Pretrial Motions
In Sex Cases

Defending Those Accused
Of Sexual Cases

Texas Criminal Defense Lawyers Association
Radisson Hotel Fossil Creek
Fort Worth, Texas
December 4-5, 2014

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mark@markstevenslaw.com

Real Lawyers. . .

Love Pre-Trial Motions

There is no bigger bang for your buck.

A List of Standard Motions

- Motion To Have Official Court Reporter Make A Full Record
- Defendant's Request For A Pretrial Hearing
- Motion For Discovery Of State's Witness List
- Motion For Disclosure Of Names And Addresses Of Each Person The State May Use At Trial To Present Evidence Under Rules 702, 703, and 705 Of The Texas Rules Of Evidence
- Motion For Discovery Of The Arrest And Conviction Records Of State's Witnesses
- Motion To Require The State To Reveal Agreements Entered Into Between The State And Its Witnesses
- Motion For Production Of Witness Statements And Writings Used To Refresh The Recollection Of Witnesses
- Motion For Discovery Of Exculpatory And Mitigating Evidence
- Motion For Voir Dire Of Expert Witness
- Motion In Limine
- Motion To Suppress Evidence
- Motion To Suppress Written Or Oral Statements Of Defendant
- Motion For Identification Hearing Out Of The Presence Of Jury

Motion Strategy

- **Standard Motions**
- **Custom Motions**

1. You drive the train, for a little while, anyway.
2. Motions are easy.
3. Motions can get your case dismissed.
4. Motions can get all the state's evidence suppressed.
5. Motions can get some of the evidence suppressed.
6. Motions and hearings on motions can get you discovery.
7. Motions can preserve issues for appeal.
8. Clients are impressed with tangibles like motions.

What's not to love about pretrial motions?

Discovery

Michael Morton Act

NO. 2014-CR-00000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	216TH JUDICIAL DISTRICT
JOE SMITH	)	KERR COUNTY, TEXAS

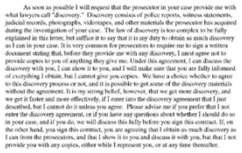
MOTION FOR DISCOVERY PURSUANT TO ARTICLE 39.14(a) OF THE TEXAS CODE OF CRIMINAL PROCEDURE

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith requests that the Court order the State of Texas produce and permit the inspection and the electronic duplication, copying, and photographing on his behalf of the following, as soon as practicable, as mandated by article 39.14(a) of the Texas Code of Criminal Procedure:

1. All offense reports;
2. All written and recorded statements of the defendant;
3. All written and recorded statements of all witnesses;
4. All witness statements of all law enforcement officers in this case;
5. All documents, papers, books, accounts, letters, objects and other tangible things seized from the defendant, his home or his vehicle;
6. All photographs, videotapes, audio, and other electronic recordings taken, made, or obtained by agents of the state of Texas during its investigation of this case;
7. All books, accounts, letters, cell phone records, text messages, voicemails, emails, social media content, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state.

- 39.14(a);
- Applies to offenses committed on or after January 1, 2014;
- Except Family Code §264.408 & Code of Criminal Procedure 39.15;
- "upon timely request"
- "as soon as practicable";
- View but don't copy;
- Redact
- Equal or greater by agreement



As soon as possible I will request that the prosecutor in your case provide me with what lawyers call "discovery." Discovery consists of police reports, witness statements, judicial records, photographs, videotapes, and other materials the prosecutor has acquired during the investigation of your case. The law of discovery is too complex to be fully explained in this letter, but suffice it to say that it is my duty to obtain as much discovery as I can in your case. It is very common for prosecutors to require me to sign a written document stating that, before they provide me with any discovery, I must agree not to provide copies to you of anything they give me. Under this agreement, I can discuss the discovery with you, I can show it to you, and I will make sure that you are fully informed of everything I obtain, but I cannot give you copies. We have a choice whether to agree to this discovery process or not, and it is possible to get some of the discovery materials without the agreement. It is my strong belief, however, that we get more discovery, and we get it faster and more effectively, if I enter into the discovery agreement that I just described, but I cannot do it unless you agree. Please advise me if you prefer that I not enter the discovery agreement, or if you have any questions about whether I should do so in your case, and if you do, we will discuss this fully before you sign this contract. If, on the other hand, you sign this contract, you are agreeing that I obtain as much discovery as I can from the prosecutors, and that I show it to you and discuss it with you, but that I not provide you with any copies, either while I represent you, or at any time thereafter.

Contract language

- **I cannot give you copies.**
- **If you do not want to participate, let me know.**
- **If I do not hear from you, I will presume you are agreeable**

Motion For Discovery And Production

NO. A-00000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 216TH JUDICIAL DISTRICT
JOE SMITH) KERR COUNTY, TEXAS

MOTION FOR DISCOVERY AND PRODUCTION

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves that the Court order the State of Texas to produce copies of the following materials if these are in possession of the Kerr County District Attorney's Office or any other law enforcement agency in the State of Texas:

I.

1. The names of all mental health professionals who have discussed with the complainant the incidents alleged in this indictment, and that person's records. From discovery provided so far, it appears that the complainant reported to her therapist on or about April 27, 2014 that she had been sexually assaulted by Mr. Smith on or about February 18, 2014. When Carol Twiss of the Kerr County Sheriff's Department interviewed the complainant on April 27, 2014, Twiss said she wanted the complainant to execute a waiver, so that Twiss could get the counseling records from the complainant's therapist. According to Twiss, these records were "important." These same records are also important to the defense. Specifically, it is known that the complainant in this case has made several contradictory statements to a variety of persons about what allegedly happened to her on or about February 18, 2014.

I

- Mental health witnesses and records
- Cell phone records, texts, emails
- Social media content
- Recorded interviews
- Forensic reports
- School records
- Intended civil litigation
- CPS records
- Medical records
- Victim impact statements
- Complainant's true name
- Photos, including colposcope

NO. 00000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 186th JUDICIAL DISTRICT
JOE SMITH) BEXAR COUNTY, TEXAS

MOTION FOR DISCOVERY OF RECORDS CONSIDERED CONFIDENTIAL UNDER § 261.201 OF THE TEXAS FAMILY CODE

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves that this Honorable Court order the State to produce for inspection and copying or photographing any and all records pertaining to the defendant or the complainant, concerning the instant cause or any other incident involving either the defendant or the complainant which the Texas Department of Protective and Regulatory Services considers confidential under § 261.201 of the Texas Family Code, and for good cause shows the following:

I.

In his Motion for Discovery, defendant requested records and information created or maintained by the Texas Department of Protective and Regulatory Services, also known as Child Protective Services. Defendant believes the Department will claim that part or all of the requested materials are subject to the confidentiality provisions of § 261.201 of the Texas Family Code. This motion specifically addresses that "confidential" information.

II.

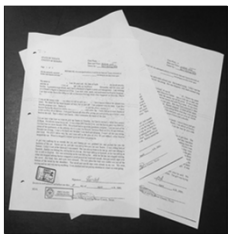
Section 261.201 of the Texas Family Code provides that certain information

Discovering CPS Records

Family Code § 261.201

- If CPS claims confidentiality
- Court order after notice and hearing and in camera review
- Essential to the administration of justice
- No danger to life or safety

Old School/New School



Motion For Copies Of Electronically Recorded Interviews

NO. 2014-CR-0000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 290TH JUDICIAL DISTRICT
JOE SMITH) BEXAR COUNTY, TEXAS

MOTION FOR COPIES OF ELECTRONICALLY RECORDED INTERVIEWS

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves for copies of electronically recorded interviews of the complaining witness Connie Jones, and of her mother and purported outcry witness, Elizabeth Jones so that his attorney can effectively assist his defense, and confront and cross-examine witnesses against him, pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 3, 10, 13, and 19 of the Texas Constitution, and Article 39.14(a) of the Texas Code of Criminal Procedure.

I.

Connie and Elizabeth Jones first spoke to Detective Adams of the Kirby Police Department on September 20, 2013. Adams contacted Child Safe and that same day a "forensic interview" was done with Connie Jones, who was then 24 years old. That interview, which clearly was done primarily, if not entirely, for the purpose of litigation, is lengthy, lasting more than one hour and nine minutes. It is recorded on video tape, and the resulting DVD is in possession of the District Attorney's office. Adams also interviewed Elizabeth Jones, and that interview, which was captured on audiotape and lasts for approximately 32 minutes, is also in possession of the District Attorney's Office.

II.

Assistant District Attorney Dean has permitted counsel to watch and listen to the listed electronic recordings, and has offered to make them available in the District Attorney's office

1

- For witnesses 13 and older
- Cf. article 39.15
- The state's choice
- Not fair
- Burdensome
- My experts
- Impossible to impeach
- *In re Dist. Attorney's Office of 25th Judicial Dist.,* 358 S.W.3d 244 (Tex. Crim. App. 2011)

The police would never look on a computer for evidence of a crime, would they?

NO. 2014-CR-0000

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

MOTION FOR PRODUCTION OF COPIES OF COMPUTER EVIDENCE

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves for production of copies of all information, records and other data collected from all computers and storage devices seized or examined by the state in its investigation in this case, pursuant to the Fifth, Sixth and Fourteenth Amendment of the United States Constitution. Article I, §§ 3, 10, 13, and 19 of the Texas Constitution and Article 39.14 of the Texas Code of Criminal Procedure.

I.

The defendant asserts that:

1. The items requested are in the exclusive possession, custody and control of the State of Texas or the United States Government by, and through its agents, the police or the prosecuting attorney's office, and the Defendant has no other means of ascertaining the disclosures requested.
2. The items requested are not privileged.
3. The items and information are material to this cause and the issues of guilt or innocence and punishment to be determined in this cause.
4. The Defendant cannot safely go to trial without such information and inspection, nor can the Defendant adequately prepare his defense to the charges against him.
5. The consent such disclosure the Defendant's rights under Article 39.14, Article I, §§ 3, 10, 13 and 19 of the Constitution of the State of Texas, and the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America will be violated, to his irreparable injury and thus deprive the Defendant of a fair trial herein.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Honorable Court will grant this the Defendant's Motion For Production Of Copies of

Motion For Production Of Copies Of <u>Computer Evidence</u>

"copies of all information, records and other data collected from all computers and storage devices seized or examined by the state in its investigation in this case"

Don't know much about arithmetic, but I know that 99.99996% conclusive is bad.

Motions For Production Of Information Regarding DNA Evidence

DPS **Other Labs**

Motions To Set Aside

Why bother?

- Judges never grant those motions anyway, do they?
- The state can just amend, can't it?
- The state will just refile, won't it?
- Who cares about appeal; we win all our cases before the jury, don't we?

Tex. Code Crim. Proc. art. 21.15

A charging instrument alleging recklessness or criminal negligence

"must allege, with reasonable certainty, the act or acts relied upon to constitute recklessness or criminal negligence"

When is an allegation reasonably certain enough for the defense?

Motion To Set Aside [Indecent Exposure]

NO. 000000

STATE OF TEXAS } IN THE COUNTY COURT

VS. } AT LAW

JOE SMITH } COMAL COUNTY, TEXAS

DEFENDANT'S MOTION TO SET ASIDE THE INFORMATION

[Indecent Exposure]

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*, 309 S.W.3d 10, 16(Tex. Crim. App. 2010)(motion to quash should have been granted since fact-finder could not infer recklessness from the information because there is nothing inherently reckless about either exposing oneself or masturbating); *see also Gorgnaef v. State*, 740 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

- ***Smith v. State*, 309 S.W. 3d 10, 16 (Tex. Crim. App. 2010)**
- **"trier of fact could not infer recklessness from the information because there is nothing inherently reckless about either exposing oneself or masturbating."**
- **State should have alleged it was done in a public place**

Motions To Set Aside Included In The Paper

- **Indecent Exposure**
- **Possession of Child Pornography**
- **Sexual Assault of a Disabled Person**
- **Sexual Performance**
- **Solicitation of a Minor.**

Experts

Motion For Disclosure Of Names and Addresses . . . .

NO. 00000

STATE OF TEXAS } IN THE DISTRICT COURT

VS. } ___TH JUDICIAL DISTRICT

JOE SMITH } BEXAR COUNTY, TEXAS

MOTION FOR DISCLOSURE OF NAMES AND ADDRESSES OF EACH PERSON THE STATE MAY USE AT TRIAL TO PRESENT EVIDENCE UNDER 101 LES 702, 703 AND 705 OF THE TEXAS RULES OF EVIDENCE

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves this Court to order the State of Texas to disclose the names and addresses of each person it may use at trial to present evidence under Rules 702, 703 and 705 of the Texas Rules of Evidence, as required by article 39.14(b) of the Texas Code of Criminal Procedure.

I.

Article 39.14(b) of the Texas Code of Criminal Procedure provides as follows:

On motion of a party and on notice to the other parties, the court in which an action is pending may order one or more of the other parties to disclose to the party making the motion the name and address of each person the other party may use at trial to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence. The court shall specify in the order the time and manner in which the other party must make the disclosure to the moving party, but in specifying the time in which the other party shall make disclosure the court shall require the other party to make the disclosure not later than the 20th day before the date the trial begins.

TEX. CODE CRIM. PROC. ANN. art. 39.14(b).

II.

By this motion, the defense invokes article 39.14(b) and moves that this Court

- **TEX. CODE CRIM. PROC. § 39.14(b)**
- **Names and addresses**
- **20 days before trial**
- **Get it signed early**
- **reciprocity**

Complying with a 39.14(b) Request

Playing nice

Mark Stevens
Lawyer
310 S. St. Mary's Ste., Ste. 1920
San Antonio, Tx 78205

March 28, 2014

Ms. Susan D. Reed
Assistant District Attorney
Bexar County District Attorney's Office
101 Dolorosa
San Antonio, TX 78205

Re: *State of Texas vs. Joe Smith*, No. 2014-CR-0000

Dear Ms. Reed:

This letter will advise you, pursuant to article 39.14(b) of the Texas Code of Criminal Procedure, that, at the present time, the defense may call the following person at trial to present evidence under Rule 702, 703 and 705 of the Texas Rules of Evidence:

Robert C. Benjamin
Dept. Of Biological Sciences
University of North Texas
1155 Union Circle
Denton, Texas 76203

Jack Farrell
18101 Northbrook Dr.
San Antonio, TX 78232

Sincerely,

Mark Stevens

MS:tz

Picking a fight

Mark Stevens
Lawyer
310 S. St. Mary's St., Ste. 1920
San Antonio, Tx 78205

March 28, 2014

HAND-DELIVERED

Ms. Susan D. Reed
Assistant Criminal District Attorney
Bexar County District Attorney's Office
San Antonio, TX 78205

Re: *State of Texas vs. Joe Smith*, No. 2014-CR-0000

Dear Ms. Reed:

Rule 39.14(b)

This letter will advise you, pursuant to article 39.14(b) of the Texas Code of Criminal Procedure, that, at the present time, the defense may call the following person at trial to present evidence under Rule 702, 703 and 705 of the Texas Rules of Evidence:

Billy S. Horton
1234 Main Street
College Station, Texas 77840

TEX. DISCIPLINARY R. PROF. CONDUCT 4.02(b)

Rule 4.02(b) of the Texas Disciplinary Rules of Professional Conduct provides the following:

In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Complying with a 39.14(b) Request

- Texas Disciplinary Rules of Professional Conduct 4.02(b) and comment 3
- Experts retained by opposing counsel should not be contacted without permission
- Exception: certain governmental agents
- "I am unable to give my consent . . . ."

Picking a fight

Mark Stevens
Lawyer
310 S. St. Mary's Ste., Ste. 1920
San Antonio, Tx 78205

March 28, 2014

HAND-DELIVERED

Ms. Susan D. Reed
Assistant Criminal District Attorney
Bexar County District Attorney's Office
300 Dolorosa
San Antonio, TX 78205

Re: *State of Texas vs. Joe Smith*, No. 2014-CR-0000

Dear Ms. Reed:

Rule 39.14(b)

This letter will advise you pursuant to article 39.14(b) of the Texas Code of Criminal Procedure, that, at the present time, the defense may call the following person at trial to present evidence under Rule 702, 703 and 705 of the Texas Rules of Evidence:

Hilly S. Hooton
104 Elm Street
College Station, Texas 77840

TEX. DISCIPLINARY R. PROF. CONDUCT 4.02(b)

Rule 4.02(b) of the Texas Disciplinary Rules of Professional Conduct provides the following:

> In representing a client a lawyer shall not communicate or cause another to communicate about the subject of the representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

HIPAA

NO. 2010-CR-0000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 144TH JUDICIAL DISTRICT
JOE SMITH) BEXAR COUNTY, TEXAS

ORDER

The Health Information Portability and Accountability Act, 45 CFR 164.512 (HIPAA), provides that a covered entity, specifically North Central Baptist Hospital for purposes of this Order, may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.

In accordance with 45 CFR 164.512(e)(1)(i), the covered entity, North Central Baptist Hospital may disclose protected health information in response to an order of a court or administrative tribunal, provided that only the protected health information expressly authorized by such order is disclosed or in compliance with and as limited by the relevant requirements of a court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer.

Therefore, it is ORDERED AND DECREED that North Central Baptist Hospital will provide the protected health information regarding patient Chelsea Jones, DOB April 1, 1990, described in the attached duly issued subpoena duces tecum in accordance with the instructions therein and subject to all enforcement provisions of Chapter 24 of the Texas Code of Criminal Procedure.

Signed on April 25, 2011.

JUDGE PRESIDING

Medical Records

PROGRESS NOTE

- •"Consumer is presently experiencing severe and frequent flashbacks of many years of being sexually molested by her grandfather."
- •"Consumer states that these flashbacks occur as dreams of her father 'holding me down' while other men rape me."
- •"Consumer also describes visual and auditory hallucinations that accompany the flashbacks/nightmares."

Motion For Voir Dire Of Expert Witness	Motion For Daubert Hearing
	
"underlying facts and data"	reliability & relevance

NO. 2011-CR-0000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 379th JUDICIAL DISTRICT
JOE SMITH) BEXAR COUNTY, TEXAS

MOTION FOR VOIR DIRE OF EXPERT WITNESS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Joe Smith, defendant in the above styled and numbered cause, and moves this Court to conduct a hearing prior to trial and outside the presence of the jury to determine the preliminary question of the qualification of all expert witnesses upon which the state intends to rely at trial, and to determine the underlying facts and data upon which their opinions are based, and, for good cause, shows the following:

I.

Defendant expects the state to rely upon expert witnesses to prove its case.

II.

The burden of establishing the admissibility of an expert's opinion rests on the party offering the evidence.

III.

Whether the proffered witness possesses the requisite qualifications is a preliminary matter for the trial court to decide and not a matter of weight only to be determined by the jury.

NO. 000000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 144th JUDICIAL DISTRICT
JOE SMITH) BEXAR COUNTY, TEXAS

MOTION FOR DAUBERT HEARING

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves that this Court set a hearing prior to trial as required by Rule 104(a) of the Texas Rules of Evidence to determine the preliminary question of the relevancy and reliability of any expert testimony proffered by the prosecution. For good cause, Mr. Smith shows the following:

I.

The defense believes that the state will attempt to present to the jury testimony from expert witnesses pursuant to Rules 702, 703, and 705 of the Texas Rules of Evidence.

II.

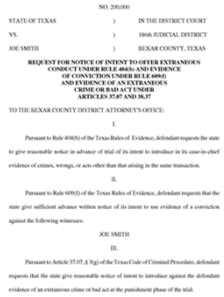
Rule 702 permits a party to elicit expert testimony from qualified witnesses that "will assist the trier of fact to understand the evidence or to determine a fact in issue." The party offering evidence from an expert bears the burden of demonstrating to the trial court that this testimony is both relevant and reliable.

III.

Under Rule 104(a), the trial court acts as a "gatekeeper," determining preliminary

Rule 103(a)

Request For Notice Of Intent To Offer Extraneous Conduct Under Rule 404(b) . . . Rule 609(f) . . . And Articles 37.07 . . . 38.37



NO. 200,000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 166th JUDICIAL DISTRICT
JOE SMITH) BEXAR COUNTY, TEXAS

REQUEST FOR NOTICE OF INTENT TO OFFER EXTRANEOUS CONDUCT UNDER RULE 404(b) AND EVIDENCE OF CONVICTION UNDER RULE 609(f) AND EVIDENCE OF AN EXTRANEOUS CRIME OR BAD ACT UNDER ARTICLES 37.07 AND 38.37

TO THE BEXAR COUNTY DISTRICT ATTORNEY'S OFFICE:

I.

