

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 175TH JUDICIAL DISTRICT
MICHAEL SMITH) BEXAR COUNTY, TEXAS

DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Michael 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 indictment alleges that the defendant possessed “visual material.” For this alleged offense, “visual material” is defined in § 43.26(b)(3), as follows:

(A) any film, photograph, videotape, negative, or slide or any photographic reproduction that contains or incorporates in any manner any film, photograph, videotape, negative, or slide; or

(B) any disk, diskette, or other physical medium that allows an image to be displayed on a computer or other video screen and any image transmitted to a computer or other video screen by telephone line, cable, satellite transmission, or other method.

TEX. PENAL CODE ANN. § 43.26(b)(3).

Because the definition of “visual material” is an element of the offenses of

possession of child pornography and possession of child pornography with intent to promote, and is a part of the prohibited conduct the state seeks to prove, “it must be alleged in the charging instrument upon proper request.” *Saathoff v. State*, 891 S.W.2d 264, 267 (Tex. Crim. App. 1995). This indictment is defective because it does not allege which of the two statutorily defined types of “visual material” -- that defined by § 43.26(b)(3)(A) or that defined by § 43.26(b)(3)(B) -- the state intends to attempt to prove that defendant possessed. *E.g.*, *Olurebi v. State*, 870 S.W. 2d 58, 62 (Tex. Crim. App. 1994)(where “there are two ways for a credit card to be ‘fictitious’ under section 32.31(b)(2), a trial court should grant a motion to quash an indictment that fails to adequately notify the defendant of the manner in which the credit card is fictitious”); *Drumm v. State*, 560 S.W. 2d 944, 945-46 (Tex. Crim. App. 1977)(information should have been quashed because it failed to allege which subsection of the statute the state intended to rely upon to prove that appellant’s license had been suspended); *White v. State*, 50 S.W. 3d 31, 39 (Tex. App.--Waco 2001, pet. ref’d)(trial court erred in denying motion to quash information which failed to specify which statutory definition of abuse the state intended to prosecute appellant for failing to report). *See also* 7 MICHAEL J. MCCORMICK, THOMAS D. BLACKWELL & BETTY BLACKWELL, CRIMINAL FORMS AND TRIAL MANUAL §§ 22.20 & 22.21 (Texas Practice Supp. 2002)(model indictment form reads, in pertinent part, “who was engaging in sexual conduct, to wit: [*identify the material and specify the conduct*]”).

II.

Texas law requires the indictment to state “[e]verything . . . which is necessary to be proved.” TEX. CODE CRIM. PROC. ANN. art. 21.03. Here, the state will have to prove, if it can, whether the “visual material” in question was that defined by § 43.26(b)(3)(A) or § 43.26(b)(3)(B). It is not possible for the state to prove that the defendant possessed contraband “visual material” without adducing facts which describe the particular type of material involved. The indictment here is defective under article 21.03 because it does not allege the particular type of visual material the state intends to prove. *See Cruise v. State*, 587 S.W. 2d 403, 404 (Tex. Crim. App. 1979)(where prosecution cannot prove its case of aggravated assault without adducing facts which describe the way in which appellant caused bodily injury, “the trial court committed reversible error in refusing to order the State to disclose such facts when confronted with appellant's motion to quash the indictment for the reasons stated”); *accord Castillo v. State*, 689 S.W.2d 443, 449 (Tex. Crim. App. 1985)(trial court erred under article 21.03 in denying motion to quash where it was “clear that it was necessary for the prosecution to prove the manner in which the appellant did ‘start a fire’ in order to meet its burden of proof”).

III.

Because the indictment is drafted so unclearly, it is impossible to tell whether the terms “a computer file,” and “a series of computer files,” are meant to describe the type of “visual material” alleged to be contraband. If so, neither of these two terms are contained

in the statutory provision which defines “visual material” -- § 43.26 (b)(3). Accordingly, this indictment does not allege that an offense against the law was committed by the defendant, in violation of TEX. CODE CRIM. PROC. ANN. arts. 21.01 & 27.08 (1), TEX. PENAL CODE ANN. § 1.03(a), the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Course of Law Clauses of Article I, §§ 13 and 19 of the Texas Constitution. *Cf. Porter v. State*, 996 S.W.2d 317, 320 (Tex. App.--Austin 1999), *opinion supplemented*, 65 S.W. 3d 72 (Tex. App.--Austin 1999, no pet.)(acquittal ordered where court of appeals concluded that appellant did not possess a “film image” as that term was defined in the statute).

IV.

The indictment alleges that defendant possessed “visual material *containing an image* that visually depicts a child younger than 18 years of age at the time the image of the child was made, who is engaging in sexual conduct” [emphasis supplied] The italicized language is not found in the statute which defendant allegedly violated -- § 43.26 of the Texas Penal Code. By employing non-statutory language, the state has altered the definition of crimes which were legislatively created. But there is no common-law of crimes in Texas. In our state, “notice of an offense must invariably rest on a specific statute.” *Billingslea v. State*, 780 S.W. 2d 271, 275 (Tex. Crim. App. 1989). “Our statutes have been wholly intolerant of constructive offenses.” *Haney v. State*, 544 S.W. 2d 384, 387-88 (Tex. Crim. App. 1976)(conviction reversed and remanded where

appellant was convicted of conduct that did not constitute a penal offense). This indictment is defective because it does not allege that an offense against the law was committed by the defendant, in violation of TEX. CODE CRIM. PROC. ANN. arts. 21.01 & 27.08 (1), TEX. PENAL CODE ANN. § 1.03(a), the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Course of Law Clauses of Article I, §§ 13 and 19 of the Texas Constitution. *Cf. Porter v. State*, 996 S.W.2d 317, 320 (Tex. App.--Austin 1999), *opinion supplemented*, 65 S.W. 3d 72 (Tex. App.--Austin 1999, no pet.)(acquittal ordered where court of appeals concluded that appellant did not possess a “film image” as that term was defined in the statute).

