

NO. 000000

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

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

TO THE HONORABLE JUDGE OF SAID COURT:

Jo 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.

The information alleges that Ms. Smith unlawfully appropriated “fourteen (14) Health or Beauty item(s), Three (3) Clothing item(s), One (1) Household item(s) and Four (4) Fashion Accessories or Jewelry item(s) . . . which had a value of Fifty Dollars (\$50.00) or more but less than Five Hundred Dollars (\$500.00),” on October 7, 2012, from the owner, Wal-Mart. The information is defective because it fails to sufficiently identify or describe the property allegedly stolen. *See Swabado v. State*, 597 S.W. 2d 361, 363 (Tex. Crim. App. 1980); *Amaya v. State*, 551 S.W. 2d 385, 387 (Tex. Crim. App. 1977); *See also* TEX. CODE CRIM. PROC. ANN. art. 21.09.

II.

Ms. Smith was arrested with another person, Brittany Jones, and they are both

charged with unlawfully appropriating identically-described items, from the same store, on the same date. Are these two defendants charged with stealing the same items, or items of the same vaguely described type? If the items are the same items, did they act, according to the state, as parties under Chapter Seven of the Texas Penal Code? Or did they act alone? The information gives no notice and is therefore defective. This lack of notice here is particularly troublesome in light of the lack of specificity complained-of in the preceding paragraph of this motion.

### III.

The information does not specify how the complainant's consent was not effective, even though the term "effective consent" has multiple statutory definitions. *See Geter v. State*, 779 S.W.2d 403, 406 (Tex. Crim. App. 1989).

### IV.

Although the information has aggregated the amounts of the property for jurisdictional purposes, it has not alleged that the "amounts are obtained . . . pursuant to one scheme or continuing course of conduct . . ." which is required before these can be considered as "one offense." Texas Penal Code Ann. § 31.09. In omitting this language the State has failed to allege in its information "everything which is necessary to be proved" in violation of Texas Code Criminal Procedure Ann. Article 21.03.

### V.

The information alleges that defendant unlawfully appropriated fourteen (14) Health or Beauty item(s), Three (3) Clothing item(s), One (1) Household item(s) and Four

(4) Fashion Accessories or Jewelry item(s), said property having the value of Fifty Dollars (\$50.00) or more but less than Five Hundred Dollars (\$500.00). On its face, then, the information in a single count and paragraph alleges various separate offenses. This is in violation of article 21.24 of the Texas Code of Criminal Procedure which provides that each separate offense be stated in a separate count. Additionally, submission of these multiple offenses disjunctively will make it impossible to instruct the jury in such a way as to insure that its verdict is unanimous, as required by Article V, Section 13 of the Texas Constitution and Article 36.29(a) of the Texas Code of Criminal Procedure.

## VI.

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 she 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 District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 6th 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