Pursuant to Rule 404(b) of the Texas Rules of Evidence, defendant requests the state to give reasonable notice in advance of trial of its intent to introduce in its case-in-chief evidence of crimes, wrongs, or acts other than that arising in the same transaction.

II.

Pursuant to Rule 609(f) of the Texas Rules of Evidence, defendant requests that the state give sufficient advance written notice of its intent to use evidence of a conviction against the following witnesses:

JOE SMITH

III.

Pursuant to Article 37.07, § 3(g) of the Texas Code of Criminal Procedure, defendant requests that the state give reasonable notice of intent to introduce against the defendant evidence of an extraneous crime or bad act at the punishment phase of the trial.

Rule 404(b)

"provided that, upon timely REQUEST by the accused . . . reasonable notice is given in advance of trial of intent to introduce . . . ."

Espinosa v. State

Request, not motion

Umoja v. State

Friday before Monday is not reasonable.

NO. 2008-CR-0000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 226th JUDICIAL DISTRICT
JOE SMITH) BEXAR COUNTY, TEXAS

MOTION IN LIMINE

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves this Court before trial in limine for an order instructing the District Attorney, his representatives and witnesses to refrain from making any direct or indirect reference whatsoever, at trial before the jury to any of the following matters:

I.

Defendant moves to exclude all extraneous crime or misconduct evidence which is not alleged in the indictment, unless it can be shown to the Court, outside the presence of the jury by sufficient proof that defendant perpetrated such conduct, that this evidence is relevant to a material issue in the case, other than character conformity, and that its probative value outweighs its potential for prejudice.

II.

If the prosecutor is allowed to allude to, comment upon, inquire about, or introduce evidence concerning, any of the above matters, ordinary objections during the course of trial, even sustained with proper instructions to the jury, will not remove the harmful effect of same in view of its highly prejudicial content.

WHEREFORE, PREMISES CONSIDERED, defendant, prays that this Court

Motion In Limine

- standard
- very general
- does not preserve error.

Defendant's Objections To Evidence Pursuant To Rule 103(a)(1)

STATE
VS.) AT LAW NUMBER ONE
JO SMITH) BEXAR COUNTY, TEXAS

DEFENDANT'S OBJECTIONS TO EVIDENCE PURSUANT TO RULE 103(a)(1)

TO THE HONORABLE JUDGE OF THE COURT:

Jo Smith objects prior to trial, under Rule 103(a)(1) of the Texas Rules of Evidence, to certain evidence she believes the state may offer at trial.

I.
Rule 103(a)(1)

Rule 103(a)(1) of the Texas Rules of Evidence provides that : "When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections." In this document, the defense objects to evidence discussed herein under Rule 103(a)(1).

II.
Extraneous Misconduct

Jo Smith moves to exclude all extraneous crime or misconduct evidence which is not alleged in the indictment in this case, unless it can be shown by sufficient proof that she perpetrated such conduct. In deciding whether to admit such evidence, this Court "must, under rule 104(b) (of the Texas Rules of Evidence), make an initial determination

1

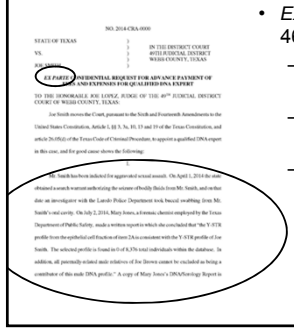
- very specific
- file it just before voir dire
- Rule 103(a)(1)
- extraneous misconduct
- inadmissible opinions
- right to counsel
- right to silence

Defendant's Objections To Evidence Pursuant To Rule 103(a)(1)

- **improper outcry**
- **CPS, administrative allegations or findings**
- **victim impact evidence**
- **hearsay**
- **authentication**
- **business records**
- **polygraphs**
- **testimonial aids**
- **civil litigation**
- **gang involvement**
- **conjunctive/disjunctive.**

Ake v. Oklahoma

Ex parte Confidential Request For Advance Payment Of Fees And Expenses For Qualified DNA Expert



NO. 2014-CRA-0000

STATE OF TEXAS
VS.
JOE SMITH

IN THE DISTRICT COURT
49TH JUDICIAL DISTRICT
WEBB COUNTY, TEXAS

EX PARTE CONFIDENTIAL REQUEST FOR ADVANCE PAYMENT OF FEES AND EXPENSES FOR QUALIFIED DNA EXPERT

TO THE HONORABLE JOE LOPEZ, JUDGE OF THE 49TH JUDICIAL DISTRICT COURT OF WEBB COUNTY, TEXAS:

Joe Smith moves the Court, pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 3, 3a, 10, 13 and 19 of the Texas Constitution, and article 26.05(d) of the Texas Code of Criminal Procedure, to appoint a qualified DNA expert in this case, and for good cause shows the following:

I.

Mr. Smith has been indicted for aggravated sexual assault. On April 1, 2014 the state obtained a search warrant authorizing the seizure of bodily fluids from Mr. Smith, and on that date an investigator with the Laredo Police Department took buccal swabbing from Mr. Smith's oral cavity. On July 2, 2014, Mary Jones, a forensic chemist employed by the Texas Department of Public Safety, made a written report in which she concluded that "the Y-STR profile from the epithelial cell fraction of item 2A is consistent with the Y-STR profile of Joe Smith. The selected profile is found in 0 of 8,376 total individuals within the database. In addition, all paternally related male relatives of Joe Brown cannot be excluded as being a contributor of this male DNA profile." A copy of Mary Jones's DNA/Serology Report is

- *Ex parte Briggs*, 187 S.W. 3d 458, 467 (Tex. Crim. App. 2005)
  - Subpoena treating doctors and introduce medical records;
  - Move to withdraw and request appointment of counsel; or,
  - Remain as counsel and request experts for "now" indigent, pursuant to *Ake*.

Some Law

- Tex. Code Crim. Proc. Ann. art. 28.01
  - 7 day rule
  - Presence of defendant required
  - Generally permissive, not mandatory
- Tex. Code Crim. Proc. Ann. art. 28.02
  - Defendant has a right to open and close

Other Motions

Defendant's Objections To Admissibility Of Videotape Of Joe Smith

2011-CR-0000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 290th JUDICIAL DISTRICT
JOE SMITH) BEXAR COUNTY, TEXAS

DEFENDANT'S OBJECTIONS TO ADMISSIBILITY OF VIDEOTAPE OF JOE SMITH ON MARCH 17, 2011

TO THE HONORABLE JUDGE OF THE 290TH JUDICIAL DISTRICT COURT:

Introduction

The law permits the introduction of a defendant's oral statements if certain conditions are satisfied. First and foremost, before "the defendant's statement" can be admitted against him, it must at least be his statement. In this case, although Mr. Smith does make some statements himself on this videotape, as we show in detail in this motion, other statements on the videotape were spoken – either directly or indirectly – by others – including the interrogating officer, and other unidentified persons. The statements identified in this motion are wholly irrelevant to Mr. Smith, or unfairly prejudicial to him, or both, and are inadmissible for various other reasons, including that they are hearsay and deny him the constitutional right to confront and cross-examine witnesses against him, and that they refer to inadmissible extraneous misconduct, to comments on credibility.

This motion points out in detail that evidence that the defense has so far been able to identify as inadmissible. Removing all the inadmissible evidence, then introducing the

1

- handcuffs
- "So if she describes that and says, "I've seen him do that to Jimmy before, what do you think she means?
- She probably means that I grabbed him and shook his head.
- So do you shake him?
- I could have. I probably did.
- You'd go to Gruene hall, get drunk, and you beat the hell out of her.

Defendant's Objections To Admissibility Of Videotape Of Joe Smith

2011-CR-0000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 290th JUDICIAL DISTRICT
JOE SMITH) BEXAR COUNTY, TEXAS

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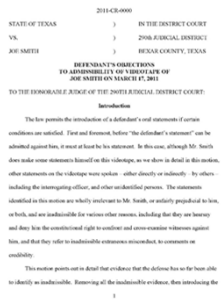
This motion points out in detail that evidence that the defense has so far been able to identify as inadmissible. Removing all the inadmissible evidence, then introducing the

1

- I was there. I saw it. It looked like a massacre. I probably never seen that much blood in my life. What did they do to you to make you do this to them?
- Do you know what a lie detector test is? If I gave you one this minute, would you pass?

Defendant's Objections To Admissibility Of Videotape Of Joe Smith



2011-CR-0000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 290th JUDICIAL DISTRICT
JOE SMITH) BEXAR COUNTY, TEXAS

DEFENDANT'S OBJECTIONS TO ADMISSIBILITY OF VIDEOTAPE OF JOE SMITH ON MARCH 17, 2011

TO THE HONORABLE JUDGE OF THE 290TH JUDICIAL DISTRICT COURT:

Introduction

The law permits the introduction of a defendant's oral statements if certain conditions are satisfied. First and foremost, before "the defendant's statement" can be admitted against him, it must at least be his statement. In this case, although Mr. Smith does make some statements himself on this videotape, as we show in detail in this motion, other statements on the videotape were spoken – either directly or indirectly – by others – including the interrogating officer, and other unidentified persons. The statements identified in this motion are wholly irrelevant to Mr. Smith, or unfairly prejudicial to him, or both, and are inadmissible for various other reasons, including that they are hearsay and deny him the constitutional right to confront and cross-examine witnesses against him, and that they refer to inadmissible extraneous misconduct, to comments on credibility.

This motion points out in detail that evidence that the defense has so far been able to identify as inadmissible. Removing all the inadmissible evidence, then introducing the

1

- "I've never seen a baby fall and get a bruise like this. I've got a 17 year old, and a 13 year old. Been through that. That's somebody messing with the kid.

Continuance

NO._____

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) _____JUDICIAL DISTRICT
_____) _____ COUNTY, TEXAS

DEFENDANT'S MOTION FOR CONTINUANCE

TO THE HONORABLE JUDGE OF SAID COURT:

_____moves the Court to continue the trial date in this cause for these reasons:

I.

- Written
- Sworn

Application For Writ Of Habeas Corpus Seeking Bail Reduction

NO. 2014-CR-0000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 227TH JUDICIAL DISTRICT
JOE SMITH) BEXAR COUNTY, TEXAS

APPLICATION FOR WRIT OF HABEAS CORPUS SEEKING BAIL REDUCTION

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith makes this Application for Writ of Habeas Corpus Seeking Bail Reduction, and, for good cause shows the following:

I.

Defendant is illegally confined and restrained of his liberty by the Sheriff of Bexar County, Texas in the Bexar County Adult Detention Center in San Antonio, Texas in lieu of a bond in the amount of $500,000.00. Defendant is charged with the felony offense of aggravated sexual assault.

II.

Defendant's confinement and restraint is illegal because his bond is excessive, oppressive and beyond his financial means, in violation of the Eighth and Fourteenth Amendments to the United States Constitution, Article 1, §§ 11, 13 and 19 of the Texas Constitution, and articles 1.07 and 17.15 of the Texas Code of Criminal Procedure.

III.

Defendant respectfully requests this Court to grant defendant an evidentiary hearing and, after receiving evidence, to reduce the amount of said bond to a reasonable amount in

Writ not Motion

Motion To Compel Election Before Trial

NO. 2013-CR-0000

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

MOTION TO COMPEL ELECTION BEFORE TRIAL BEGINS

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves that this Court compel the state to elect which offenses it seeks to prosecute him on, and that the election be made before the jury is selected, for the following reasons:

I.
The Indictment Alleges Two Different Criminal Acts

The indictment contains two counts, each alleging a separate act on a different date:

- Count I alleges that Mr. Smith, on or about the 1st day of June 2002, did intentionally and knowingly cause the penetration of the sexual organ of Ann Jones, a child who was younger 14 years, by the Defendant's finger.
- Count II alleges that Mr. Smith, on or about the 8th day of June, 2002, did intentionally and knowingly engage in sexual contact with Ann Jones, a female child younger than seventeen (17) years and not the spouse of the defendant by touching part of the genitals of Ann Jones with the intent to arouse or gratify the sexual desire of any person.

1

- When the state proves more acts than it alleges, it must elect those acts it will rely on for conviction
- When the election occurs is crucial
- *O'Neal v. State*, 746 S.W. 2d 769, 772 (Tex. Crim. App. 1988)

Joinder & Severance

NO. A 11
A 12
A 13

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 216TH JUDICIAL DISTRICT
JOE SMITH) KERR COUNTY, TEXAS

DEFENDANT'S OBJECTION TO CONSOLIDATION AND JOINDER AND MOTION FOR SEVERANCE

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith objects to consolidation and joinder of cause numbers A 11 A 12, and A 13, and moves that trial on those causes be severed and shows the following:

I.

On March 15, 2014, the state filed the State's Notice Of Consolidation Of Prosecution concerning cause numbers A 11, A 12, and A 14, pursuant to § 3.02 of the Texas Penal Code.

II.

Section 3.04(a) of the Texas Penal Code grants to the defense a mandatory severance of cases the state seeks to join under § 3.02. By this motion, the defense objects to consolidation and joinder of cause numbers A 11, A 12, and A 14.

III.

In addition to his mandatory right to sever under § 3.04(a), defendant further objects that joinder of cause numbers A 11 and A 12, on the one hand, with cause number

1

- § 3.04(a)("defendant shall have a right to severance of the offenses")
- § 3.04(c)(except offenses designated in § 3.03(b))
  - Intoxication assault and manslaughter
  - Certain sex offenses where victim is younger than 17
  - Improper photography and child pornography
  - Gang related conduct
  - First degree injury to child or elderly person
- Except for unfair prejudice. § 3.04(c)

Joinder & Severance

NO. A 11

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 216TH JUDICIAL DISTRICT
JOE SMITH) KERR COUNTY, TEXAS

REQUEST FOR NOTICE OF ORDER OF TRIALS

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith has been indicted in three different indictments, each of which charge one or more crimes. Under § 3.04 of the Texas Penal Code he has an absolute right to separate trials on these indictments. He requests separate trials and also that the state notify him which case the state intends to try first, at least 14 days before trial is to commence.

Respectfully submitted.

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3102
(210) 220-1433
State Bar No. 19184200

Attorney for Defendant

Request For Notice Of Order Of Trials

Outcry

Motion to Prohibit

NO. 2014-CR-0000

THE STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	144TH JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

MOTION TO PROHIBIT THE UTILIZATION OF AN OUTCRY STATEMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith files this his Motion to Prohibit the Utilization of an Outcry Statement and shows the following:

I.

The defense has not received a "Notice of Intent to Present Outcry Statement" at least fourteen days before the date the proceeding is to begin, contrary to Article 38.072 of the Texas Code of Criminal Procedure. Mr. Smith has no notice of who the state intends to call as an outcry witness nor the content of such outcry as also required by Article 38.072. When such requirements are not met, the statement is inadmissible hearsay.

II.

To permit the State to utilize the hearsay testimony also violates Mr. Smith's constitutional rights of confrontation, due process, and due course of law, as delineated in the Sixth Amendment of the United States Constitution and Article 1, § 10 of the Texas Constitution.

WHEREFORE, PREMISES CONSIDERED, the Defendant moves this Honorable Court at its pretrial hearing to prohibit the use of such Outcry Statement, and for such other

Motion to Clarify

NO. 2013-CR-0000

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

MOTION TO CLARIFY OUTCRY WITNESS

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith files this his Motion To Clarify Outcry Witness, and shows the following:

I.

On February 08, 2013, the state filed two separate documents entitled "Notice Of Intent To Present Outcry Statement," each of which purports to designate a different "outcry" witness. Specifically, the state has designated Mary Brown and Robert Johnson, as its outcry witness.

II.

Article 38.072, §2(a)(3) requires that the outcry statement be made to the "first person . . . to whom the child . . . made a statement about the offense . . . ." Necessarily, then, there can be only one true outcry witness.

III.

The state has designated not one, but at least two persons as outcry witnesses. This violates article 38.072, § 2(a)(3). The defense does not concede that any outcry witness can testify in this case, but in any event if the state intends to use anyone as an outcry witness, it should designate the one person it intends to use, and it has not done so yet.

WHEREFORE, PREMISES CONSIDERED, the Defendant moves this Honorable

Rape-Shield Law

NO. 2014-CR-0000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	187TH JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

PRETRIAL TO ASK QUESTIONS ABOUT THE ALLEGED VICTIM'S PAST SEXUAL BEHAVIOR PURSUANT TO RULE 412(c)

I.

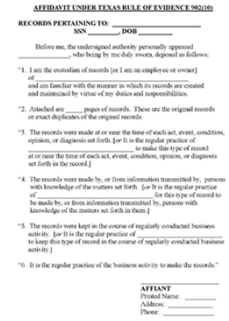
Defendant informs the court that he proposes to ask questions of several witnesses concerning specific instances of the alleged victim's past sexual behavior. Pursuant to Rule 412(c) of the Texas Rules of Evidence, when the defense proposes to ask such questions, before doing so in the presence of the jury, it must inform the court, which must then hold an in camera hearing to determine the admissibility of such evidence.

II.

From the discovery provided by the state so far, the defense has learned that, sometime in the summer of 1999, the 12 year old complainant in this case began making contact with older males on the Internet, using the screen name, "Lo=258." A number of these contacts developed into consensual sexual encounters. Indictments in Bexar County and Guadalupe County charged that the following individuals committed the offenses of aggravated sexual assault and indecency with a child against the complainant, on or about the listed dates:

1. Tom Sommers. December 30, 1999; January 24, 2000.
2. Michael Raymond. January 31, 2000.

- Reputation is not admissible
- specific instances of past sexual behavior may be admissible
- Must inform the court outside the presence of the jury
- in camera hearing



AFFIDAVIT UNDER TEXAS RULE OF EVIDENCE 902(10)

RECORDS PERTAINING TO: _____
SSN _____ DOB _____

Before me, the undersigned authority personally appeared _____, who being by me duly sworn, deposed as follows:

"1. I am the custodian of records [or I am an employee or owner] of _____
and am familiar with the manner in which its records are created and maintained by virtue of my duties and responsibilities.

"2. Attached are _____ pages of records. These are the original records or exact duplicates of the original records.

"3. The records were made at or near the time of each act, event, condition, opinion, or diagnosis set forth. [or It is the regular practice of _____ to make this type of record at or near the time of each act, event, condition, opinion, or diagnosis set forth in the record.]

"4. The records were made by, or from information transmitted by, persons with knowledge of the matters set forth. [or It is the regular practice of _____ for this type of record to be made by, or from information transmitted by, persons with knowledge of the matters set forth in them.]

"5. The records were kept in the course of regularly conducted business activity. [or It is the regular practice of _____ to keep this type of record in the course of regularly conducted business activity.]

"6. It is the regular practice of the business activity to make the records."

_____
AFFIANT
Printed Name: _____
Address: _____
Phone: _____

Rule 902(10)

- effective for cases filed on or after September 1, 2014.
- business records
- self-authenticating
- if filed with the clerk at least 14 days before trial
- accompanied by an affidavit
- with notice to all parties
- be careful

Can I file a motion to . . ?

Yes.

Motion For Notice Of Intent To Offer Statements Allegedly Made By Defendant

NO. 2013-CR-0000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 226TH JUDICIAL DISTRICT
JOE SMITH) BEXAR COUNTY, TEXAS

MOTION FOR NOTICE OF INTENT TO OFFER STATEMENTS ALLEGEDLY MADE BY DEFENDANT

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves this Court to require the state to give written notice, at least 30 days prior to hearing his Motion to Suppress Written or Oral Statements of Defendant, of all statements allegedly made by Mr. Smith, that the state intends to offer at trial. For good cause, we show the following:

I.

Review of the discovery provided to date reveals several witnesses who say that Mr Smith made statements to them about the evidence in this case. Some of these statements were electronically recorded and some were not. Some were made to persons who were obviously agents of the State of Texas, in other cases, the agency relationships are less clear. Some were likely the product of custodial interrogation. The admissibility of each statement will depend on the facts and circumstances under which they were made, if in fact they were made.

II.

A defendant is entitled to a hearing outside the presence of the jury on the admissibility of any confession he is alleged to have made. TEX. R. EVID. 104(c). A

A few things to remember about motions . . .

