

NO. 2018CR-0000

STATE OF TEXAS ) IN THE COUNTY COURT  
VS. ) AT LAW  
JOE SMITH ) COMAL COUNTY, TEXAS

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

TO THE HONORABLE JUDGE OF SAID COURT:

Joe 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 21.15 of the Texas Code of Criminal Procedure for the following reasons:

I.

The information is defective because it does not allege with reasonable certainty the act relied upon by the state to show that defendant acted recklessly. *Smith v. State*, 2009 WL 625048 (Tex. Crim. App. 2010); *Gengnagel v. State*, 748 S.W.2d 227, 230 (Tex. Crim. App. 1988); *see* Tex. Code Crim. Proc. Ann. art. 21.15.

II.

The information is vague and fails to give proper notice of the persons alleged to have been involved in this offense. Specifically, it alleges that Mr. Smith exposed his penis to Michael South “with intent to arouse or gratify “his” sexual desire, but it does not specify whether “his” is meant to identify Mr. Smith or Mr. South, or someone else. Additionally, the information alleges that Mr. Smith was reckless about whether “another” was present who would be offended or alarmed, but does not identify this other

person. Finally, the information claims that Mr. Smith masturbated his penis in the presence of the “complainant,” but it nowhere identifies anyone as the “complainant.”

### III.

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:

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**CERTIFICATE OF SERVICE**

I certify that a copy of defendant's Motion To Set Aside The Information has been delivered to the Criminal District Attorney; 307 Courthouse Annex; 150 N. Seguin St.; New Braunfels, TX 78130 on this the 1st day of March, 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 Information, and said Motion is hereby

(GRANTED) (DENIED)

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JUDGE PRESIDING