V.

An additional problem results from the state’s decision to import language into its indictment not found in the statute itself. By seeking to prosecute defendant for possessing material “containing an image” depicting a child younger than 18 years old, the state attempts to authorize his conviction for possession of “virtual” child pornography. It is now clear that the criminalization of “virtual” child pornography “abridges the freedom to engage in a substantial amount of lawful speech . . . [and is therefore] overbroad and unconstitutional.” *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1405 (2002). This indictment is defective because, as worded, it authorizes the jury to convict defendant in violation of the First Amendment to the United States Constitution. *See also* TEX. CONST. Art. I, § 8 (“no law shall ever be passed curtailing the

liberty of speech”).

VI.

Each count of the indictment lists one or more names or titles of “a computer file,” or “series of computer files.” These so-called names or titles may well disgust the jury. They do not, however, adequately identify the alleged contraband visual material allegedly possessed by defendant. *See, e.g., Swabado v. State*, 597 S.W. 2d 361, 363 (Tex. Crim. App. 1980)(indictment failed sufficiently to identify the government records allegedly falsified). *See also* TEX. CODE CRIM. PROC. ANN. Art. 21.02(7)(offense is not “set forth in plain and intelligible words”); TEX. CODE CRIM. PROC. ANN. Art. 21.04(indictment must 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”); TEX. CODE CRIM. PROC. ANN. Art. 21.11(indictment must “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”

VII.

The indictment does not require that the defendant know that the children allegedly depicted are in fact children younger than 18, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Course of Law

Clauses of Article I, §§ 13 and 19 of the Texas Constitution. *Cf. United States v. X-Citement Video, Inc.*, 513 U.S. 64, 79 (1994).

VIII.

Counts 14 through 25 of the indictment each purport to allege possession “with intent to promote. “Promote,” pursuant to § 43.25(a)(5), “means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do any of the above.” Because “intent to promote” is an element of the offense of possession of child pornography with intent to promote, and is a part of the prohibited conduct the state seeks to prove, “it must be alleged in the charging instrument upon proper request.” *Saathoff v. State*, 891 S.W.2d 264, 267 (Tex. Crim. App. 1995). This indictment is defective because it does not allege which of the many statutory ways that one can promote the possession of child pornography. *E.g., Olurebi v. State*, 870 S.W. 2d 58, 62 (Tex. Crim. App. 1994)(where “there are two ways for a credit card to be ‘fictitious’ under section 32.31(b)(2), a trial court should grant a motion to quash an indictment that fails to adequately notify the defendant of the manner in which the credit card is fictitious”); *Drumm v. State*, 560 S.W. 2d 944, 945-46 (Tex. Crim. App. 1977)(information should have been quashed because it failed to allege which subsection of the statute the state intended to rely upon to prove that appellant’s license had been suspended); *White v. State*, 50 S.W. 3d 31, 39 (Tex. App.--Waco 2001, pet. ref’d)(trial court erred in denying

motion to quash information which failed to specify which statutory definition of abuse the state intended to prosecute appellant for failing to report).

IX.

The indictment is defective because the statute on which it is based -- TEX. PENAL CODE ANN. § 43.26 -- is unconstitutional, both on its face, and as applied to defendant, for the following reasons:

1. The statute does not require that the defendant know that the child depicted is in fact a child, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Course of Law Clauses of Article I, §§ 13 and 19 of the Texas Constitution. *Cf. United States v. X-Citement Video, Inc.*, 513 U.S. 64, 79 (1994).
2. The statute, as worded, permits prosecution for possession of “virtual” child pornography, and is therefore overbroad, in violation of the First Amendment to the United States Constitution and Article I, § 8 of the Texas Constitution. *See generally Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1405 (2002).
3. By authorizing prosecution for possession of material depicting “simulated sexual intercourse,” *see* TEX. PENAL CODE ANN. § 43.25 (a)(2) & (6), the statute permits prosecution for possession of “virtual” child pornography, and is therefore overbroad, in violation of the First Amendment to the United States Constitution and Article I, § 8 of the Texas Constitution. *See generally Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1405 (2002).
4. Section 43.26(f) employs a mandatory and conclusive presumption concerning prosecutions for possession with intent to promote, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Course of Law Clauses of Article I, §§ 13 and 19 of the Texas Constitution.

X.

Because of these defects:

1. 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.
2. 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.
3. 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.
4. The offense is not "set forth in plain and intelligible words", in violation of TEX. CODE CRIM. PROC. ANN. Art. 21.02(7).
5. The indictment does not state "[e]verything . . . which is necessary to be proved", in violation of TEX. CODE CRIM. PROC. ANN. Art. 21.03.

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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By: _____
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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 District Attorney's Office, Cadena-Reeves Justice Center, 300 Dolorosa, San Antonio, Texas, on this the _____ day of June, 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