- There is no bigger bang for your buck.
- Think expansively.
- Written motions are usually better than oral motions.
- Swear only when necessary.
- File them timely.
- And in the right court.
- Serve them on the other side (usually).
- Present them to the court.
- Get a ruling.
- May I be excused, Your Honor?

NO. 2014-CR-000000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	216TH JUDICIAL DISTRICT
JOE SMITH	)	KERR COUNTY, TEXAS

MOTION FOR DISCOVERY
PURSUANT TO ARTICLE 39.14(a)
OF THE TEXAS CODE OF CRIMINAL PROCEDURE

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith requests that the Court order the State of Texas produce and permit the inspection and the electronic duplication, copying, and photogaphing on his behalf of the following, as soon as practicable, as mandated by article 39.14(a) of the Texas Code of Criminal Procedure:

1. All offense reports;

2. All written and recorded statements of the defendant;

3. All written and recorded statements of all witnesses;

4. All witness statements of all law enforcement officers in this case;

5. All documents, papers, books, accounts, letters, objects and other tangible things seized from the defendant, his home or his vehicle;

6. All photographs, videotapes, audio, and other electronic recordings taken, made, or obtained by agents of the state of Texas during its investigation of this case;

7. All books, accounts, letters, cell phone records, text messages, voicemails, emails, social media content, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state.

8. All exculpatory, impeachment, or mitigating documents, items, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.

Respectfully submitted:

MARK STEVENS
310 S. St. Mary's Street, Suite 1920
San Antonio, TX 78205
(210) 226-1433
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of the defendant's Motion For Discovery Pursuant To Article 39.14(b) of the Texas Code of Criminal Procedure has been delivered to the District Attorney's Office, Kerr County, 521 E. Garrett St.; Kerrville, Texas 78028, on this the ___ day of January, 2014.

MARK STEVENS

ORDER

On this the _____ day of _____, 2014, came on to be considered defendant's Motion For Discovery Pursuant To Article 39.14(b) of the Texas Code of Criminal Procedure is granted and denied as indicated in the body of this motion.

JUDGE PRESIDING

[Excerpt from Contract]

As soon as possible I will request that the prosecutor in your case provide me with what lawyers call "discovery." Discovery consists of police reports, witness statements, judicial records, photographs, videotapes, and other materials the prosecutor has acquired during the investigation of your case. The law of discovery is too complex to be fully explained in this letter, but suffice it to say that it is my duty to obtain as much discovery as I can in your case. It is very common for prosecutors to require me to sign a written document stating that, before they provide me with any discovery, I must agree not to provide copies to you of anything they give me. Under this agreement, I can discuss the discovery with you, I can show it to you, and I will make sure that you are fully informed of everything I obtain, but I cannot give you copies. We have a choice whether to agree to this discovery process or not, and it is possible to get some of the discovery materials without the agreement. It is my strong belief, however, that we get more discovery, and we get it faster and more effectively, if I enter into the discovery agreement that I just described, but I cannot do it unless you agree. Please advise me if you prefer that I not enter the discovery agreement, or if you have any questions about whether I should do so in your case, and if you do, we will discuss this fully before you sign this contract. If, on the other hand, you sign this contract, you are agreeing that I obtain as much discovery as I can from the prosecutors, and that I show it to you and discuss it with you, but that I not provide you with any copies, either while I represent you, or at any time thereafter.

NO. A-00000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	216TH JUDICIAL DISTRICT
JOE SMITH	)	KERR COUNTY, TEXAS

MOTION FOR DISCOVERY AND PRODUCTION

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves that the Court order the State of Texas to produce copies of the following materials if these are in possession of the Kerr County District Attorney's Office or any other law enforcement agency in the State of Texas:

I.

1. The names of all mental health professionals who have discussed with the complainant the incidents alleged in this indictment, and that person's records. From discovery provided so far, it appears that the complainant reported to her therapist on or about April 27, 2014 that she had been sexually assaulted by Mr. Smith on or about February 18, 2014. When Carol Twiss of the Kerr County Sheriff's Department interviewed the complainant on April 27, 2014, Twiss said she wanted the complainant to execute a waiver, so that Twiss could get the counseling records from the complainant's therapist. According to Twiss, these records were "important." These same records are also important to the defense. Specifically, it is known that the complainant in this case has made several contradictory statements to a variety of persons about what allegedly happened to her on or about February 18, 2014.

(GRANTED) (DENIED)

2. Cell phone records in the state's possession, including text messages, voice mails and emails of the complainant and any person who the state anticipates it will call as a witness in this case.

(GRANTED) (DENIED)

3. All social media content that the state has collected during its investigation of the complainant, any witnesses who might testify, and the defendant.

(GRANTED) (DENIED)

4. Any video or audio tapes made by law enforcement agents of interviews with any of its witnesses, including the complainant, L.S., and Joe Smith.

(GRANTED) (DENIED)

5. All reports, written or oral, concerning forensic testing and results therefrom, on any person or item obtained by the State of Texas in this case, including the complainant or her clothes.

(GRANTED) (DENIED)

6. Any school records of any person that the State of Texas has obtained during its investigation of this case.

(GRANTED) (DENIED)

7. Any documents or records in the state's possession indicating that the complainant has any intention of filing civil litigation concerning the allegations that are the subject of this indictment.

(GRANTED) (DENIED)

8. Any records concerning reports made to Child Protective Services by this complainant concerning allegations she has made against Joe Smith or any other person.

(GRANTED) (DENIED)

9. An essential element that must be proven by the state in this case is that Mr. Smith caused serious bodily injury to the complainant. Counsel has viewed medical records in the District Attorney's file and asserts that there will be a serious question in this case whether the complainant suffered serious bodily injury as defined by Texas law. If the state persists in this allegation, it may be necessary for the defense to retain a medical expert to review the medical evidence for the purpose of giving an opinion on the question of serious bodily injury. The complainant's medical records are the biggest part of the medical evidence in this case, and must be reviewed by any medical experts retained by the defense in advance of trial.

(GRANTED) (DENIED)

10. Copies of all victim impact statements that contain material exculpating him or mitigating his punishment, as required by article 56.03(g) of the Texas Code of Criminal Procedure.

(GRANTED) (DENIED)

11. The indictment identifies the complainant by the pseudonym, "A1." Mr. Smith requires the true name and the correct date of birth of the complainant so that he can determine whether the indictments in this case were returned within "ten years from

the [complainant's] 18th birthday," as required by Texas law. *See* TEX. CODE CRIM. PROC. ANN. art. 12.01(5). Additionally, Mr. Smith must know the name of the complainant so that his lawyer can properly investigate this case and render effective assistance of counsel and adequately confront and cross-examine adverse witnesses, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, § 10 of the Texas Constitution.

(GRANTED) (DENIED)

12. Copies of all photographic and videotape evidence in its possession, including those photographs made with the "colposcope," which show or purport to show evidence of physical injuries to the complainant in this cause. The state's expert witness has relied on this photographic evidence in concluding that complainant suffered sexual abuse in this case. These same photographs should be made available to defendant's expert in order that this conclusion can be tested and challenged.

(GRANTED) (DENIED)

II.

The defendant asserts that:

1. The items requested are in the exclusive possession, custody and control of the State of Texas or the United States Government by and through its agents, the police or the prosecuting attorney's office, and the Defendant has no other reasonable means of ascertaining the disclosures requested.

2. The items requested are not privileged.

3. The items and information are material to this cause and the issues of guilt or innocence and punishment to be determined in this cause.

4. The Defendant cannot safely go to trial without production of the requested items, such information and inspection, nor can the Defendant adequately prepare the defense to the charges against him.

5. The absent such discovery the Defendant's rights under Article 39.14, Article I, §§ 3, 10, 13 and 19 of the Constitution of the State of Texas, and the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States of America will be violated, to his irreparable injury and thus deprive the Defendant of a fair trial herein.

Respectfully submitted:

MARK STEVENS
310 S. St. Mary's Street, Suite 1920
San Antonio, TX 78205
(210) 226-1433
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of the defendant's Motion For Discovery and Production has been delivered to the District Attorney's Office, Kerr County, 521 E. Garrett St.; Kerrville, Texas 78028, on this the ___ day of January, 2014.

MARK STEVENS

ORDER

On this the _____ day of _____, 2014, came on to be considered defendant's Motion For Discovery and Production is granted and denied as indicated in the body of this motion.

JUDGE PRESIDING

NO. 00000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	186th JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

MOTION FOR DISCOVERY OF RECORDS CONSIDERED CONFIDENTIAL UNDER § 261.201 OF THE TEXAS FAMILY CODE

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves that this Honorable Court order the State to produce for inspection and copying or photographing any and all records pertaining to the defendant or the complainant, concerning the instant cause or any other incident involving either the defendant or the complainant which the Texas Department of Protective and Regulatory Services considers confidential under § 261.201 of the Texas Family Code, and for good cause shows the following:

I.

In his Motion for Discovery, defendant requested records and information created or maintained by the Texas Department of Protective and Regulatory Services, also known as Child Protective Services. Defendant believes the Department will claim that part or all of the requested materials are subject to the confidentiality provisions of § 261.201 of the Texas Family Code. This motion specifically addresses that "confidential" information.

II.

Section 261.201 of the Texas Family Code provides that certain information

created or maintained by the Texas Department of Protective and Regulatory Services is confidential and not subject to public release. Section 261.201(a) specifically proves that:

(a) The following information is confidential, is not subject to public release under Chapter 5552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency;

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audio tapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

TEX. FAM. CODE § 261.201(a).

III.

The Texas Family Code, in § 261.201(b), does provide a procedure under which information the Texas Department of Protective and Regulatory Services believes is confidential may be released. Specifically, that section provides that:

(b) A court may order the disclosure of information that is confidential under this section if:

(1) a motion has been filed with the court requesting the release of the information;

(2) a notice of hearing has been served on the investigating agency and all other interested parties; and

(3) after hearing and an in camera review of the requested information, the court determines that the disclosure of the requested information is:

(A) essential to the administration of justice; and

(B) not likely to endanger the life or safety of:
(i) a child who is the subject of the report of alleged or suspected abuses or neglect;

(ii) a person who makes a report of alleged or suspected abuse or neglect; or

(iii) any other person who participates in an investigation of reported abuse or neglect or who provides care for the child (sic).

TEX. FAM. CODE § 261.201(b).

IV.

In support of this motion, defendant shows the following:

1. The items requested are in the exclusive possession, custody and control of the State of Texas or the United States Government by and through its agents, the police, the Texas Department of Protective and Regulatory Services, or the prosecuting attorney's office, and the defendant has no other means of ascertaining the disclosures requested.

2. The items and information requested are essential to the administration of justice, and are material to this cause and to the issues of guilt or innocence or punishment to be determined this cause.

3. The defendant cannot safely go to trial without such information and inspection, nor can the defendant adequately prepare the defense to the charges against him.

4. That absent such discovery the defendant's rights under Article 39.14 of the Texas Code of Criminal Procedure, Article I, §§ 10, 13 and 19 of the Constitution of the State of Texas, and the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America will be violated.

WHEREFORE, PREMISES CONSIDERED, defendant respectfully prays that this Honorable Court will set this matter down for a hearing prior to trial on the merits, and

that at such hearing any information not meeting the requirements of § 261.201(a) of the Texas Family code be ordered immediately produced to counsel for the defendant for inspection, copying and/or photographing. Defendant further requests that any information this Honorable Court determines does meet the requirements of § 261.201(a) be reviewed in camera, and any and all information or records meeting the provisions of § 261.201(b) be ordered immediately produced to counsel for the defendant for inspection, copying and/or photographing. As neither defendant nor his counsel is aware of the potential "interested parties," defendant additionally requests that the State be ordered to provide the notice of the hearing required by § 261.201(b)(2).

Respectfully submitted:

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of defendant's Motion for Discovery of Records Considered Confidential Under § 261.201 of the Texas Family Code has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on March 12, 2014.

MARK STEVENS

ORDER

On this the _____ day of _____, 2014, came on to be considered Motion for Discovery of Records Considered Confidential Under § 261.201 of the Texas Family Code, and said Motion is hereby

ORDERED that this matter shall be set for a hearing to be held on:

_____, 2014 at _____ o'clock ___ m.; and it is

FURTHER ORDERED that the State's prosecuting attorney shall provide the required notice of this hearing to all interested agencies and parties required by § 261.201(b)(2) of the Texas Family Code.

Signed on this the _____ day of _____, 2014.

_____

JUDGE PRESIDING

NO. 2014-CR-0000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	290TH JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

MOTION FOR COPIES OF ELECTRONICALLY RECORDED INTERVIEWS

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves for copies of electronically recorded interviews of the complaining witness Connie Jones, and of her mother and purported outcry witness, Elizabeth Jones so that his attorneys can effectively assist his defense, and confront and cross-examine witnesses against him, pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 3, 10, 13, and 19 of the Texas Constitution, and Article 39.14(a) of the Texas Code of Criminal Procedure.

I.

Connie and Elizabeth Jones first spoke to Detective Adams of the Kirby Police Department on September 20, 2013. Adams contacted Child Safe and that same day a "forensic interview" was done with Connie Jones, who was then 24 years old. That interview, which clearly was done primarily, if not entirely, for the purpose of litigation, is lengthy, lasting more than one hour and nine minutes. It is recorded on video tape, and the resulting DVD is in possession of the District Attorney's office. Adams also interviewed Elizabeth Jones, and that interview, which was captured on audiotape and lasts for approximately 32 minutes, is also in possession of the District Attorney's Office.

II.

Assistant District Attorney Dean has permitted counsel to watch and listen to the listed electronic recordings, and has offered to make them available in the District Attorney's office

for viewing in the future, but has declined to provide counsel with his own copies.

III.

Counsel has already spent in excess of two hours at the district attorney's office listening to the two electronic recordings described above. Based on past experiences, counsel estimates he will have to spend at least 40 hours more, listening to and transcribing these recordings, in order to be prepared for trial. Counsel himself sometimes creates a written transcript of electronic recordings, and sometimes he hires certified court reporters to do this for him. Whichever method is used here will require computer equipment and a great deal of time. It is unreasonably burdensome and expensive for counsel and other members of the defense team to have to spend this much time in a conference room of the district attorney's office, away from their own offices and the equipment and resources available to them there.

IV.

It is almost certain that counsel will have to use the witnesses's electronic recordings to refresh their memories at trial and to impeach them, and to present his own case, during opening statements and closing arguments. This will require extensive advance preparation, so that detailed time stamping of the recordings can be made, and so that pertinent excerpts of the recordings can be created. There is no way this can be done unless copies of the recordings are provided to the defense well in advance of trial.

V.

Counsel may have to engage the services of experts to examine the complainant's tape recording to ensure both that it has not been altered, and that the complainant was not improperly and suggestively examined by the state's forensic questioner. This cannot be effectively done if counsel is not provided copies of the recordings.

VI.

The State of Texas decided that its two principal witnesses would be interviewed as they were, and that electronic recordings would be made. As a result, these recordings are now in the sole possession of the state, and are available for the state to watch as often as it chooses, in the privacy of its own offices, and to conduct whatever expert analyses, and to make whatever excerpts the prosecutors deem necessary, to effectively present their case. It is fundamentally unfair for the state to consciously and unilaterally create evidence of this sort, while at the same time denying the person prosecuted equal access to the information gathered. "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations." *Dennis v. United States*, 384 U.S. 855, 873 (1966).

VII.

This Court had the authority to order the District Attorney's Office to provide copies of electronic recordings of witnesses to the defense under article 39.14(a) of the Texas Code of Criminal Procedure. *In re Dist. Attorney's Office of 25th Judicial Dist.*, 358 S.W.3d 244 (Tex. Crim. App. 2011). What the Court of Criminal Appeals common-sensically observed in that case will also be true in ours: "The court's order for the State to make the copy, which is a task both easy and inexpensive, was reasonable. It also was authorized by the statute." *Id*. at 246.

VIII.

The defense is willing to pay any costs reasonably associated with producing the copies it requests by this motion. Additionally, undersigned counsel, as an officer of the Court, will abide by any protective orders this Court believes it is necessary to impose to

insure that no improper use is made of the electronic recordings produced, and that no unauthorized person has access to same.

IX.

The defendant asserts that:

1. The items requested are in the exclusive possession, custody and control of the State of Texas or the United States Government by and through its agents, the police or the prosecuting attorney's office, and the Defendant has no other means of ascertaining the disclosures requested.

2. The items requested are not privileged.

3. The items and information are material to this cause and the issues of guilt or innocence and punishment to be determined in this cause.

4. The Defendant cannot safely go to trial without production of the requested items, such information and inspection, nor can the Defendant adequately prepare the defense to the charges against him.

5. The absent such discovery the Defendant's rights under Article 39.14, Article I, §§ 3, 10, 13 and 19 of the Constitution of the State of Texas, and the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States of America will be violated, to his irreparable injury and thus deprive the Defendant of a fair trial herein.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Honorable Court will grant the Defendant's Motion For Copies Of Electronically Recorded Interviews.

Respectfully submitted:

_____

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of this motion has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, TX 78205, on this the 22nd day of February, 2014.

_____
MARK STEVENS

ORDER

On this the _____ day of _____, 2014, came to be considered Defendant's Motion For Copies Of Electronically Recorded Interviews, and said motion is hereby

(GRANTED) (DENIED)

_____
JUDGE PRESIDING

NO. 2014-CR-0000

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

MOTION FOR PRODUCTION OF COPIES OF COMPUTER EVIDENCE

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves for production of copies of all information, records and other data collected from all computers and storage devices seized or examined by the state in its investigation in this case, pursuant to the Fifth, Sixth and Fourteenth Amendment of the United States Constitution, Article I, §§ 3, 10, 13, and 19 of the Texas Constitution and Article 39.14 of the Texas Code of Criminal Procedure.

I.

The defendant asserts that:

1. The items requested are in the exclusive possession, custody and control of the State of Texas or the United States Government by and through its agents, the police or the prosecuting attorney's office, and the Defendant has no other means of ascertaining the disclosures requested.

2. The items requested are not privileged.

3. The items and information are material to this cause and the issues of guilt or innocence and punishment to be determined in this cause.

4. The Defendant cannot safely go to trial without such information and inspection, nor can the Defendant adequately prepare the defense to the charges against him.

5. The absent such discovery the Defendant's rights under Article 39.14, Article I, §§ 3, 10, 13 and 19 of the Constitution of the State of Texas, and the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States of America will be violated, to his irreparable injury and thus deprive the Defendant of a fair trial herein.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Honorable Court will grant this the Defendant's Motion For Production Of Copies of

Computer Evidence.

Respectfully submitted:

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

MARK STEVENS

Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing Motion has been delivered to the Bexar County District Attorney, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 28th day of April, 2014.

MARK STEVENS

ORDER

On this the ____ day of _____, 2014, came to be considered Defendant's Motion For Production Of Copies of Computer Evidence, and said motion is hereby

(GRANTED) (DENIED)

JUDGE PRESIDING

NO. 2014-CR-0000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	290TH JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

MOTION FOR PRODUCTION OF INFORMATION CONCERNING DNA EVIDENCE
[DPS Lab]

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith requests that this Court order the State of Texas to produce information concerning DNA evidence and serology testing, and for good cause shows the following:

I.

Mr. Smith is charged with sexual assault. Through discovery he knows that the state has used the Texas Department of Public Safety to conduct DNA and serology testing of the complainant and articles of her clothing, and that two reports have been generated; a serology/DNA report, dated June 24, 2013, and supplemental serology/DNA report, dated July 27, 2013. Counsel has received copies of both reports from the state, but has not been able to obtain a copy of DPS's case file. DPS advises counsel that they will provide the case file if ordered to do so by the Court.

II.

Counsel respectfully moves this Court to order the Texas Department of Public Safety copy to a CD storage disk a complete copy of its case file in laboratory case number L-00000, including a complete description of the testing procedures used and the

results obtained from all testing performed on all items tested in this case, and that it mail or email a copy of this disk to:

Mark Stevens
Lawyer
310 S. St. Mary's, Suite 1920
San Antonio, TX 78205
mark@markstevenslaw.com

II.

The requested information is essential so that defendant can receive the effective assistance of counsel, his right to cross-examine and confront witnesses against him, and his right to present a defense, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Texas Constitution.

WHEREFORE, PREMISES CONSIDERED, defendant prays that this Honorable Court grant this motion for production.

