

NO. CR-00000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 22ND JUDICIAL DISTRICT
WILLIAM SMITH) HAYS COUNTY, TEXAS

DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

William 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.

Count One of the indictment is defective because:

1. It fails to properly allege that he attempted the offense of sexual performance by a child. Specifically, it alleges that he did "attempt" to induce a child to engage in sexual conduct and sexual performance. The offense of sexual performance, though, requires *actual* inducement. In effect, then, this indictment alleges that Mr. Smith attempted an attempted offense, and this is no offense under Texas law.
2. It does not properly allege the manner and means by which Mr. Smith allegedly attempted to induce a child to engage in sexual conduct and sexual performance. *E.g.*, *Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984); *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983); *Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983); *Jeffers v. State*, 646 S.W. 2d 185, 188 (Tex. Crim. App. 1981); *Ellis v. State*, 613 S.W. 2d 741, 742 (Tex. Crim. App. 1981); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978).
3. The allegation, "through the use of Internet communications" is so vague

and broad as to give Mr. Smith no notice as to what he is charged with doing in order that he might prepare a defense for trial and to protect himself against being tried multiple times for the same offense. There are a large number of things that could fit the definition of "Internet communications" and Mr. Smith is entitled to know which of these he alleged "used."

II.

Count Two of the indictment is defective because:

1. It alleges that he did "request, command, and attempt to induce" a child, but does not properly state the manner and means by which this offense was allegedly committed. *E.g.*, *Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984); *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983); *Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983); *Jeffers v. State*, 646 S.W. 2d 185, 188 (Tex. Crim. App. 1981); *Ellis v. State*, 613 S.W. 2d 741, 742 (Tex. Crim. App. 1981); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978).
2. It alleges an intent to commit the offense of sexual assault, but does not allege which of the several statutory types of sexual assault the state intends to prove, even though there are multiple possibilities under § 22.011 of the Texas Penal Code. Where a statute provides for more than one way in which the defendant can commit an offense, the charging instrument must specify which of the several ways the defendant's conduct violated the statute. *Cf. Ferguson v. State*, 622 S.W.2d 846, 851 (Tex. Crim. App. 1981).
3. It alleges that Mr. Smith believed the child was younger than 18 years of age. The statute, though, requires that the child be a minor, and defines minor as someone younger than 17 years of age. TEX. PENAL CODE ANN. § 15.031(f). No offense is alleged in this indictment.
4. It mentions "circumstances surrounding the conduct of the Defendant, as the Defendant believed them to be." This allegation is so vague and broad as to give Mr. Smith no notice as to what he is charged with doing in order that he might prepare a defense for trial and to protect himself against being tried multiple times for the same offense.

III.

Because of these defects:

1. 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.
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 indictment does not state "[e]verything . . . which is necessary to be proved", in violation of TEX. CODE CRIM. PROC. ANN. Art. 21.03.
4. 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.
5. 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.

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 _____
MARK STEVENS

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of defendant's Motion To Set Aside The Indictment has been delivered to John Saba Jr., Assistant Attorney General; Internet Bureau; P.O. Bos 12548; Austin, TX 78711-2548, on this the 2d day of November, 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