Penal Code is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, due to its failure to recognize an affirmative defense based on defendant's reasonable belief that the complainant at the time was 17 years of age or older.
3. The Due Course of Law provision found in Article I, §§ 13 and 19 of the Texas Constitution is broader than, and provides even greater protection than, the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009)(party who relies on a state constitutional argument must argue that it provides greater protection than its federal counterpart, and, where necessary, must disabuse the trial court of the erroneous notion that the state and federal constitutional provisions provide the same protection). Section 22.011 of the Texas Penal Code is also unconstitutional under the Due Course of Law provision of the Texas Constitution, Article I, §§ 13 and 19, due to its failure to require the State to prove that defendant had a culpable mental state, or a "mens rea," relating to the complainant's age, when engaging in the conduct alleged.
4. The Due Course of Law provision found in Article I, §§ 13 and 19 of the Texas Constitution is broader than, and provides even greater protection than, the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009)(party who relies on a state constitutional argument must argue that it provides greater protection than its federal counterpart, and, where necessary, must disabuse the trial court of the erroneous notion that the state and federal constitutional provisions provide the same protection). Section 22.011 of the Texas Penal Code is unconstitutional under the Due Course of Law provision of the Texas Constitution, Article I, §§ 13 and 19, due to its failure to recognize an affirmative defense based on defendant's reasonable belief that the complainant at the time was 17 years of age or older.

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 hereby certify that a copy of defendant's Motion To Set Aside The Indictment has been delivered to the District Attorney's Office, Kendall County, 521 E. Garrett St.; Kerrville, Texas 78028, on this the \_\_\_\_ day of January, 2018.

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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)

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JUDGE PRESIDING