Respectfully submitted:

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of the defendant's Motion For Production of Information Concerning DNA Evidence has been delivered to the Bexar County District Attorney's Office; Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas on this the 10th day of February, 2014.

_____

MARK STEVENS

ORDER

On this the _____ day of _____, 2014, came to be considered defendant's Motion for Production of Information Concerning DNA Evidence, and said motion is hereby

(GRANTED) (DENIED)

_____

JUDGE PRESIDING

NO. 2014-CR-0000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	290TH JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

MOTION FOR PRODUCTION OF INFORMATION CONCERNING DNA EVIDENCE
[Non-DPS Lab]

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith requests that this Court order the State of Texas to produce information concerning DNA evidence and serology testing, and for good cause shows the following:

I.

Mr. Smith is charged with sexual assault. Through discovery he knows that the state has used the Bexar County Medical Examiner to conduct DNA and serology testing of the complainant and articles of her clothing, and that at least one report has been generated. Counsel has received a copy of one report from the state, but has not been able to obtain a copy of the laboratory's case file. The Medical Examiner advises counsel that it will provide the case file if ordered to do so by the Court.

II.

Counsel respectfully moves this Court to order the Bexar County Medical Examiner to copy to a CD storage disk a complete copy of its case file in laboratory case number L-00000, including a complete description of the testing procedures used and the results obtained from all testing performed on all items tested in this case, and that it mail

or email a copy of this disk to:

Mark Stevens
Lawyer
310 S. St. Mary's, Suite 1920
San Antonio, TX 78205
mark@markstevenslaw.com

II.

The requested information is essential so that defendant can receive the effective assistance of counsel, his right to cross-examine and confront witnesses against him, and his right to present a defense, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Texas Constitution.

WHEREFORE, PREMISES CONSIDERED, defendant prays that this Honorable Court grant this motion for production.

Respectfully submitted:

_____

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of the defendant's Motion For Production of Information Concerning DNA Evidence has been delivered to the Bexar County District Attorney's

Office; Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas on this the 10th day of February, 2014.

_____

MARK STEVENS

ORDER

On this the _____ day of _____, 2014, came to be considered defendant's Motion for Production of Information Concerning DNA Evidence, and said motion is hereby

(GRANTED) (DENIED)

_____

JUDGE PRESIDING

NO. 000000

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

DEFENDANT'S MOTION TO SET ASIDE THE INFORMATION
[Indecent Exposure]

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*, 309 S.W.3d 10, 16(Tex. Crim. App. 2010)(motion to quash should have been granted since fact-finder could not infer recklessness from the information because there is nothing inherently reckless about either exposing oneself or masturbating); *see also 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:

_____

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

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 Criminal District Attorney; 307 Courthouse Annex; 150 N. Seguin St.; New Braunfels, TX 78130 on this the 1st day of March, 20114.

_____

MARK STEVENS

ORDER

On this the _____ day of _____, 2014, came on to be considered Defendant's Motion to Set Aside the Information, and said Motion is hereby

(GRANTED) (DENIED).

SIGNED on the date set forth above.

_____

JUDGE PRESIDING

NO. 2008-CR-0000

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

DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT
[Possession of Child Pornography]

TO THE HONORABLE JUDGE OF SAID COURT:

Joe 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*]").

IV.

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").

V.

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).

VI.

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).

VII.

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").

VIII.

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 . . . ."

IX.

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).

X.

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).

XI.

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.

III.

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:

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

_____
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 the District Attorney's Office, Cadena-Reeves Justice Center, 300 Dolorosa,

San Antonio, Texas, on this the _____ day of June, 2014.

_____
MARK STEVENS

ORDER

On this the _____ day of _____, 2014 came on to be considered Defendant's Motion to Set Aside the Indictment, and said Motion is hereby

(GRANTED) (DENIED).

SIGNED on the date set forth above.

_____
JUDGE PRESIDING

NO. 2014-CR-0000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	290TH JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT
[Sexual Assault of a Disabled Person]

TO THE HONORABLE JUDGE OF SAID COURT:

Joe 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 I, Paragraph A of the indictment is defective because:

1. it alleges that the complainant was a "disabled individual," even though it does not explain which of the various statutory definitions of that phrase provided by § 22.04(c)(3) of the Texas Penal Code that the state intends to rely on. "[I]t is clear that even though an act or omission by a defendant is statutorily defined, if that definition provides for more than one manner or means to commit that act or omission, then upon timely request, the state must allege the particular manner or means it seeks to establish." *Ferguson v. State*, 622 S.W.2d 846, 851 (Tex. Crim. App. 1981); *see also Geter v. State*, 779 S.W.2d 403, 406 (Tex. Crim. App. 1989);

2. it impermissibly "bootstraps" the second degree felony offense of sexual assault to the first degree offense of aggravated sexual assault by apparently twice using the same feature – the complainant's "mental disease or defect;"

3. it does not allege the manner and means whereby defendant caused the complainant's sexual organ to contact or be penetrated by the sexual organ of the defendant. *Cf. Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by

which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979)(indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal);

4. it alleges more than one offense – namely, that the defendant caused the female sexual organ of the complainant "to contact *or* be penetrated by the sexual organ of the defendant" – in a single paragraph of the indictment, in violation of article 21.24 of the Texas Code of Criminal Procedure. In addition to violating article 21.24, the manner in which the state has pleaded these offenses will certainly make it difficult, if not impossible, to instruct the jury in such a way as to insure that its verdicts are unanimous, as required by Article V, § 13 of the Texas Constitution and article 36.29(a) of the Texas Code of Criminal Procedure;

5. it alleges more than one offense – namely, that the complainant was "incapable either of appraising the nature of the act *or* resisting it" – in a single paragraph of the indictment, in violation of article 21.24 of the Texas Code of Criminal Procedure;

II.

Count I, Paragraph B of the indictment is defective because:

1. it alleges that the complainant was a "disabled individual," even though it does not explain which of the various statutory definitions of that phrase provided by § 22.04(c)(3) of the Texas Penal Code that the state intends to rely on. "[I]t is clear that even though an act or omission by a defendant is statutorily defined, if that definition provides for more than one manner or means to commit that act or omission, then upon timely request, the state must allege the particular manner or means it seeks to establish." *Ferguson v. State*, 622 S.W.2d 846, 851 (Tex. Crim. App. 1981); *see also Geter v. State*, 779 S.W.2d 403, 406 (Tex. Crim. App. 1989);

2. it does not allege the manner and means whereby defendant caused the complainant's sexual organ to contact or be penetrated by the sexual organ of the defendant. *Cf. Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*,

689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979)(indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal);

3. it alleges more than one offense – namely, that the defendant caused the female sexual organ of the complainant "to contact *or* be penetrated by the sexual organ of the defendant" – in a single paragraph of the indictment, in violation of article 21.24 of the Texas Code of Criminal Procedure. In addition to violating article 21.24, the manner in which the state has pleaded these offenses will certainly make it difficult, if not impossible, to instruct the jury in such a way as to insure that its verdicts are unanimous, as required by Article V, § 13 of the Texas Constitution and article 36.29(a) of the Texas Code of Criminal Procedure;

III.

Count II, Paragraph A of the indictment is defective because:

1. it alleges that the complainant was a "disabled individual," even though it does not explain which of the various statutory definitions of that phrase provided by § 22.04(c)(3) of the Texas Penal Code that the state intends to rely on. "[I]t is clear that even though an act or omission by a defendant is statutorily defined, if that definition provides for more than one manner or means to commit that act or omission, then upon timely request, the state must allege the particular manner or means it seeks to establish." *Ferguson v. State*, 622 S.W.2d 846, 851 (Tex. Crim. App. 1981); *see also Geter v. State*, 779 S.W.2d 403, 406 (Tex. Crim. App. 1989);

2. it impermissibly "bootstraps" the second degree felony offense of sexual assault to the first degree offense of aggravated sexual assault by apparently twice using the same feature – the complainant's "mental disease or defect;"

3. it does not allege the manner and means whereby defendant caused the complainant's sexual organ to contact or be penetrated by the sexual organ of the defendant. *Cf. Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege

manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979)(indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal);

4. it alleges more than one offense – namely, that the defendant caused the female sexual organ of the complainant "to contact *or* be penetrated by the sexual organ of the defendant" – in a single paragraph of the indictment, in violation of article 21.24 of the Texas Code of Criminal Procedure. In addition to violating article 21.24, the manner in which the state has pleaded these offenses will certainly make it difficult, if not impossible, to instruct the jury in such a way as to insure that its verdicts are unanimous, as required by Article V, § 13 of the Texas Constitution and article 36.29(a) of the Texas Code of Criminal Procedure;

5. it alleges more than one offense – namely, that the complainant was "incapable either of appraising the nature of the act *or* resisting it" – in a single paragraph of the indictment, in violation of article 21.24 of the Texas Code of Criminal Procedure;

IV.

Count II, Paragraph B of the indictment is defective because:

1. it alleges that the complainant was a "disabled individual," even though it does not explain which of the various statutory definitions of that phrase provided by § 22.04(c)(3) of the Texas Penal Code that the state intends to rely on. "[I]t is clear that even though an act or omission by a defendant is statutorily defined, if that definition provides for more than one manner or means to commit that act or omission, then upon timely request, the state must allege the particular manner or means it seeks to establish." *Ferguson v. State*, 622 S.W.2d 846, 851 (Tex. Crim. App. 1981); *see also Geter v. State*, 779 S.W.2d 403, 406 (Tex. Crim. App. 1989);

2. it does not allege the manner and means whereby defendant caused the complainant's sexual organ to contact or be penetrated by the sexual organ of the defendant. *Cf. Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged and destroyed the property); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984)(indictment for arson must allege

manner and means in which defendant started the fire) ; *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979)(indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal);

3. it alleges more than one offense – namely, that the defendant caused the female sexual organ of the complainant "to contact *or* be penetrated by the sexual organ of the defendant" – in a single paragraph of the indictment, in violation of article 21.24 of the Texas Code of Criminal Procedure. In addition to violating article 21.24, the manner in which the state has pleaded these offenses will certainly make it difficult, if not impossible, to instruct the jury in such a way as to insure that its verdicts are unanimous, as required by Article V, § 13 of the Texas Constitution and article 36.29(a) of the Texas Code of Criminal Procedure;

V.

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:

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

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, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 21st day of February, 2014.

MARK STEVENS

ORDER

On this the _____ day of _____, 2014, came on to be considered Defendant's Motion to Set Aside the Indictment, and said Motion is hereby

(GRANTED) (DENIED).

JUDGE PRESIDING

NO. CR0000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	33RD JUDICIAL DISTRICT
JOE SMITH	)	BLANCO COUNTY, TEXAS

DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT
[Sexual Performance]

TO THE HONORABLE JUDGE OF SAID COURT:

Joe 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 Defects In The First Count

1. Count I alleges that Mr. Smith did "induce" a child to engage in sexual conduct or a sexual performance, but it does not state the manner and means by which this alleged inducement was done, in violation of the principles stated in *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983)(indictment for gambling promotion must state manner and means by which defendant received bets and offers to bet); *see also Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984) (indictment for arson must allege manner and means in which defendant started the fire) ; *Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983)(indictment for criminal mischief must allege the manner and means by which defendant damaged

and destroyed the property); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979)(indictment for aggravated robbery must allege manner and means whereby defendant allegedly caused bodily injury); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978)(information for animal cruelty must allege manner and means by which defendant tortured the animal).

2. Count I alleges that Mr. Smith induced the complainant "to engage in sexual conduct or a sexual performance, to-wit: cause said child to contact the sexual organ of William Brown . . . ." This allegation is defective for several reasons:

   a. First, inducing a child to engage in sexual conduct, and inducing a child to engage in a sexual performance, are two separate offenses. *See Dornbusch v. State*, 156 S.W. 3d 859, 870 (Tex. App.--Corpus Christi 2005, pet. ref'd); *Ex parte Anderson*, 902 S.W. 2d 695, 697 (Tex. App.--Austin 1995, pet. ref'd). Separate offenses may be joined in the same indictment, but no paragraph or count may contain more than one offense. TEX. CODE CRIM. PROC. ANN. art. 21.24. The first Count impermissibly joins two offenses in violation of article 21.24.

   b. Second, the Count alleges that Mr. Smith caused the child to contact Brown's sexual organ, but does not state the manner and means by which he caused this contact. Elsewhere in this motion we have cited cases establishing the manner and means requirement, and those cases also apply here.

   c. Third, the penal code provides multiple meanings for the phrase "sexual conduct." *See* TEX. PENAL CODE ANN. § 43.25(a)(2). This Count is defective because it fails to specify any of the multiple types of "sexual conduct" the state intends to prove in this case. Where a statute provides for more than one way in which an offense may be committed, 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); *see also Olurebi v. State*, 870 S.W.2d 58, 62 (Tex. Crim. App. 1994).

d. Fourth, the Count does not allege "an offense against the law was committed by the defendant." TEX. CODE CRIM. PROC. ANN. art. 27.08(1). Specifically, it alleges that Mr. Smith induced the complainant to engage in sexual conduct or sexual performance in a wholly conclusory fashion, but, when it attempts to describe just what he did, it alleges only that he caused the complainant to contact the sexual organ of Hughes. But this alleged action does not constitute either "sexual conduct," or "sexual performance," as those two terms were defined under the version of § 43.25 that was in effect on December 31, 1994. At that time, TEX. PENAL CODE ANN. § 43.25(a)(1) defined "sexual performance" as "any performance or part thereof that includes sexual conduct by a child younger than 18 years of age." TEX. PENAL CODE ANN. § 43.25(a)(2) defined "sexual conduct" as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals."

3. Count I is defective because it identifies the complainant only by the pseudonym "A1." Mr. Smith cannot defend himself unless the complainant's true identity and his or her date of birth are revealed. Nor can counsel render effective assistance of counsel, or confront or cross examine this witness unless he knows the missing information.

4. Count I purports to allege that Mr. Smith committed the offense of sexual performance of a child, apparently in violation of TEX. PENAL CODE ANN. § 43.25, on or about December 31, 1994. The statute of limitations for this offense is three years. *See* TEX. CODE CRIM. PROC. ANN. art. 12.01(6). This Count should be set aside because "it appears from the face thereof that a prosecution for the offense is barred by a lapse of time." TEX. CODE CRIM. PROC. ANN. art. 27.08(2).

5. Count I alleges that the offense occurred "on or about the 31st day of December, 1994." This Count should be set aside because the allegation of the date is so

vague it does not permit Mr. Smith to prepare a defense to the charges against him, or to protect himself against a subsequent prosecution for the same offense, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Course of Law provision of Article I, §§ 10, 13, and 19 of the Texas Constitution.

II.
The Law

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 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 78205-3192
(210) 226-1433
State Bar No. 19184200

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 Blanco County District Attorney's Office; P.O. Box 725; Llano, Texas 78643-0725, on this the 29th day of September, 2014.

MARK STEVENS

ORDER

On this the _____ day of _____, 2014, came on to be considered Defendant's Motion to Set Aside the Information, and said Motion is hereby

(GRANTED) (DENIED).

JUDGE PRESIDING

NO. CR-000000

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

DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT
[Solicitation of a Minor]

TO THE HONORABLE JUDGE OF SAID COURT:

Joe 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 is defective because:

1. The allegation that Mr. Smith "used Internet communications" is so vague and broad as to give him 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."

2. The allegation that Mr. Smith "used Internet communications" 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).

3. The allegation that Mr. Smith set up a meeting with "someone" is so vague

and broad as to give him 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.

4. It alleges an intent to commit the offense of sexual assault of a child, but does not allege which of the several statutory types of sexual assault of a child the state intends to prove, even though there are multiple possibilities under § 22.011(a)(2) 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).

II.

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:

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

_____
MARK STEVENS

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby 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, 2014.

_____
MARK STEVENS

ORDER

On this the _____ day of _____, 2014, came on to be considered Defendant's Motion to Set Aside the Indictment, and said Motion is hereby

(GRANTED) (DENIED).

SIGNED on the date set forth above.

_____
JUDGE PRESIDING

NO. 00000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	379TH JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

MOTION FOR DISCLOSURE OF NAMES AND ADDRESSES OF EACH PERSON THE STATE MAY USE AT TRIAL TO PRESENT EVIDENCE UNDER RULES 702, 703 AND 705 OF THE TEXAS RULES OF EVIDENCE

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves this Court to order the State of Texas to disclose the names and addresses of each person it may use at trial to present evidence under Rules 702, 703 and 705 of the Texas Rules of Evidence, as required by article 39.14(b) of the Texas Code of Criminal Procedure.

I.

Article 39.14(b) of the Texas Code of Criminal Procedure provides as follows:

> On motion of a party and on notice to the other parties, the court in which an action is pending may order one or more of the other parties to disclose to the party making the motion the name and address of each person the other party may use at trial to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence. The court shall specify in the order the time and manner in which the other party must make the disclosure to the moving party, but in specifying the time in which the other party shall make disclosure the court shall require the other party to make the disclosure not later than the 20th day before the date the trial begins.

TEX. CODE CRIM. PROC. ANN. art. 39.14(b).

II.

By this motion, the defense invokes article 39.14(b) and moves that this Court

order the State of Texas to disclose to undersigned counsel for the defendant the name and address of each person the state may use at trial to present evidence under Rules 702, 703, and 705 of the Texas Rules of Evidence.

III.

Undersigned counsel further requests that this notice be provided in written notice be either served personally on counsel, or delivered to counsel by certified mail, and that the written notice be provided not later than the 20th day before trial begins.

Respectfully submitted:

_____

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of defendant's Motion For Disclosure of Names And Addresses Of Each Person The State May Use At Trial To Present Evidence Under Rules 702, 703 and 705 of the Texas Rules of Evidence has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 17th day of November, 2014.

_____

MARK STEVENS

ORDER

On this the _____ day of _____, 2014, came on to be considered Motion For Disclosure of Names And Addresses Of Each Person The State May Use At Trial To Present Evidence Under Rules 702, 703 and 705 of the Texas Rules of Evidence, and said Motion is hereby

(GRANTED) (DENIED).

It is therefore ordered that, not later than 5:00 p.m. on the ____ day of _____, 20__, the State of Texas shall disclose in writing and shall serve either personally or by certified mail, on _____, counsel for defendant Joe Smith the names and addresses of each person the State may use during the trial of this case to present evidence under Rules 702, 703 and 705 of the Texas Rules of Evidence.

_____

JUDGE PRESIDING

Mark Stevens
Lawyer
310 S. St. Mary's St., Ste. 1920
San Antonio, Tx 78205

March 28, 2014

Ms. Susan D. Reed
Assistant District Attorney
Bexar County District Attorney's Office
300 Dolorosa
San Antonio, TX 78205

Re: *State of Texas vs. Joe Smith*, No. 2014-CR-0000

Dear Ms. Reed:

This letter will advise you, pursuant to article 39.14(b) of the Texas Code of Criminal Procedure, that, at the present time, the defense may call the following persons at trial to present evidence under Rule 702, 703 and 705 of the Texas Rules of Evidence:

Robert C. Benjamin
Dept. Of Biological Sciences
University of North Texas
P.O. Box 305220
Denton, Texas 76253

Jack Ferrell
14310 Northbrook Dr.
San Antonio, TX 78232

Sincerely,

Mark Stevens

MS/cr

Mark Stevens
Lawyer
310 S. St. Mary's St., Ste. 1920
San Antonio, Tx 78205

March 28, 2014

HAND-DELIVERED

Ms. Susan D. Reed
Assistant Criminal District Attorney
Bexar County District Attorney's Office
300 Dolorosa
San Antonio, TX 78205

Re: *State of Texas vs. Joe Smith*, No. 2014-CR-0000

Dear Ms. Reed

Rule 39.14(b)

This letter will advise you, pursuant to article 39.14(b) of the Texas Code of Criminal Procedure, that, at the present time, the defense may call the following person at trial to present evidence under Rule 702, 703 and 705 of the Texas Rules of Evidence:

Billy S. Brown
100 Elm Street
College Station, Texas 77840

TEX. DISCIPLINARY R. PROF. CONDUCT 4.02(b)

Rule 4.02(b) of the Texas Disciplinary Rules of Professional Conduct provides the following:

> In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

TEX. DISCIPLINARY R. PROF. CONDUCT 4.02(b), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app.(STATE BAR RULES art. X, § 9).

