

NO. 000000

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

DEFENDANT'S MOTION TO SET ASIDE THE INFORMATION

TO THE HONORABLE JUDGE OF SAID COURT:

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

I.

Article I, § 23 of the Texas Constitution states: "Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the legislature shall have power by law, to regulate the wearing of arms, with a view to prevent crime." Tex. Const. art. I, § 23. Texas Penal Code Section 46.02 is an unconstitutional exercise of legislative power violating Article I, § 23's guarantee of every citizens' "right to bear arms," because it absolutely restricts every citizens' right to keep and bear arms without addressing the mandated constitutional restriction on the legislative power to limit Article I, § 23 only for the prevention of crime.

II.

The Second Amendment to the United States Constitution states: "A well regulated

militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." U.S.C.A. Const. Amend. II. The Fourteenth Amendment to the United States Constitution states in pertinent part, that: "no state shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.C.A. Const. Amend. XIV.

III.

Section 46.02 of the Texas Penal Code violates the Second and Fourteenth Amendments to the United States Constitution in that it makes it an unlawful offense for a person to "intentionally, knowingly, or recklessly carry on or about his person a handgun . . ." this provision of the Texas Penal Code directly infringes upon the Second Amendment right to bear arms, and amounts to a denial of due process and equal protection of the laws, both of which are guaranteed by the Fourteenth Amendment.

IV.

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.

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 Information has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 16th day of February, 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