Comment 3 adds this:

> Paragraph (b) of this Rule provides that unless authorized by law, experts employed or retained by a lawyer for a particular matter should not be contacted by opposing counsel regarding that matter without the consent of the lawyer who retained them. However, certain governmental agents or employees such as police may be contacted due to their obligations to the public at large.

Mr. Brown has been appointed to assist the defense in this case, and he has been, and will be, conferring with and advising me in that capacity. Based on the attorney-client privilege and the work-product privilege, I am unable to give my consent to you or anyone from the State of Texas or the Bexar County District Attorney's Office to communicate with Mr. Brown about the subject of representation in this case.

Sincerely,

Mark Stevens

MS/cr

NO. 2010-CR-0000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	144TH JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

ORDER

The Health Information Portability and Accountability Act, 45 CFR 164.512 (HIPAA), provides that a covered entity, specifically North Central Baptist Hospital for purposes of this Order, may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.

In accordance with 45 CFR 164.512(e)(1)(i), the covered entity, North Central Baptist Hospital may disclose protected health information in response to an order of a court or administrative tribunal, provided that only the protected health information expressly authorized by such order is disclosed or in compliance with and as limited by the relevant requirements of a court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer.

Therefore, it is ORDERED AND DECREED that North Central Baptist Hospital will provide the protected health information regarding patient Chelsea Jones, DOB April 1, 1990, described in the attached duly issued subpoena dues tecum in accordance with the instructions therein and subject to all enforcement provisions of Chapter 24 of the Texas Code of Criminal Procedure.

Signed on April 25, 2011.

_____

JUDGE PRESIDING

NO. 2011-CR-0000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	379th JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

MOTION FOR VOIR DIRE OF EXPERT WITNESS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Joe Smith, defendant in the above styled and numbered cause, and moves this Court to conduct a hearing prior to trial and outside the presence of the jury to determine the preliminary question of the qualification of all expert witnesses upon which the state intends to rely at trial, and to determine the underlying facts and data upon which their opinions are based, and, for good cause, shows the following:

I.

Defendant expects the state to rely upon expert witnesses to prove its case.

II.

The burden of establishing the admissibility of an expert's opinion rests on the party offering the evidence.

III.

Whether the proffered witness possesses the requisite qualifications is a preliminary matter for the trial court to decide and not a matter of weight only to be determined by the jury.

IV.

The party offering such evidence also bears the burden of establishing its relevance, and that its probative value outweighs its prejudicial potential.

V.

Defendant requests a hearing on the preliminary question concerning the expert's qualification pursuant to Rule 104(a) of the Texas Rules of Evidence.

VI.

In addition to the Rule 104(a) hearing, the defendant is entitled to a voir dire examination out of the hearing of the jury "directed to the underlying facts and data upon which the opinion is based." *See* Tex. R. Evid. 705(b).

WHEREFORE, PREMISES CONSIDERED, defendant respectfully prays that this Honorable Court grant this motion and order a voir dire hearing pursuant to Rules 104(a) and 705(b).

Respectfully submitted:

_____

MARK STEVENS
310 S. St. Mary's Street, Suite 1920
San Antonio, TX 78205
(210) 226-1433
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of defendant's Motion For Voir Dire of Expert Witness has been delivered to the Bexar County District Attorney's Office, Bexar County Justice Center; 300 Dolorosa; San Antonio, Texas, on this the 1st day of January, 2011.

_____
MARK STEVENS

ORDER

On this the _____ day of _____, 2011, came to be considered defendant's Motion for Voir Dire Of Expert Witness, and said motion is hereby

(GRANTED) (DENIED)

_____
JUDGE PRESIDING

NO. 000000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	144th JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

MOTION FOR DAUBERT *HEARING*

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves that this Court set a hearing prior to trial as required by Rule 104(a) of the Texas Rules of Evidence to determine the preliminary question of the relevancy and reliability of any expert testimony proffered by the prosecution. For good cause, Mr. Smith shows the following:

I.

The defense believes that the state will attempt to present to the jury testimony from expert witnesses pursuant to Rules 702, 703, and 705 of the Texas Rules of Evidence.

II.

Rule 702 permits a party to offer expert testimony from qualified witnesses that "will assist the trier of fact to understand the evidence or to determine a fact in issue." The party offering evidence from an expert bears the burden of demonstrating to the trial court that this testimony is both relevant and reliable.

III.

Under Rule 104(a), the trial court acts as a "gatekeeper," determining preliminary

questions concerning the admissibility of expert testimony before this testimony is admitted for the jury's consideration. *See Daubert v. Merrell Dow Pharamaceuticals*, 509 U.S. 579, 589 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999); *Hartman v. State*, 946 S.W.2d 60, 62 (Tex. Crim. App. 1997).

WHEREFORE, PREMISES CONSIDERED, defendant respectfully moves this Court to hold a hearing prior to trial as required by Rule 104(a) of the Texas Rules of Evidence to determine the preliminary question of the relevancy and reliability of any expert testimony proffered by the prosecution.

Respectfully submitted:

_____

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433 Office
(210) 223-8708 Fax
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of Motion For *Daubert* Hearing has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on April 1, 2011.

_____

MARK STEVENS

ORDER

The defendant's Motion For *Daubert* Hearing has been presented to the Court and the Court orders that same is hereby:

(GRANTED) (DENIED)

_____

PRESIDING JUDGE

NO. 200,000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	186th JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

REQUEST FOR NOTICE OF INTENT TO OFFER EXTRANEOUS CONDUCT UNDER RULE 404(b) AND EVIDENCE OF CONVICTION UNDER RULE 609(f) AND EVIDENCE OF AN EXTRANEOUS CRIME OR BAD ACT UNDER ARTICLES 37.07 AND 38.37

TO THE BEXAR COUNTY DISTRICT ATTORNEY'S OFFICE:

I.

Pursuant to Rule 404(b) of the Texas Rules of Evidence, defendant requests the state to give reasonable notice in advance of trial of its intent to introduce in its case-in-chief evidence of crimes, wrongs, or acts other than that arising in the same transaction.

II.

Pursuant to Rule 609(f) of the Texas Rules of Evidence, defendant requests that the state give sufficient advance written notice of its intent to use evidence of a conviction against the following witnesses:

JOE SMITH

III.

Pursuant to Article 37.07, § 3(g) of the Texas Code of Criminal Procedure, defendant requests that the state give reasonable notice of intent to introduce against the defendant evidence of an extraneous crime or bad act at the punishment phase of the trial.

iv.

Pursuant to Article 38.37, § 3 of the Texas Code of Criminal Procedure, the state must give notice of its intent to introduce in the case in chief evidence described in this article not later than the 30th day before the date of the defendant's trial.

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

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify defendant's original Request For Notice Of Intent To Offer Extraneous Conduct Under Rule 404(b) And Evidence Of Conviction Under Rule 609(f) has been delivered to the District Attorney's Office; Justice Center; 300 Dolorosa; San Antonio, Texas, on this the 1st day of April, 2014.

MARK STEVENS

NO. 2008-CR-0000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	226th JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

MOTION IN LIMINE

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves this Court before trial in limine for an order instructing the District Attorney, his representatives and witnesses to refrain from making any direct or indirect reference whatsoever, at trial before the jury to any of the following matters:

I.

Defendant moves to exclude all extraneous crime or misconduct evidence which is not alleged in the indictment, unless it can be shown to the Court, outside the presence of the jury by sufficient proof that defendant perpetrated such conduct, that this evidence is relevant to a material issue in the case, other than character conformity, and that its probative value outweighs its potential for prejudice.

II.

If the prosecutor is allowed to allude to, comment upon, inquire about, or introduce evidence concerning, any of the above matters, ordinary objections during the course of trial, even sustained with proper instructions to the jury, will not remove the harmful effect of same in view of its highly prejudicial content.

WHEREFORE, PREMISES CONSIDERED, defendant, prays that this Court

order and instruct the District Attorney, his representatives and witnesses, not to elicit or give testimony respecting, allude to, cross-examine respecting, mention, or refer to any of the above matters until a hearing has been held outside the presence of the jury at which time this Court can determine the admissibility of these matters.

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

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of defendant's Motion in Limine was delivered to the Bexar County District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 1st day of April, 2014.

_____

MARK STEVENS

ORDER

On this the _____ day of _____, 2004, came to be considered defendant's Motion in Limine, and said motion is hereby

(GRANTED) (DENIED)

_____

JUDGE PRESIDING

NO. 2014-CR-0000

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

DEFENDANT'S OBJECTIONS TO EVIDENCE PURSUANT TO RULE 103(a)(1)

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith objects prior to trial, under Rule 103(a)(1) of the Texas Rules of Evidence, to certain evidence he believes the state may offer at trial.

I. Rule 103(a)(1)

Rule 103(a)(1) of the Texas Rules of Evidence provides that : "When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections." In this document, the defense reurges all objections it has previously made, and makes further objections to evidence discussed herein, also under Rule 103(a)(1). We request that the Court rule on those objections at this time, and that all objections made and overruled by the Court be deemed to apply to any evidence admitted before the jury without the necessity of repeating the objections.

II.
Extraneous Misconduct

Mr. Smith moves to exclude all extraneous misconduct evidence which is not alleged in the indictment in this case, unless it can be shown by sufficient proof that he perpetrated such conduct. In deciding whether to admit such evidence, this Court "must, under rule 104(b) [of the Texas Rules of Evidence], make an initial determination at the proffer of the evidence, that a jury could reasonably find beyond a reasonable doubt that the defendant committed the extraneous offense." *Harrell v. State*, 884 S.W.2d 154, 160 (Tex. Crim. App. 1994). Additionally, the state must prove that this extraneous evidence is relevant to a material issue in the case other than character conformity; and its probative value outweighs its potential for prejudice, and misleading and confusing the jury.

The state has announced on August 31, 2014 its intent to prove various acts of extraneous misconduct, specifically listing the following acts:

1. On or about the 1st day of August 2007 and continuing until on or about the 24th day of January, 2008, Joe Smith, hereinafter referred to as Defendant, seduced and groomed Johnny Jones for Defendant's sexual purposes;

2. On or about the 30th day of September, 2004 and continuing until on or about the 30th day of November, 2004, Defendant touched Sammy Brown on his stomach;

3. On or about the 30th day of September, 2004 and continuing until on or about the 30th day of November, 2004, Defendant kissed Sammy Brown on his lips;

4. On or about the 15th day of March, 2004, Joe Smith, hereinafter referred to

as defendant, did intentionally and knowingly engage in sexual contact with Billy Johnson, a male child younger than seventeen (17) years by touching part of the genitals of Billy Johnson with the intent to arouse or gratify the sexual desire of any person;

5. On or about the 31st day of January, 2005, Defendant took several photographs of Sammy Johnson, a minor child, in his underwear;

6. On or about the 24th day of January, 2008 Joe Smith, hereinafter referred to as defendant, did intentionally or knowingly possess visual material that visually depicted, and which the defendant knew visually depicted a child, who was younger than 18 years of age at the time the image of the child was made, engaging in sexual conduct, to-wit: Sexual Contact, namely an image: 25i2345je[1]jpg, depicting a naked male child with the child's hand touching an adult male's genitals;

7. On or about a period between 2004 and 2006, in Bexar County, Texas, the Defendant, Joe Smith, placed his mouth on the foot of Johnny Jones, a minor child, and photographs were taken.

8. That Mr. Smith was allegedly fired from a job in Colorado in 2001;

9. That Mr. Smith allegedly has a violent temper;

The state cannot prove beyond a reasonable doubt with competent and admissible evidence that Mr. Smith perpetrated any of these transactions. These transactions are irrelevant and therefore inadmissible under Rules 401 and 402 of the Texas Rules of Evidence. If relevant to anything, they are relevant only to character conformity, and therefore inadmissible under Rule 404(b). These transactions are unfairly prejudicial, confusing and misleading, and therefore inadmissible under Rule 403, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Course of Law Provision of Article I, §§ 13 and 19 of the Texas Constitution.

(GRANTED) (DENIED)

III.
Extraneous Misconduct
Not Timely Disclosed

Mr. Smith also moves to exclude all extraneous crime or misconduct evidence, notice of which was requested by defendant, but not provided by the state as required by Rules 404(b) and 609(f) of the Texas Rules of Criminal Procedure, and articles 38.37 and 37.07 of the Texas Code of Criminal Procedure.

(GRANTED) (DENIED)

IV.
Inadmissible Opinion Testimony

Mr. Smith has requested the opportunity to conduct a voir dire examination of each opinion witness the state would call, pursuant to Rule 705(d) of the Texas Rules of Evidence, as well as so-called *Daubert* hearings. *See Daubert v. Merrell Dow Pharamaceuticals*, 509 U.S. 579, 589 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999); *Hartman v. State*, 946 S.W. 2d 60, 62 (Tex. Crim. Ap. 1997). Mr. Smith objects to anyone giving expert opinion testimony unless those persons are qualified under Rule 702 of the Texas Rules of Evidence, and their testimony is found by the Court to be relevant, reliable, and not unfairly prejudicial, confusing, or misleading. Nor should any so-called expert be allowed to give an opinion about the credibility of any other witness, or attempt to bolster another witness's credibility. *See Salinas v. State*, 166 S.W. 3d 368, 371 (Tex. App.–Fort Worth 2005, pet. ref'd); *see also Schutz v. State*, 957

S.W. 2d 52, 59 (Tex. Crim. App. 1997); *Yount v. State*, 872 S.W. 2d 706, 708 (Tex. Crim. App. 1993).

(GRANTED) (DENIED)

V.
Undisclosed Witnesses

Mr. Smith filed a motion for discovery of state's witnesses, and that motion was granted on July 7, 2014. Mr. Smith objects to any witness testifying for the state who has not already been named as a possible witness by the state.

(GRANTED) (DENIED)

VI.
Untimely Designated Expert Witnesses

Mr. Smith objects to any expert witness testifying for the state unless that person was timely designated as a witness.

(GRANTED) (DENIED)

VII.
Untested Character Evidence

The defense objects to the presentation of any evidence by the state concerning his character through witnesses who have not been previously examined outside the presence of the jury to determine if they can competently testify on the subject. *Jones v. State*, 641 S.W. 2d 545, 552 (Tex. Crim. App. 1982)(when one party seeks to introduce reputation testimony, the opponent must be allowed to test the qualifications of the reputation witness on voir dire, before he testifies, and outside the presence of the jury); *Lopez v.*

State, 860 S.W. 2d 938, 944-46 (Tex. App.– San Antonio 1993, no pet.)(reversed where character witness was unqualified).

(GRANTED) (DENIED)

VIII.
The Right to Silence Cannot Be Used Against Mr. Smith

Texans have the constitutional right to remain silent in the face of questioning by the police. Mr. Smith objects to the state eliciting evidence before the jury or in any way suggesting that he exercised his constitutional right to remain silent. Eliciting this sort of evidence would violate the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 13 and 19 of the Texas Constitution. *See also Doyle v. Ohio,* 426 U.S. 610 (1976); *Sanchez v. State*, 707 S.W 2d 575 (Tex. Crim. App. 1986). And this evidence is irrelevant, in violation of Rules 401 and 402 of the Texas Rules of Evidence. Additionally, whatever marginal relevance the evidence has is substantially outweighed by its potential for unfairly prejudicing the jury, in violation of Rule 403 of the Rules of Evidence, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Course of Law Provision of Article I, §§ 13 and 19 of the Texas Constitution.

(GRANTED) (DENIED)

IX.
The Right To Counsel Cannot Be Used Against Mr. Smith

Mr. Smith moves to exclude any reference to his having requested to speak to a

lawyer before speaking to officers or agents of the State of Texas and to his refusal to speak to said officers and agents until being allowed to do so. Such references would be contrary to article 38.38 of the Texas Code of Criminal Procedure, and to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 13 and 19 of the Texas Constitution. *See also Doyle v. Ohio*, 426 U.S. 610 (1976); *Sanchez v. State*, 707 S.W. 2d 575 (Tex. Crim. App. 1986). And this evidence is irrelevant, in violation of Rules 401 and 402 of the Texas Rules of Evidence. Additionally, whatever marginal relevance the evidence has is substantially outweighed by its potential for unfairly prejudicing the jury, in violation of Rule 403 of the Rules of Evidence, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Course of Law Provision of Article I, §§ 13 and 19 of the Texas Constitution.

(GRANTED) (DENIED)

X.
The Admissibility of Statements Allegedly Made by Mr. Smith Must Be Determined Outside The Presence Of The Jury

Counsel for Mr. Smith is unaware of any statements – written or oral – that the state claims that Mr. Smith made to law enforcement officers or its agents in this case. If there are such statements, Mr. Smith is entitled to a hearing, outside the presence of the jury, to determine their admissibility. *See Jackson v. Denno*, 378 U.S. 368 (1964); TEX. CODE CRIM. PROC. ANN. Art. 38.22, § 6; TEX. R. EVID. 104(c).

(GRANTED) (DENIED)

XI.
Improper "Outcry" Evidence

Mr. Smith objects to any so-called "outcry" evidence which would violate either articles 38.07, 38.071, or 38.072 of the Texas Code of Criminal Procedure, Rules 801, 802 and 803 of the Texas Rules of Evidence, or his rights to confront and cross-examine witnesses, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Texas Constitution. *See e.g., Martinez v. State*, 178 S.W.3d 806, 815 (Tex. Crim. App. 2005)(testimony from mother of 13 year old complainant concerning what the complainant had told her that the defendant had allegedly done to her some two days earlier was inadmissible hearsay). Additionally, admission of such testimony would deny Mr. Luzarraga his right to confront and cross-examine witnesses against him, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, § 10 of the Texas Constitution.

(GRANTED) (DENIED)

XII.
Allegations, Findings, Or Conclusions By Child Protective Services Or By The San Antonio Independent School District

The defense objects to the presentation of any evidence by the state that the San Antonio Independent School District, or Child Protective Services have made any allegations, findings, or conclusions that Mr. Smith engaged in any wrongdoing, or that the complainant or any other persons in this case were the victims of abuse. Such

administrative allegations, findings, or conclusions are irrelevant and therefore inadmissible under Rules 401 and 402 of the Texas Rules of Evidence. If relevant to anything, they are relevant only to character conformity, and therefore inadmissible under Rule 404(b). And they are unfairly prejudicial, confusing and misleading, and therefore inadmissible under Rule 403, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Course of Law Provision of Article I, §§ 13 and 19 of the Texas Constitution.

(GRANTED) (DENIED)

XIII.
Victim Impact Evidence

Mr. Smith objects to the admission of any victim impact or victim character evidence at the first phase of the trial.

(GRANTED) (DENIED)

XIV.

All Evidence Illegally Seized At 720 Lane

Mr. Smith has filed a motion to suppress physical evidence and a supplemental motion to suppress physical evidence in which he has demonstrated that the evidence seized from 720 Lane, and subsequently, from computers taken from that address, were illegally seized, in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Article I, § 9 of the Texas Constitution, and articles 18.02 and 38.23 of the Texas Code of Criminal Procedure. Accordingly, these items should be

suppressed, and neither testimony nor photographs of these items should be admitted.

(GRANTED) (DENIED)

XV.
The Discovery Of Non-Criminal Materials At 720 Lane

On January 24, 2014, officers with the San Antonio Police Department obtained and executed a search warrant on a residence at 720 Lane and photographed or seized a large amount of non-criminal material, including photographs, books, videotapes, CDs, DVDs, floppy disks, cards, notes, writings, audio cassettes, a pistol, ammunition, a stun gun, and video games. These non-criminal materials are irrelevant and therefore inadmissible under Rules 401 and 402 of the Texas Rules of Evidence. If relevant to anything, they are relevant only to character conformity, and therefore inadmissible under Rule 404(b). And they are unfairly prejudicial, confusing and misleading, and therefore inadmissible under Rule 403, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Course of Law Provision of Article I, §§ 13 and 19 of the Texas Constitution.

(GRANTED) (DENIED)

XVI.

The State Should Not Refer To The Complainant As A "Victim"

No one, including the prosecutor or any witness should refer to the complainant as a "victim." Mr. Smith is presumed innocent in this case and will enter a plea of "not

guilty" before the jury. Referring to the complainant as a victim is improper and denies him his constitutional presumption of innocence, in violation of the Fourteenth Amendment to the United States Constitution. *Cf. Talkington v. State*, 682 S.W. 2d 674, 675 (Tex. App.–Eastland 1984, pet. ref'd)(improper to refer to complainant as "victim in court's charge).

(GRANTED) (DENIED)

XVII.
Documents And Photographs:
Hearsay, Confrontation, Authentication, And Relevancy

The state has listed a large number of documents and photographs on its exhibit list which it provided to undersigned counsel on September 25, 2014. Counsel believes he has copies of many, and maybe all, of these documents and photographs, though he has not yet seen those actual items that the state proposes to offer. Mr. Smith objects to the offer and admission of documents or photographs that:

2. constitute or contain hearsay, inadmissible under Rules 801 and 802 of the Texas Rules of Evidence;

3. violate Mr. Jessop's right to confront and cross-examine witnesses, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, § 10 of the Texas Constitution;

4. are not properly authenticated, as required by Rule 901 of the Texas Rules of Evidence;

5. have not been maintained with the proper chain of custody to insure their evidentiary integrity; or,

6. are relevant only to persons other than Joe Smith, under Rules 401 and 402 of the

Texas Rules of Evidence.

(GRANTED) (DENIED)

XVIII.
Claims Of Privilege Are Not The Proper Subject Of Comment

Various witnesses have invoked claims of privilege in this case. Rule 513(a) of the Texas Rules of Evidence prohibits both Court and counsel from commenting on a witness's claim of privilege, "whether in the present proceeding or upon a prior occasion," and mandates that "no inference may be drawn therefrom."

(GRANTED) (DENIED)

XIX.
Polygraph Examination

In an interview on April 28, 2014, Carol Thomas of the Bexar County Sheriff's Department asked Mr. Smith if he was willing to take a polygraph test and a discussion was had. Any mention of a polygraph in Texas is absolutely prohibited, and, among other things, would be contrary to Rules 401, 402 and 403 of the Texas Rules of Evidence, and to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 13 and 19 of the Texas Constitution. *See also Crawford v. State*, 617 S.W.2d 925 (Tex.Cr.App.1981); *Fernandez v. State*, 564 S.W.2d 771 (Tex. Crim. App.1978); *Romero v. State*, 493 S.W.2d 206 (Tex. Crim. App. 1973).

(GRANTED) (DENIED)

XX.
Business Records

The state has filed business records affidavits and purported business records from Tivy High School and the San Antonio Independent School District. Admission of these records would deny Mr. Smith his rights to confront and cross-examine witnesses against him, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Texas Constitution. *See Crawford v. Washington*, 541 U.S. 36 (2004); *Russeau v. State*, 171 S.W.3d 871, 880-81 (Tex. Crim. App. 2005); *See also Porter v. State*, 578 S.W.2d 742, 746 (Tex. Crim. App. 1978)(business records not admissible if they do "not have the indicia of reliability sufficient to insure the integrity of the fact finding process commensurate with the constitutional rights of confrontation and cross-examination").

(GRANTED) (DENIED)

XXI.
Unauthenticated Electronic Communications

Purported electronic communications, including text messages, emails, or Facebook communications are inadmissible unless properly authenticated. The proponent of such evidence must make a *prima facie* case of authoriship before the trial court, which serves as the gatekeeper, before same can be admitted before the jury. *See Tienda v. State*, 2012 WL 385381(Tex. Crim. App. 2012).

(GRANTED) (DENIED)

XXII.
911 Calls

Numerous persons made 911 calls on March 1, 2014, shortly after 10:00 am. These reports are hearsay, inadmissible under Rules 801 and 802 of the Texas Rules of Evidence. Additionally, this information denies Mr. Smith his right to confront and cross-examine witnesses against his, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Texas Constitution. And contents of these calls are unreliable, and their admission would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Course of Law Provision of Article I, §§ 13 and 19 of the Texas Constitution. This content is also substantially more prejudicial than probative, and would likely confuse and mislead the jury if admitted, in violation of Rule 403 of the Texas Rules of Evidence.

(GRANTED) (DENIED)

XXIII.
The Attorney-Client Privilege

The state has listed two of Mr. Smith's attorneys as potential witnesses – Gordon Jones and Martin Brown. Confidential communications between Mr. Smith and his attorneys are privileged and inadmissible against Mr. Smith. *See* TEX. R. EVID. 503(b)(1). Additionally, any fact that came to the knowledge of either attorney by reason of the attorney-client relationship is privileged and may not be disclosed in Texas. *See* TEX. R.

EVID. 503(b)(2). No evidence should be elicited from either attorney until this Court has determined, outside the presence of the jury, that they have unprivileged evidence to give. Mr. Smith should not be required to assert the attorney-client privilege in the presence of the jury. *See* TEX. R. EVID. 513. And the fact that Mr. Smith contacted or retained attorneys may not be used against him or commented on by the prosecutors or the Court. *See* TEX. CODE CRIM. PROC. ANN. art. 38.38.

(GRANTED) (DENIED)

XXIV.
Transcripts of Recorded Conversations

The state has tendered to the defense transcripts of certain conversations purportedly between Mr. Smith and others. The prosecutors advise the defense that they want the jury to use these transcripts. The defense disagrees that the transcripts thus far provided by the state fully and accurately capture the recorded conversations. The defense maintains that the tapes themselves are the best evidence of the content of the conversations, and that the transcripts will not assist the jury in learning the true evidence. Allowing the jury to use these transcripts will deny Mr. Smith the right to confront and cross-examine witnesses against him and the effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Texas Constitution.

(GRANTED) (DENIED)

XXV.
Personal Writings

Various writings were seized from Mr. Smith and his home and vehicles and computers pursuant to several search warrants. The state maintains that some of these documents were written by Mr. Smith and some were not. Those personally written by him are inadmissible under article 18.02 (10) of the Texas Code of Criminal Procedure. Those not personally written by him are irrelevant, unfairly prejudicial, and inadmissible under Rules 401, 402, and 403 of the Texas Rules of Evidence.

(GRANTED) (DENIED)

XXVI.
Testimonial Aids Should Be Prohibited

The complainant should be prohibited from bringing anything to the witness stand with him when he testifies, such as animals, stuffed animals, or dolls. Such materials would arouse sympathy from the jury in violation of Rule 403 of the Texas Rules of Evidence, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Course of Law Provision of Article I, §§ 13 and 19 of the Texas Constitution.

(GRANTED) (DENIED)

XXVII.
Prior Pleas, Plea Discussions, And Related Statements

Mr. Smith objects to any suggestion by any person, direct or indirect, that he entered or attempted to enter into a plea bargain with the state. or that he had any plea

discussions, written or oral, or that he made any statements, written or oral, in connection with plea bargaining, or that he withdrew from a plea bargain in this case. TEX. R. EVID. 410 strictly prohibits any mention of such matters. Additionally, any mention of such matters would be irrelevant and therefore inadmissible under Rules 401 and 402 of the Texas Rules of Evidence, and would also be unfairly prejudicial, confusing and misleading, and therefore inadmissible under Rule 403.

(GRANTED) (DENIED)

XXVIII.
Civil Litigation, Compromise And Offers To Compromise, Payment Of Medical And Similar Expenses, And Liability Insurance

That there have been proceedings and judgments in civil court, or settlements, compromises or offers to compromise, or payment of medical or other expenses, is not admissible as evidence against Mr. Smith in this criminal case. *See* TEX. R. EVID. 408 & 409. Additionally, this sort of evidence would be irrelevant, in violation of Rules 401 and 402 of the Texas Rules of Evidence. And whatever marginal relevance the evidence has is substantially outweighed by its potential for unfairly prejudicing the jury, in violation of Rule 403 of the Rules of Evidence.

(GRANTED) (DENIED)

XXIX.
Strong And Early Admonitions About Publicity Are Needed

Jurors and prospective jurors will be tempted to conduct electronic research about this case. Acquiring such information, though, would impair Mr. Smith's constitutional

presumption of innocence, and would deny his the right to a fair and impartial trial and due process and due course of law, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 13 and 19 of the Texas Constitution. We request that this Court give a strong admonishment to the jury panel, at the very beginning of the voir dire process, that they are not to read or listen to any accounts of this trial in the media, or anywhere else, and that they are not to seek out or receive any information in oral, written or electronic form, at any time before or during this trial. We further request that similar and regular admonishments be given throughout the trial, and at the close of every day of trial.

(GRANTED) (DENIED)

XXX.
Alleged Nicknames

Unsubstantiated allegations have been made that Mr. Smith has been known by derogatory nicknames. He objects to any suggestion by anyone at this trial that he has been known by derogatory nicknames. These nicknames are irrelevant and therefore inadmissible under Rules 401 and 402 of the Texas Rules of Evidence. If relevant to anything, they are relevant only to character conformity, and therefore inadmissible under Rule 404(b). Furthermore, they are unfairly prejudicial, confusing and misleading, and therefore inadmissible under Rule 403.

(GRANTED) (DENIED)

XXXI.
Allegations Of Gang Involvement

From discovery and reviewing the witness lists, the defense believes that state might attempt to offer evidence that Mr. Smith is, or that he has in the past been, associated with gangs. The state cannot prove beyond a reasonable doubt that Mr. Smith is or has been involved with any gangs or gang-related behavior. Mr. Smith has not been convicted of any offense concerning gangs, as required by Rule 609 of the Texas Rules of Evidence. These allegations are irrelevant and therefore inadmissible under Rules 401 and 402 of the Texas Rules of Evidence. If relevant to anything, they are relevant only to character conformity, and therefore inadmissible under Rule 404(b). These allegations are unfairly prejudicial, confusing and misleading, and therefore inadmissible under Rule 403.

(GRANTED) (DENIED)

XXXII.
Photographs And Videos That Violate Rule 403

Through the discovery process counsel has been provided photographs, many of which are cumulative and otherwise unfairly prejudicial. Mr. Smith requests a hearing, before the state offers any photographs or videotapes, to determine whether these are inadmissible, either because they are not relevant and material under Rules 401 and 402 of the Texas Rules of Evidence, or whether they are inadmissible under Rule 403 because their "probative value is substantially outweighed by the danger of unfair prejudice,

confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." *See Long v. State*, 803 S.W.2d 259, 271-72 (Tex. Crim. App. 1991)(court must consider the number of exhibits offered, their gruesomeness, their detail, their size, whether they are black and white or color, whether they are close-up, whether the body is naked or clothed, and the availability or other means or proof and the circumstances unique to each individual case).

(GRANTED) (DENIED)

XXXIII.
Hearsay And Unauthenticated Documents

Mr. Smith objects to any documentary evidence that constitutes or contains hearsay, inadmissible under Rules 801 and 802 of the Texas Rules of Evidence, or which is not properly authenticated, as required by Rule 901 of the Texas Rules of Evidence, or which has not been maintained with the proper chain of custody to insure its evidentiary integrity.

(GRANTED) (DENIED)

XXXIV.
Conjunctive Allegations
Must Be Proven Conjunctively

The state has chosen to draft its indictment against Mr. Smith conjunctively, alleging that he "intentionally and knowingly caused the penetration of the mouth of the complainant with the defendant's sexual organ, 'and that he] intentionally and knowingly caused the sexual organ of the complainant to contact the mouth of the defendant." The

indictment that was signed by the foreperson of the grand jury also reads conjunctively. It must therefore be true that the grand jury believed that Mr. Smith was criminally responsible because he did both of these things, not just one of them. In order to prove its case against Mr. Smith, the state must be required to prove both of these allegations, and not just one of them. To allow the state to prove less than what the grand jury considered and certified by its indictment would constitute a constructive amendment of that indictment, and would deny Mr. Smith his constitutional rights to a grand jury indictment, in violation of Article I, §10 of the Texas Constitution, and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, as well as Articles 1.05, 21.01, 21.02, 21.03, 21.04, 21.11, and 21.15. Such practice would also deny Mr. Smith his right to a unanimous jury, required by Article V, § 13 of the Texas Constitution and article 36.29(a) of the Texas Code of Criminal Procedure. Accordingly, the prosecutors must not be allowed to suggest to the jury, directly or indirectly, during jury selection, opening statement, trial, or summation, that they need only prove one of its allegations.

(GRANTED) (DENIED)

XXXV.
Previously Urged Objections

On October 21 – 23, 2014, pre-trial hearings were held on various motions filed by the defense and on that date and shortly thereafter, this Court ruled. Mr. Smith lodged numerous objections to admission of certain evidence, and he reurges those objections at this time. If those objections are again overruled, the defense requests that the Court

consider the objections as having been made if the state offers the evidence at trial, and that the defense not be required to make the objections again, as is provided by Rule 103(a)(1).

(GRANTED) (DENIED)

XXXVI.
Miscellaneous Irrelevant And Prejudicial Evidence

1. Guns were seized during the search of a storage unit located at 1000 DeZavala Road. None of these guns were linked in any way to Joe Smith. None of the guns were stolen or illegal, and none constitute contraband of any sort whatsoever. Admitting this evidence against Joe Smith would violate Rules 401 and 402 of the Texas Rules of Evidence, Rule 403 of the Texas Rules of Evidence, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Course of Law Provision of Article I, §§ 13 and 19 of the Texas Constitution.

2. Discovery makes reference to something called a "cyanide poisoning document." This document, whatever it is, has not been linked in any way to Joe Smith. Admitting or referring to it during this trial would violate Rules 401 and 402 of the Texas Rules of Evidence, Rule 403 of the Texas Rules of Evidence, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Course of Law Provision of Article I, §§ 13 and 19 of the Texas Constitution.

(GRANTED) (DENIED)

Respectfully submitted:

MARK STEVENS
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Tower Life Building, Suite 1920
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(210) 226-1433
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of Defendant's Objections To Evidence Pursuant to Rule 103(a)(1) has been delivered to Bexar County District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 20^{4h} day of November, 2014.

_____

MARK STEVENS

ORDER

On this the _____ day of _____, 2014, came on to be considered Defendant's Objections To Evidence Pursuant to Rule 103(a)(1), and said Motion is hereby granted or denied as indicated in the body of this motion.

_____

JUDGE PRESIDING

NO. 2014-CRA-0000

STATE OF TEXAS	)	
	)	IN THE DISTRICT COURT
VS.	)	49TH JUDICIAL DISTRICT
	)	WEBB COUNTY, TEXAS
JOE SMITH	)	

EX PARTE CONFIDENTIAL REQUEST FOR ADVANCE PAYMENT OF FEES AND EXPENSES FOR QUALIFIED DNA EXPERT

TO THE HONORABLE JOE LOPEZ, JUDGE OF THE 49TH JUDICIAL DISTRICT COURT OF WEBB COUNTY, TEXAS:

Joe Smith moves the Court, pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 3, 3a, 10, 13 and 19 of the Texas Constitution, and article 26.05(d) of the Texas Code of Criminal Procedure, to appoint a qualified DNA expert in this case, and for good cause shows the following:

I.

Mr. Smith has been indicted for aggravated sexual assault. On April 1, 2014 the state obtained a search warrant authorizing the seizure of bodily fluids from Mr. Smith, and on that date an investigator with the Laredo Police Department took buccal swabbing from Mr. Smith's oral cavity. On July 2, 2014, Mary Jones, a forensic chemist employed by the Texas Department of Public Safety, made a written report in which she concluded that "the Y-STR profile from the epithelial cell fraction of item 2A is consistent with the Y-STR profile of Joe Smith. The selected profile is found in 0 of 8,376 total individuals within the database. In addition, all paternally-related male relatives of Joe Brown cannot be excluded as being a contributor of this male DNA profile." A copy of Mary Jones's DNA/Serology Report is

attached as Exhibit A.

II.

Mr. Smith has given a written statement to the Laredo Police Department in which he asserted that he has never met the complainant in this case, and that he never had a sexual relationship with her. A copy of Mr. Smith's written statement is attached as Exhibit B. The state will certainly attempt to use its DNA evidence to undermine Mr. Smith's statement and his defense in this case. Mr. Smith requires the assistance of a competent and qualified DNA expert who can assist in the evaluation, preparation, and presentation of a meaningful defense in this case.

III.

Mr. Smith is indigent. He cannot afford to hire a DNA expert to assist in the evaluation, preparation and presentation of his defense. Because of the defendant's indigency, counsel was appointed by this Court.

IV.

Robert C. Benjamin, Ph.D., is an associate professor of biological sciences at the University of North Texas. He holds a Ph.D. in Cellular and Developmental Biology from Harvard University. Since 1979, Dr. Benjamin has studied and analyzed human DNA in scores of research projects and has published numerous scholarly articles on the analysis of human DNA. His curriculum vitae is attached as Exhibit C.

Dr. Benjamin's fee is $150 per hour and estimates that he will need approximately

30 hours to examine the evidence in this case and the reports and case files of the state's experts, and to consult with the defense about his findings. If he has to travel to Laredo to testify, more time will undoubtedly be required.

FOR THESE REASONS, the defense asks that the Court authorize the payment of reasonable funds to Robert C. Benjamin, Ph.D., as the defense DNA expert in this case, and to order the County Auditor of Webb County to compensate him initially for up to 30 hours of work at $150.00 per hour.

Respectfully submitted:

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State Bar No. 19184200

Attorney for Defendant

NO. 2014-CRA-0000

STATE OF TEXAS	)	
	)	IN THE DISTRICT COURT
VS.	)	49TH JUDICIAL DISTRICT
	)	WEBB COUNTY, TEXAS
JOE SMITH	)	

ORDER

On this _____ day of _____, 2011, came on to be heard the Defendant's Ex Parte Confidential Request for Advance Payment Of Fees and Expenses For A Qualified DNA Expert. The Defendant's motion is hereby

(GRANTED) (DENIED)

Advanced funding to Robert Benjamin, Ph.D., is approved in the amount of _____and the Webb County Auditor is Ordered to pay funds consistent with this Order to: Robert Benjamin, Ph.D.

SIGNED on this the _____day of _____, 2014.

NO. A 10000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	216th JUDICIAL DISTRICT
JOE SMITH	)	KERR COUNTY, TEXAS

DEFENDANT'S OBJECTIONS TO ADMISSIBILITY OF VIDEOTAPE OF JOE SMITH ON APRIL 28, 2011

TO THE HONORABLE JUDGE OF THE 216TH JUDICIAL DISTRICT COURT:

Introduction

The law permits the introduction of a defendant's oral statements if certain conditions are satisfied. First and foremost, before "the defendant's statement" can be admitted against him, it must at least be his statement. In this case, although Mr. Smith does make some statements himself on this videotape, as we show in detail in this motion, other statements on the videotape were spoken – either directly or indirectly – by others – including the interrogating officer, unidentified persons, and the complainant. The statements identified in this motion are wholly irrelevant to Mr. Smith, or highly and unfairly prejudicial to him, or both, and are inadmissible for various other reasons, including that they are hearsay and deny him the constitutional right to confront and cross-examine witnesses against him, and that they refer to inadmissible extraneous misconduct, to comments on credibility, and to polygraph tests.

This motion points out in detail that evidence that the defense has so far been able

to identify as inadmissible. Removing all the inadmissible evidence, then introducing the redacted version will reduce the original videotape to a peculiar looking skeleton, whose emaciated existence will necessarily confuse and mislead the jury and prejudice Mr. Smith, and deny him his evidentiary right to effectively assert "the rule of optional completeness," and prevent him from mounting a defense, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10, 13, and 19 of the Texas Constitution. The proper remedy is to suppress the entire videotape. Should his objections to the entire videotape be overruled, Mr. Smith makes the following objections and seeks to exclude the specified portions of the videotape:

I.
Statements By Carol Twiss And Others
That Violate The Hearsay Rule
And Mr. Smith's Rights To Confront And Cross-Examine

On their face it is clear that the following are out-of-court statements that meet the definition of inadmissible hearsay under Rule 801, and are therefore inadmissible under Rule 802 of the Texas Rules of Evidence. Additionally, admitting these statements against Mr. Smith would violate his right to confront and cross-examine witnesses against him, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Texas Constitution. *See also Crawford v. Washington*, 541 U.S. 36 (2004). The beginning and end of the videotaped portion at issue are found atop the pertinent written transcriptions.

[17:18:08 – 17:18:10]

Twiss: So everybody else told me that you were drinking is a liar?

[GRANTED] [DENIED]

[17:21:01 – 17:21:18]

Twiss Cause your story ain't matching everybody else's.

Joe I don't [unintelligible]

Twiss Well. I'm not gonna feed you.

Joe Um hmm.

Twiss You're gonna tell me what happened for real. I'm telling you now that the statement that you're giving me this minute does not match what everybody else was saying.

[GRANTED] [DENIED]

[17:22:27 – 17:23:11]

Twiss: Why would Lee tell me that you took your clothes off.

Smith: I never touched her.

Twiss Why would Lee tell me you had sex with her?

Smith I've never touched her.

Twiss Why would Lee say that?

Smith I don't know.

Twiss Is he mad at you?

Smith No. We're good friends.

Twiss Okay. Is he a liar?

Smith No, I've never known him to be a liar.

Twiss Okay. I don't have any reason not to believe him, because his statement is consistent with what everybody else is telling me.

Smith Yes ma'am.

Twiss Yours is the only one that's not,

Smith Um hmm

Twiss so, look, you, you, you, I think you're leaving something out because you think something bad's gonna happen to you, but you need to be honest.

Smith Well, I, honestly, maybe, but I've never touched her.

Twiss Why would he say that?

Smith I don't know why

Twiss Why would she say that you tried to force yourself upon her?

[GRANTED] [DENIED]

[17:24:02 – 17:24:20]

Twiss: Cause there like identical, these things that I, . . .

Joe: Um hmm.

Twiss: these tools that I use. See I, I want, I want you to be honest, because Lee got to come in here and tell his side.

Smith: Okay.

Twiss His side does not match what you're saying. His side does match what she's saying.

[GRANTED] [DENIED]

[17:24:44 – 17:24:4]

Twiss: Why would all the girls say that to me?

Smith: All the . . . ? Did you talk to every single girl.

Twiss: Many, many.

[GRANTED] [DENIED]

[17:25:38 – 17:25:40]

Twiss Well two people said that you did.

[GRANTED] [DENIED]

[17:26:09 – 17:26:13]

Twiss: Okay. What if Lee said the same thing.

[GRANTED] [DENIED]

[17:27:28 – 17:28:15]

Twiss: Okay. Well you tell me why this girl would say the things she said, and why Lee corroborates what she says.

Smith: [unintelligible]

Twiss: You know what corroborate means?

Smith: Yes.

Twiss: Okay. Some people don't, so I gotta ask. You know what that means, you know what it means. So why would what he says match what she's saying?

Smith: I don't know.

Twiss: And he doesn't hate you. He's your friend. Ya'll are friends.

Smith: [unintelligible]

Twiss: This is not a guy who came in here and lied. I don't think.

Smith: He's a good guy.

Twiss: I think so. He came in here and told the truth. So what's, why are you holding back? Why aren't you telling me any of this?

Smith: I'm telling you everything . . .

Twiss: So either Lee's a liar, or you're a liar. Which one is it?

Smith: Lee's not a liar.

[GRANTED] [DENIED]

[17:37:37 – 17:37:42]

Twiss: Lee said that happened.

Smith: I don't, honestly, I don't think so. No, I'm pretty positive . . .

[GRANTED] [DENIED]

[17:37:59 – 17:38:09]

Twiss: Okay. So if she told me that you tried to force her . . .

Smith: Um hmm.

Twiss: that would be a lie?

Smith: Yes.

Twiss: That would be an absolute lie?

[GRANTED] [DENIED]

[17:38:31 – 17:38:47]

Twiss: That don't match everything Lee said. Don't match everything she's said. So. I've got a problem. Who do I believe? You? Lee? Her?

Smith: Me. I give you [unintelligible]

[GRANTED] [DENIED]

[17:40:28 – 17:41:36]

Twiss: I hope that, uh, this day forward, changes your attitude about how you treat people. I really do. You should not treat women or men derog – or have derogatory things to say about them. It's not. They don't enjoy it. They really don't. It doesn't make you look like a greater guy. In fact, people, they're trying to make excuses for your behavior. This is how he is. He's a jerk. This is how he is. And I know, I know they don't tell you that, but that's what they say about you when you're not here. He could be a good guy, but he's such a jerk sometimes.

Smith: That's true.

Twiss: Or, huh?

Smith: That's true.

Twiss: But, you know, is that really the reputation that you want to have, when you go onto college, and, and forward?

Smith: (shaking head negatively) Not necessarily.

Twiss: It's not a good one to have. It doesn't get you anywhere in life.

Smith: Right.

Twiss: It just makes people go, well that kid. He's a good, he's a good basketball player, but he's, otherwise, terrible. Not the reputation you want to have.

[GRANTED] [DENIED]

II.
Extraneous Misconduct

Throughout the videotape Carol Twiss accuses Mr. Smith of various acts of misconduct that are not alleged in this indictment. The asserted misconduct is detailed below, and its location on the videotape is bracketed. The state cannot prove beyond a reasonable doubt that Mr. Smith perpetrated any of these transactions. Mr. Smith has not been convicted of any offense concerning these transactions, as required by Rule 609 of the Texas Rules of Evidence. These transactions are irrelevant and therefore inadmissible under Rules 401 and 402 of the Texas Rules of Evidence. If relevant to anything, they are relevant only to character conformity, and therefore inadmissible under Rule 404(b). These transactions are also unfairly prejudicial, confusing and misleading, and therefore inadmissible under Rule 403.

[17:19:00 – 17:19:34]

Twiss: You were throwing stuff. You were acting a fool.

Smith: But yeah, I was, uh, that wasn't . . . I, I just, I didn't like her. I was upset.

Twiss: What does that have to do with anything? Peeing in a boot?

Smith: I was upset.

Twiss: It wasn't her boot.

Smith: I know. It was her . . . Anything . . . I mean, I wasn't the only one, I don't know, but.

Twiss: I, I know you weren't the only one, but, uh, you know. That's very disrespectful.

Smith: Yes ma'am.

Twiss: How'd you like if I went to your house and peed into your boots?

Smith: Uh, I probably wouldn't be too happy.

Twiss: No. That's just not right.

[GRANTED] [DENIED]

[17:19:46 – 17:19:47]

Smith: Peeing in the boot?

[GRANTED] [DENIED]

[17:23:36 – 17:24:02]

Twiss: Have you ever sent a text to Lee about this?

Smith: Not that I think, no, I don't think so

Twiss: You sure?

Smith: Oh, I mean, uh . . . .

Twiss: Ya'll ever get your stories together about what you're gonna say when questioned, or if questioned?

Smith: Uh, you know, I don't think that we ever texted about. I know that they, they texted.

Twiss: You sure?

Smith: I, I, I honestly couldn't remember. I couldn't tell you.

[17:24:30 – 17:25:27]

Twiss: You said some ugly things to her. You do that to all the girls, but on that particular night, you were being particularly ugly to her.

Smith: I mean, I don't do it to all the girls.

Twiss: Yes you do.

Smith: That's not true.

Twiss: Um hmm.

Smith: That's not true.

Twiss: Why would all the girls say that to me?

Smith: All the . . . ? Did you talk to every single girl.

Twiss: Many, many.

Smith: No.

Twiss: You're very rude to them. You're uh, you don't have any respect for women.

Smith: Well, I do. I have a girlfriend.

Twiss: Do you?

Smith: Yes.

Twiss: So how would you feel if someone told your girlfriend that, uh, she was a bitch, and got in her face, and yelled at her and.

Smith: I'd probably be pretty upset.

Twiss: Okay, well, how do you think, uh, Chris felt?

Smith: I'm sure she was upset.

Twiss: Because that's what you did to her.

Smith: [unintelligible]

Twiss: Why did you, why would you do that to her?

Smith: Because I don't necessarily like her, um [unintelligible]

[GRANTED] [DENIED]

[17:25:28 – 17:26:55]

Twiss: So you go into this house and you get intoxicated, and you trash people's property . . .

Smith: Um hmm.

Twiss: you did all these things, and you got in her face, yelled at her.

Smith: No, [unintelligible]

Twiss: Well two people said that you did.

Smith: I don't even know what getting in her face means.

Twiss: But, you know what getting in people's face means. Yelling at them, getting aggressive toward them

Smith: I wasn't. I wasn't aggressive.

Twiss: Is that your opinion?

Smith: I guess so. I guess that could be my opinion.

Twiss: Okay.

Smith: It could be.

Twiss: So, if I . . .

Smith: Like her opinion.

Twiss: got, jumped up in your face. That would be aggressive, right?

Smith: (nods affirmatively)

Twiss: Okay. Well that's what she perceived your actions and your behavior to be.

Smith: That's her opinion.

Twiss: Okay. What if Lee said the same thing. That you were being derogatory, but you do that all the time?

Smith: Well, towards her, right?

Twiss: Towards a lot of people.

Smith: That's not true.

Twiss: Not true. Even the teachers think you're derogatory toward people and that you're a smart ass.

Smith: smart ass.

Twiss: Treat people like shit.

Smith: I'm a smart ass. [unintelligible]

Twiss: I think it is.

Smith: [unintelligible]

Twiss: Your behavior and your actions follow you everywhere you go and everything you do.

Smith: Being disrespectful is.

Twiss: Um hmm. You want people to respect you, but you don't want them, but you don't want to respect them.

Smith: I do.

Twiss: Well you don't, because you treat them poorly.

Smith: I try to treat them respectfully. I try to respect people . . . the same amount they respect me.

[GRANTED] [DENIED]

[17:34:07 – 17:34:17]

Twiss: Okay. Do ya'll do this often.

Smith: I mean. Sometimes. Not. Yeah, I guess. Every week, weekend.

[GRANTED] [DENIED]

[17:34:51 – 17:35:11]

Twiss: you're being ugly, you're throwing stuff out of the house, you're peeing in boots . . .

Smith: Right.

Twiss: What not. Because you don't like Chris. Is that right?

Smith: Right. But I wasn't the only one like throwing stuff.

Twiss: I'm aware.

Smith: Okay [unintelligible]

Twiss: I'm just talking about your

Smith: My actions?

Twiss: story, your actions, what happened with you. I am aware of the people peeing in closets and what not.

[GRANTED] [DENIED]

[17:37:42 – 17:37:46]

Twiss: You're throwing stuff outside . . .

Smith: Um hmm.

Twiss: You were peeing in closets, boots, and whatnot.

[GRANTED] [DENIED]

[17:40:28 – 17:41:36]

Twiss: I hope that, uh, this day forward, changes your attitude about how you treat people. I really do. You should not treat women or men derog – or have derogatory things to say about them. It's not. They don't enjoy it. They really don't. It doesn't make you look like a greater guy. In fact, people, they're trying to make excuses for your behavior. This is how he is. He's a jerk. This is how he is. And I know, I know they don't tell you that, but that's what they say about you when you're not here. He could be a good guy, but he's such a jerk sometimes.

Smith: That's true.

Twiss: Or, huh?

Smith: That's true.

Twiss: But, you know, is that really the reputation that you want to have, when you go onto college, and, and forward?

Smith: (shaking head negatively) Not necessarily.

Twiss: It's not a good one to have. It doesn't get you anywhere in life.

Smith: Right.

Twiss: It just makes people go, well that kid. He's a good, he's a good basketball player, but he's, otherwise, terrible. Not the reputation you want to have.

[GRANTED] [DENIED]

III.
Comments On Credibility By The Interrogating Officer

Testimony by one witness that another is untruthful is inadmissible under Rule 702 of the Texas Rules of Evidence. *Yount v. State*, 872 S.W.2d 706, 711 (Tex. Crim. App. 1993). While experts may *assist* jurors, they may not decide the ultimate issues for them. *Id*. at 710. *See Schutz v. State*, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997)(experts may "aid – not supplant – the jury's decision"). But that is exactly what the investigator attempts to do in the following excerpts.

[17:18:12 – 17:18:57]

Twiss	Joe.
Joe	I, I . . .
Twiss	Lemme tell you something.
Joe	Um hm.
Twiss	Before I get someone in here, before I start even to talk to them. . .
Joe	Um hmm.
Twiss	I do my homework.
Joe	Right.
Twiss	Lemme tell you something. I know a lot more than you think I know about what happened . . .
Joe	Um hmn
Twiss	And you start off with a lie, it's not looking good. Okay?

Joe Um hmm.

Twiss So don't try to B.S. me. You better be real friggin honest in this room, partner, because I'm not playing. This is serious. All right? And honesty is the absolute best policy.

Joe Right.

Twiss Okay? There's no point in giving me a story, cause I already know the truth.

Joe Um hmm.

Twiss All right? And the bottom line here is this ain't it, everything that happened. Ya'll were all drinking. You were drinking too.

Joe Well, I

[17:38:10 – 17:38:47]

Twiss: All the rest of your stories has changed twice now.

Smith: Yeah.

Twiss: Three times.

Smith: But I gave you the real story. We had a clean slate.

Twiss: But which one is, which one's real?

Smith: I told you the last one.

Twiss: How do I know.

Smith: Because we cleaned the slate [unintelligible]

Twiss: Well my problem is, you did say the two stories before that. Now I've got three stories . . .

Smith: Um hmm.

Twiss: That don't match everything Lee said. Don't match everything she's said. So. I've got a problem. Who do I believe? You? Lee? Her?

Smith: Me. I give you [unintelligible]

[GRANTED] [DENIED]

[17:40:09 – 17:4018]

Twiss: Well, I can tell you now. I don't, I don't like it when people come in here and try to BS me.

Smith: Sorry.

Twiss: It starts making me think they are not being truthful.

Smith: I'm sorry.

[GRANTED] [DENIED]

IV.
Polygraph Discussion

Near the end of the interview, the interrogating officer brings up a polygraph and the ensuing discussion involves Mr. Smith's willingness to take such a test, and the officer's prior experiences with the test. Any mention of a polygraph in Texas is absolutely prohibited, and, among other things, would be contrary to Rules 401, 402 and 403 of the Texas Rules of Evidence, and to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 13 and 19 of the Texas Constitution. *See also Crawford v. State*, 617 S.W.2d 925 (Tex.Cr.App.1981); *Fernandez v. State*, 564 S.W.2d 771 (Tex.Cr.App.1978); *Romero v. State*, 493 S.W.2d 206 (Tex.Cr.App.1973).

[17:38:47 – 17:40:28]

Twiss: You know what a lie detector test is?

Smith: Um hmm.

Twiss: Okay. If I gave you one right this minute, would you pass?

Smith: Yes. Wait, what, what, what would you ask me? Well, yes, I would pass, but I mean.

Twiss: I would ask you,

Smith: like . . .

Twiss: did you rape her?

Smith: No. Yes, I would pass.

Twiss: I would ask you, did you try to rape her?

Smith: No.

Twiss: I would ask you, did you take her clothes off? Did you rip her clothes off?

Smith: Nope.

Twiss: Will you take a polygraph?

Smith: Ma'am?

Twiss: Will you take one?

Smith: What, a lie detector?

Twiss: Um hmm.

Smith: Yes. I will.

Twiss: Okay. Absolutely?

Smith: Yes. A hundred percent.

Twiss: Because every time I ask someone when we're in this room, they say yes I'll take one, and then when it comes time to take one, they don't take one.

Smith: I will. I promise I will take one.

Twiss: Okay. Well I'm gonna call and get one set up.

Smith: Um hmm.

Twiss: And then, uh, it'll be soon, like, within a week.

Smith: Okay.

Twiss: Maybe two.

Smith: Yes, ma'am.

Twiss: It'll take probably an hour or two.

Smith: Is it gonna be like . . .

Twiss: It's not me doing it.

Smith: Right. Not this weekend?

Twiss: No. It's during the week. Sometime during the week. The guy who does them works for the Department of Public Safety. He doesn't work for us. He's not related to our department. He's gonna ask you some specific questions about what happened that day, and then we go from there.

Smith: Sounds great.

Twiss: But if you want to clean this up and you want to prove your innocence, that's the way to do it.

Smith: I would love to do that. That would be great.

Twiss: Well, I can tell you now. I don't, I don't like it when people come in here

and try to BS me.

Smith: Sorry.

Twiss: It starts making me think they are not being truthful.

Smith: I'm sorry. I would love to do this lie detector test.

Twiss: Okay, then, we'll do it.

Smith: [unintelligible]

[GRANTED] [DENIED]

[17:41:55 – 17:42:03]

Twiss: Okay. Well, I will set up your polygraph.

Smith: Okay. Are you just gonna call me?

Twiss: Yep. I sure will.

[GRANTED] [DENIED]

Respectfully submitted:

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

_____

MARK STEVENS
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of Defendant's Objections To Admissibility Of Videotape Of

Joe Smith On April 28, 2011has been delivered to Lucy Wilke, Kerr County District Attorney's Office, 521 Earl Garrett St.; Kerrville, Texas 78028, on this the ____ day of January, 2012.

_____
MARK STEVENS

ORDER

On this the _____ day of _____, 2014, came on to be considered Defendant's Objections To Admissibility Of Videotape Of Joe Smith On April 28, 2011, and said Motion is hereby granted and denied as indicated in the body of this motion.

_____
JUDGE PRESIDING

NO. _____

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	_____ JUDICIAL DISTRICT
_____	)	_____ COUNTY, TEXAS

DEFENDANT'S MOTION FOR CONTINUANCE

TO THE HONORABLE JUDGE OF SAID COURT:

_____moves the Court to continue the trial date in this cause for these reasons:

I.

.

WHEREFORE, the Defendant prays the Court grant this Motion and continue this cause on the docket of this Court until a later date so that the Defendant may receive a fair trial.

Respectfully submitted:

_____

MARK STEVENS
State Bar No. 19184200
442 Dwyer
San Antonio, TX 78204
(512) 226-1433

Attorney for Defendant

STATE OF TEXAS)

COUNTY OF BEXAR)

BEFORE ME, the undersigned authority, on this day personally appeared Mark Stevens, who after being duly sworn stated:

> I am the lawyer for the Defendant in the above-entitled and numbered cause. I have read the foregoing Motion for Continuance and swear that all of the allegations of fact contained therein are true and correct.

_____

Mark Stevens

SUBSCRIBED AND SWORN TO BEFORE ME on the __ day of

_____, _____

_____

Notary Public in and for
Bexar County, Texas

My commission expires:

_____

CERTIFICATE OF SERVICE

I certify that a copy of this Motion for Continuance has been delivered to the _____ County District Attorney's Office on _____..

_____
MARK STEVENS

ORDER

On this the ___ day of _____, came to be considered Defendant's Motion for Continuance, and it appears to the Court that this Motion should be

(GRANTED) (DENIED)

_____
JUDGE PRESIDING

NO. 2014-CR-0000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	227TH JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

APPLICATION FOR WRIT OF HABEAS CORPUS SEEKING BAIL REDUCTION

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith makes this Application for Writ of Habeas Corpus Seeking Bail Reduction, and, for good cause shows the following:

I.

Defendant is illegally confined and restrained of his liberty by the Sheriff of Bexar County, Texas in the Bexar County Adult Detention Center in San Antonio, Texas in lieu of a bond in the amount of $500,000.00. Defendant is charged with the felony offense of aggravated sexual assault.

II.

Defendant's confinement and restraint is illegal because his bond is excessive, oppressive and beyond his financial means, in violation of the Eighth and Fourteenth Amendments to the United States Constitution, Article I, §§ 11, 13 and 19 of the Texas Constitution, and articles 1.07 and 17.15 of the Texas Code of Criminal Procedure.

III.

Defendant respectfully requests this Court to grant defendant an evidentiary hearing and, after receiving evidence, to reduce the amount of said bond to a reasonable amount in

order that defendant will have an opportunity to obtain his release from incarceration pending trial.

WHEREFORE, premises considered, defendant prays that this Court grant and issue a Writ of Habeas Corpus to the Sheriff of Bexar County, Texas directing and commanding him to produce and have defendant before this court instanter, or at such time and place to be designated by this Court, then and there to show cause, if any he may have, why defendant should not be discharged from such illegal confinement; or that defendant be allowed bail in a reasonable amount; and defendant further prays that he be allowed immediate bail in a reasonable amount, conditioned that he be and appear at the said hearing to there await further orders of this Court.

Respectfully admitted:

MARK STEVENS
310 S. St. Mary's Street, Suite 1920
San Antonio, Texas 78204
(210) 226-1433
Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of defendant's Application For Writ of Habeas Corpus Seeking Bail Reduction has been delivered to the District Attorney's Office; 300 Dolorosa Street, San Antonio, Texas 78205 on this the ____ day of January, 2014.

MARK STEVENS

THE STATE OF TEXAS)

AFFIDAVIT

COUNTY OF BEXAR)

BEFORE ME, the undersigned authority, on this day personally appeared Mark Stevens, who being by me duly sworn, upon oath deposes and says,

> I am the attorney for Joe Smith, defendant in this cause; I have read the above and it is all true and correct.

_____

MARK STEVENS

SUBSCRIBED AND SWORN to before me this 11th day of January, 2014 to certify which witness my hand and seal of office.

_____

Notary Public, State of Texas
My commission expires: 1/27/2013

ORDER OF SETTING

On this ____ day of _____, 2014, came on to be heard the application of Joe Smith for a Writ of Habeas Corpus, and it appearing to the Court that said defendant is entitled to a hearing on said application, it is therefore ordered that the Clerk of this Court issue a Writ of Habeas Corpus directed to the Sheriff of Bexar County and commanding the said Sheriff to have and produce the person of Joe Smith before me in the courtroom of the 227th Judicial District Court, on the _____ day of January, 2011 at _____o'clock _____.m., then and there to show cause why the said Joe Smith should not be released from custody on a reasonable bond.

_____

JUDGE PRESIDING

NO. 2014-CR-0000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	227TH JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

ORDER

On this the _____ day of _____, 2014, came to be considered defendant's Application for Writ of Habeas Corpus Seeking Bail Reduction, and, said writ is issued and after hearing evidence and argument of counsel, relief on said writ is

(GRANTED) (DENIED)

Bond is set in the amount of _____.

_____

JUDGE PRESIDING

NO. 2013-CR-0000

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

MOTION TO COMPEL ELECTION
BEFORE TRIAL BEGINS

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves that this Court compel the state to elect which offenses it seeks to prosecute him on, and that the election be made before the jury is selected, for the following reasons:

I.
The Indictment Alleges Two Different Criminal Acts

The indictment contains two counts, each alleging a separate act on a different date:

- Count I alleges that Mr. Smith, on or about the 1st day of June 2002, did intentionally and knowingly cause the penetration of the sexual organ of Ann Jones, a child who was younger 14 years, by the Defendant's finger.
- Count II alleges that Mr. Smith, on or about the 1st day of June, 2002, did intentionally and knowingly engage in sexual contact with Ann Jones, a female child younger than seventeen (17) years and not the spouse of the defendant by touching part of the genitals of Ann Jones with the intent to arouse or gratify the sexual desire of any person.

II.
If The Complainant Testifies To More Than Two Criminal Acts, The State Must Elect The Acts Relied On For Conviction

In meeting its burden to prove that the crimes alleged happened "on or about" a certain date, Texas law allows the state to offer evidence that the crimes alleged occurred anytime before the date the indictment was presented. Although the indictment alleges only two acts, the defense believes that the complainant will claim that Mr. Smith touched part of her genitals more than two times. If the complainant does so testify, "the State must elect the act upon which it would rely for conviction." *O'Neal v. State*, 746 S.W. 2d 769, 771 (Tex. Crim. App. 1988).

III.
This Court Has Discretion When To Order Election

The Court of Criminal Appeals has held that the trial court has discretion to require the election any time prior to the state resting its case. Once the state rests, though, the Court *must* order the state to elect, if the defense requests. *O'Neal v. State*, 746 S.W. 2d at 772.

IV.
Why Election Should Be Ordered Before Trial In This Case

In this case, the election should be ordered before trial, so that Mr. Smith can mount the defense he is entitled to under the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, § 10 of the Texas Constitution.

If the complainant does in fact testify to more than two allegedly criminal acts, then every act beyond the second is, by definition, extraneous misconduct. Extraneous misconduct is generally inadmissible, and only becomes admissible if the state can make it so under Rules 401, 402, 403, and 404(b) of the Texas Rules of Evidence, and article 38.37 of the Texas Code of Criminal Procedure. Mr. Smith requires notice before he picks the jury, what evidence the state contends constitutes evidence of charged misconduct, and what it contends is admissible uncharged misconduct, in order that he can prepare for trial, so that he can properly question the prospective venirepersons, and also, so that he can contest the admissibility of the evidence, outside the jury's presence. If the state is allowed to wait until it rests its case to make an election, neither the defense nor the Court will know at the time the evidence is offered, whether it is offered as primary or extraneous evidence. Thus, the defense will not know whether or how to properly challenge its admissibility, and the Court will not know by what standard to admit or exclude it.

Additionally, Mr. Smith is entitled to an instruction that properly limits the jury's consideration of any extraneous misconduct. Pursuant to Rule 105(a) of the Texas Rules of Evidence, this instruction must be given immediately, as soon as the extraneous misconduct evidence is admitted. *Rankin v. State*, 974 S.W. 2d 707, 712 (Tex. Crim. App. 1996). If the state is allowed to wait until it rests its case to make an election, the defense will not know whether to request a limiting instruction, and the Court will not know whether to instruct the jury or not. The spirit of Rule 105(a) will be defeated.

Under the *O'Neal* line of cases, the state will have to make its election at least by the time it rests its case. It is not unreasonable to expect the state to know enough about its case – before the jury is selected – to require it to determine and to declare at that time those two acts it will rely on to convict Mr. Smith.

V.
What The State Should Be Required To Do In This Case

Mr. Smith requests that this Court order the State of Texas to do the following, before the jury is selected:

1. Advise the defense and the Court whether its complainant will testify that Mr. Smith touched part of her genitals on more than two occasions;
2. If so, identify as specifically as possible with respect to the actual time, place, and manner and means, the two acts it will rely on to convict Mr. Smith in this case.

Respectfully submitted:

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of defendant's Motion to Compel Election Before Trial Begins has been delivered to the District Attorney's Office; Cadena-Reeves Justice Center; 300 Dolorosa; San Antonio, Texas 78205, on this the 28th day of May, 2013.

_____

MARK STEVENS

ORDER

On this the ____ day of _____, 2013, came to be considered defendant's Motion to Compel Election Before Trial Begins, and it appears to the Court that this Motion should be

(GRANTED) (DENIED)

_____

JUDGE PRESIDING

NO. A 11
A 12
A 13

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	216TH JUDICIAL DISTRICT
JOE SMITH	)	KERR COUNTY, TEXAS

DEFENDANT'S OBJECTION TO CONSOLIDATION AND JOINDER AND MOTION FOR SEVERANCE

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith objects to consolidation and joinder of cause numbers A 11 A 12, and A 13, and moves that trial on these causes be severed and shows the following:

I.

On March 15, 2014, the state filed the State's Notice Of Consolidation Of Prosecution concerning cause numbers A 11, A 12, and A 14, pursuant to § 3.02 of the Texas Penal Code.

II.

Section 3.04(a) of the Texas Penal Code grants to the defense a mandatory severance of cases the state seeks to join under § 3.02. By this motion, the defense objects to consolidation and joinder of cause numbers A 11, A 12, and A 14.

III.

In addition to his mandatory right to sever under § 3.04(a), defendant further objects that joinder of cause numbers A 11 and A 12, on the one hand, with cause number

A 13, on the other, would be unfairly prejudicial and therefore should be severed under § 3.04(c). The first two numbered indictments – A 11 and A 12 – involve a different complainant, and allege a different date of commission, than the offense alleged in the third indictment — cause number A 13.

WHEREFORE PREMISES CONSIDERED, defendant prays that Defendant's Objection to Consolidation Joinder and Motion for Servance be granted.

Respectfully submitted:

_____

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

CERTIFICATE OF SERVICE

I hereby certify that a copy of Defendant's Objection to Consolidation and Motion for Severance has been delivered to the District Attorney's Office, Kerr County, 521 E. Garrett St.; Kerrville, Texas 78028 on this the 21st day of March, 2014.

_____

MARK STEVENS

ORDER

On this the _____ day of _____, 2014, came on to be considered Defendant's Objection to Consolidation and Motion for Severance, and said Motion is hereby

(GRANTED) (DENIED)

_____

PRESIDING JUDGE

NO. A 11

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	216TH JUDICIAL DISTRICT
JOE SMITH	)	KERR COUNTY, TEXAS

REQUEST FOR NOTICE OF ORDER OF TRIALS

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith has been indicted in three different indictments, each of which charge one or more crimes. Under § 3.04 of the Texas Penal Code he has an absolute right to separate trials on these indictments. He requests separate trials and also that the state notify him which case the state intends to try first, at least 14 days before trial is to commence.

Respectfully submitted:

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of defendant's Request For Notice Of Order of Trials has been delivered to the District Attorney's Office, Kerr County, 521 E. Garrett St.; Kerrville, Texas 78028, on this the ___ day of January, 2014.

_____

MARK STEVENS

ORDER

On this the _____ day of _____, 2014, came on to be considered Request For Notice Of Order of Trials, and said Motion is hereby

(GRANTED) (DENIED).

SIGNED on the date set forth above.

_____

JUDGE PRESIDING

NO. 2014-CR-00000

THE STATE OF TEXAS	)	IN THE DISTRICT COURT
	)	
VS.	)	144TH JUDICIAL DISTRICT
	)	
JOE SMITH	)	BEXAR COUNTY, TEXAS

MOTION TO PROHIBIT THE UTILIZATION OF AN OUTCRY STATEMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith files this his Motion to Prohibit the Utilization of an Outcry Statement and shows the following:

I.

The defense has not received a "Notice of Intent to Present Outcry Statement" at least fourteen days before the date the proceeding is to begin, contrary to Article 38.072 of the Texas Code of Criminal Procedure. Mr. Smith has no notice of who the state intends to call as an outcry witness nor the content of such outcry as also required by Article 38.072. When such requirements are not met, the statement is inadmissible hearsay.

II.

To permit the State to utilize the hearsay testimony also violates Mr. Smith's constitutional rights of confrontation, due process, and due course of law, as delineated in the Sixth Amendment of the United States Constitution and Article I, § 10 of the Texas Constitution.

WHEREFORE, PREMISES CONSIDERED, the Defendant moves this Honorable Court at its pre-trial hearing to prohibit the use of such Outcry Statement, and for such other

and further relief, general and special, at law or in equity, to which Defendant might show himself justly entitled.

Respectfully submitted:

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 01720800

CERTIFICATE OF SERVICE

I certify that a copy of the Defendant's Motion to Prohibit The Utilization Of An Outcry Statement has been delivered to the Bexar County District Attorney's office; Justice Center; 300 Dolorosa; San Antonio, Texas, on this the 4th day of April, 2014.

MARK STEVENS

ORDER

On this the _____ day of _____, 2014, came to be considered Motion To Prohibit The Utilization Of An Outcry Statement, and said motion is hereby

(GRANTED) (DENIED)

JUDGE PRESIDING

NO. 2013-CR-0000

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

MOTION TO CLARIFY OUTCRY WITNESS

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith files this his Motion To Clarify Outcry Witness, and shows the following:

I.

On February18, 2013, the state filed two separate documents entitled "Notice Of Intent To Present Outcry Statement," each of which purports to designate a different "outcry" witness. Specifically, the state has designated Mary Brown and Robert Johnson, as its outcry witness.

II.

Article 38.072, §2(a)(3) requires that the outcry statement be made to the "*first* person . . . to whom the child . . . made a statement about the offense . . . ." Necessarily, then, there can be only one true outcry witness.

III.

The state has designated not one, but at least two persons as outcry witnesses. This violates article 38.072, § 2(a)(3). The defense does not concede that any outcry witness can testify in this case, but in any event if the state intends to use anyone as an outcry witness, it should designate the one person it intends to use, and it has not done so yet.

WHEREFORE, PREMISES CONSIDERED, the Defendant moves this Honorable

Court to require the state to clarify the person it will use as its outcry witness, as required by article 38.072 of the Texas Code of Criminal Procedure.

Respectfully submitted:

_____

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Defendant's Motion to Clarify Outcry Witness has been delivered to the Bexar County District Attorney's office; Justice Center; 300 Dolorosa; San Antonio, Texas, on this the 24th day of May, 2013.

_____

MARK STEVENS

ORDER

On this the _____ day of _____, 2013, came to be considered Motion To Clarify Outcry Witness, and said motion is hereby

(GRANTED) (DENIED)

_____

JUDGE PRESIDING

NO. 2014-CR-0000

STATE OF TEXAS	)	IN THE DISTRICT COURT
	)	
VS.	)	187TH JUDICIAL DISTRICT
	)	
JOE SMITH	)	BEXAR COUNTY, TEXAS

PROPOSAL TO ASK QUESTIONS ABOUT THE ALLEGED VICTIM'S PAST SEXUAL BEHAVIOR PURSUANT TO RULE 412(c)

I.

Defendant informs the court that he proposes to ask questions of several witnesses concerning specific instances of the alleged victim's past sexual behavior. Pursuant to Rule 412(c) of the Texas Rules of Evidence, when the defense proposes to ask such questions, before doing so in the presence of the jury, it must inform the court, which must then hold an in camera hearing to determine the admissibility of such evidence.

II.

From the discovery provided by the state so far, the defense has learned that, sometime in the summer of 1999, the 12 year old complainant in this case began making contact with older males on the Internet, using the screen name, "Luv258." A number of these contacts developed into consensual sexual encounters. Indictments in Bexar County and Guadalupe County charged that the following individuals committed the offenses of aggravated sexual assault and indecency with a child against the complainant, on or about the listed dates:

1. Tom Sommers. December 30, 1999; January 24, 2000.

2. Michael Raymond. January 31, 2000.

3. Marcus Jones. January, 2000; March or April, 2000.

4. Timothy Oliva. April 9, 2000.

5. Joe Smith. April 18, 2000.

Additionally, two other suspects -- Ed Donald and Enrique Gonzales -- were investigated, but, to date, apparently have not been indicted.

III.

Shirley Menard conducted a sexual assault examination on the complainant at the Alamo Children's Advocacy Center on June 7, 2013 and found several "abnormalities" concerning the complainant's genitalia. Evidence that the complainant engaged in sexual behavior with several other persons before ever meeting defendant is necessary to rebut and explain the scientific evidence about the complainant's genitalia. *See* TEX. RULES EVID. 412(b)(2)(A).

IV.

The complainant stated in an interview with the police on May 4, 2013 that, at the time, defendant Smith was the last of the persons she had met on the Internet with whom she had had sex. That she had sex with four or five or six or others before meeting defendant will be highly relevant at the punishment phase of the trial, should that phase be reached. Under article 37.07, § 3(a)(1) of the Texas Code of Criminal Procedure, defendant is entitled to offer any evidence relevant to sentencing. If defendant is convicted of this offense, the sentencing jury must be informed that the complainant is not an inexperienced 12 year old child whose first sexual encounter was with the defendant, so that it may properly consider the full range of punishment. It is reasonable that a jury

would more harshly sentence an adult defendant who was the first to introduce a child to sex, than one who had been the child's fifth, sixth, or seventh consensual sexual partner. The press has already accused the defendant, and the others indicted, of "luring a 12-year old Schertz girl into sexual encounters." An assistant district attorney in Guadalupe County has complained of "predators" who easily find child victims. Attorney General John Cornyn said that the Internet "can attract people who want to exploit and harm children." These remarks demonstrate the natural tendency of anyone who hears about the conduct with which defendant is charged to assume that the adult is a predator. In this case, though, the complainant's sexual history before even meeting defendant shows that defendant was not the predator in this relationship. The jury will not know this, though, unless the defense is allowed to bring out the truth. The evidence we request to present to the jury is necessary so that defendant can explain and rebut inaccurate information presented against him at sentencing, and is admissible under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Course of Law Clause of Article I, §§ 13 and 19 of the Texas Constitution. *See* TEX. RULES EVID. 412(b)(2)(E).

IV.

The probative value of the evidence that defendant seeks to present to the jury outweighs its danger of unfair prejudice. *See* TEX. RULES EVID. 412(b)(3).

Respectfully submitted:

MARK STEVENS
310 S. St. Mary's Street

Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of defendant's Proposal To Ask Questions About The Alleged Victim's Past Sexual Behavior Pursuant To Rule 412(c), has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, TX 78205, on this the 10th day of May, 2013.

_____
MARK STEVENS

ORDER

On this the _____ day of _____, 2014, came on to be considered defendant's Proposal To Ask Questions About The Alleged Victim's Past Sexual Behavior Pursuant To Rule 412(c), and said Motion is hereby

(GRANTED) (DENIED).

_____
JUDGE PRESIDING

AFFIDAVIT UNDER TEXAS RULE OF EVIDENCE 902(10)

RECORDS PERTAINING TO: _____
SSN _____, DOB _____

Before me, the undersigned authority personally appeared _____, who being by me duly sworn, deposed as follows:

"1. I am the custodian of records [or I am an employee or owner] of _____ and am familiar with the manner in which its records are created and maintained by virtue of my duties and responsibilities.

"2. Attached are _____ pages of records. These are the original records or exact duplicates of the original records.

"3. The records were made at or near the time of each act, event, condition, opinion, or diagnosis set forth. [*or* It is the regular practice of _____ to make this type of record at or near the time of each act, event, condition, opinion, or diagnosis set forth in the record.]

"4. The records were made by, or from information transmitted by, persons with knowledge of the matters set forth. [*or* It is the regular practice of _____ for this type of record to be made by, or from information transmitted by, persons with knowledge of the matters set forth in them.]

"5. The records were kept in the course of regularly conducted business activity. [*or* It is the regular practice of _____ to keep this type of record in the course of regularly conducted business activity.]

"6. It is the regular practice of the business activity to make the records."

_____
AFFIANT
Printed Name: _____
Address: _____
Phone: _____

SUBSCRIBED AND SWORN TO before me on this ___ day of _____, 201__ by _____.

_____
NOTARY PUBLIC
State of Texas

NO. 2013-CR-0000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	226TH JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

MOTION FOR NOTICE OF INTENT TO OFFER STATEMENTS ALLEGEDLY MADE BY DEFENDANT

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves this Court to require the state to give written notice, at least 30 days prior to hearing his Motion to Suppress Written or Oral Statements of Defendant, of all statements allegedly made by Mr. Smith, that the state intends to offer at trial. For good cause, we show the following:

I.

Review of the discovery provided to date reveals several witnesses who say that Mr.Smith made statements to them about the evidence in this case. Some of these statements were electronically recorded and some were not. Some were made to persons who were obviously agents of the State of Texas; in other cases, the agency relationships are less clear. Some were likely the product of custodial interrogation. The admissibility of each statement will depend on the facts and circumstances under which they were made, if in fact they were made.

II.

A defendant is entitled to a hearing outside the presence of the jury on the admissibility of any confession he is alleged to have made. TEX. R. EVID. 104(c). A

defendant is also entitled to a hearing outside the presence of the jury on the voluntariness of any statements he allegedly made TEX. CODE CRIM. PROC. ANN 38.22 § 6; *Jackson v. Denno*, 378 U.S. 368 (1964).

III.

Mr. Smith requires timely notice of any statement he allegedly made that the state intends to offer against him at trial so that he can properly contest its admissibility.

IV.

Additionally, he requires timely notice to avoid unfair surprise, prohibited by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Course of Law Clause of Article 1, §§ 13 and 19 of the Texas Constitution; and so that he can confront the witnesses against him and receive the effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Texas Constitution.

V.

And, timely production of a true, complete, and accurate copy of all recordings of a defendant that the state contends are admissible under article 38.22 is required under section 3(a)(5) of that provision.

VI.

Finally, article 39.14 of the Texas Code of Criminal Procedure authorizes this Court to order the state to produce and permit the inspection and copying of any written statement of the defendant.

VII.

Mr. Smith requests the state to provide to the defense the following, at least 30 days before hearing his Motion to Suppress Written or Oral Statements of Defendant:

1. A true, complete, and accurate copy of all documents containing written statements of the defendant;

2. The substance of all oral statements allegedly made by the defendant that the state intends to offer at trial, as well as the persons to whom the statements were allegedly made, and the time and place they were allegedly made;

3. A true, complete, and accurate copy of all recordings of defendant that the state contends are admissible under article 38.22 of the Texas Code of Criminal Procedure.

Respectfully submitted:

_____

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of Motion For Notice of Intent To Offer Statements Allegedly Made by Defendant has been delivered to the Bexar County District Attorney's Office; Justice Center; 300 Dolorosa, San Antonio, Texas on March 10, 2014.

_____

MARK STEVENS

ORDER

On this the _____ day of _____, 2013, came on to be considered Defendant's Motion For Notice Of Intent To Offer Statements Allegedly Made By Defendant, and said motion is

(GRANTED) (DENIED)

_____
JUDGE PRESIDING