CAUSE NO. 0000

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

MOTION TO SET ASIDE INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves to quash the indictment in this case for the following reasons:

I.
The Indictment

The indictment in this case alleges, in pertinent part, that Mr. Smith "did . . . intentionally or knowingly deliver or offer to deliver to Mike Jones a dangerous drug, specifically 25B-NBOMe . . . ."

II.
The Statutory Provisions At Issue

- "A person commits an offense if the person delivers or offers to deliver a dangerous drug." TEX. HEALTH & SAFETY CODE §483.042(a).

- "'Dangerous drug' means a device or a drug that is unsafe for self-medication and that is not included in Schedules I through V, or Penalty Groups 1 through 4 of Chapter 481 (Texas Controlled Substances Act). The term includes a device or a drug that bears or is required to bear the legend:

  (A) 'Caution: federal law prohibits dispensing without prescription' or 'Rx only' or another legend that complies with federal law; or

  (B) 'Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian.'" TEX. HEALTH & SAFETY CODE §483.001(2).

- "'Deliver' means to sell, dispense, give away, or supply in any other manner." TEX. HEALTH & SAFETY CODE § 483.001(3).

- "'Drug' means a substance, other than a device or a component, part, or accessory of a device, that is:

  (A) recognized as a drug in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, official National Formulary, or a supplement to either pharmacopoeia or the formulary;

  (B) intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or animals;

  (C) intended to affect the structure or function of the body of man or animals but is not food; or

  (D) intended for use as a component of a substance described by Paragraph (A), (B), or (C). TEX. HEALTH & SAFETY CODE § 481.002(16).

III.
The Indictment Does Not Allege Why 25B-NBOMe Is A Dangerous Drug

The indictment alleges in a wholly conclusory fashion that Mr. Smith delivered or offered to deliver "a dangerous drug, specifically 25B-NBOMe." But because 25B-NBOMe is not specifically listed as a dangerous drug in the Health and Safety Code, the indictment must allege why this substance, whatever it is, is a dangerous drug under §483.001(a). Is it "unsafe for self-medication" and not listed in the Schedules or Penalty Groups of the Controlled Substances Act? Does it bear or is it required to bear a legend? Because the indictment in this case does not allege these matters, it does not allege an offense. *Charles v. State*, 582 S.W. 2d 836, 837 (Tex. Crim. App. 1979)(indictment alleging possession of a "dangerous drug, namely sinequam, a drug prohibited to be

dispensed without a prescription" was defective because it did not allege why this was a dangerous drug).

The indictment in this case does not state everything which is necessary to be proved, in violation of TEX. CODE CRIM. PROC. art. 21.03. Additionally, absent this information, 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. art. 21.11and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, §§ 10 and 19 of the Texas Constitution. And 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. 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. The indictment must be quashed.

IV.
No Offense Is Stated

The substance named in the indictment, "25B-NBOMe" did not bear, and was not required to bear, the legends required by subsections A or B of TEX. HEALTH & SAFETY CODE §483.001(2) on the date of the delivery or offer to deliver alleged in this

indictment. The indictment, must therefore be quashed because it failed to allege an offense under Texas law. *Benoit v. State*, 561 S.W. 2d 810, 816 (Tex. Crim. App. 1977). "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). *see also* TEX. CODE CRIM. PROC. ANN. arts. 21.01 & 27.08 (1); TEX. PENAL CODE ANN. § 1.03(a); U.S. CONST. AMEND. XIV; TEX. CONST. ART. I, §§ 10, 13 & 19.

V.
Multiple Statutory Definitions Of Dangerous Drugs

The definition of "dangerous drug" found in § 483.001(2) has multiple components. Specifically, a dangerous drug may be either a "device," or a "drug that is unsafe for self-medication," that is not included in enumerated schedules and penalty groups, and that must either bear or be required to bear certain legends. The indictment here is defective because it does not allege which of the various statutory definitions the state will rely on to prosecute Mr. Smith. *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"); *Geter v. State*, 779 S.W.2d 403, 406 (Tex. Crim. App. 1989)((theft indictment for failure to allege which of the multiple statutory definitions of "without effective consent" under TEX. PENAL CODE § 31.01(4) the state intended to rely on); *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).

Absent such specification, Mr. Smith has no notice of what he is charged with, no ability to prepare an adequate defense, and no ability to plead any judgment rendered in this case as a bar to subsequent prosecutions for the same conduct, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the Due Course of Law provision of Article I, §§ 13 and 19 of the Texas Constitution, as well as articles 21.04 and 21.11 of the Texas Code of Criminal Procedure.

VI.
Multiple Statutory Definitions of Drugs

The Texas Health and Safety Code provides multiple definitions of "drugs." *See* TEX. HEALTH & SAFETY CODE § 481.002(16). The indictment here is defective because it does not allege which of the various statutory definitions the state will rely on to prosecute Mr. Smith. *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");

Geter v. State, 779 S.W.2d 403, 406 (Tex. Crim. App. 1989)((theft indictment for failure to allege which of the multiple statutory definitions of "deception" under TEX. PENAL CODE § 31.01(1) the state intended to rely on); *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).

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VII.
Multiple Statutory Definitions of Deliver

The indictment is defective and must be quashed because it alleges a delivery or offer to deliver, but does not state whether the delivery in question was by actual or constructive transfer. *Ferguson v. State*, 622 S.W.2d 846, 851 (Tex. Crim. App. 1980)(indictment for delivery of a controlled substance must specify which of the three

different statutory types of delivery it intended to rely on).

VIII.
Manner And Means

The indictment is defective and must be quashed because it alleges that Mr. Smith delivered or offered to deliver a dangerous drug, but does not allege the manner and means of this purported delivery or offer to deliver. *See 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).

IX.
Unconstitutional Vagueness

1. *The three tests of unconstitutional vagueness.*

The statute underlying this prosecution here is unconstitutionally vague both facially, and as applied to Mr. Smith, in violation of the Due Process Of Law 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. In *Long v. State*, 931 S.W. 2d 285 (Tex. Crim. App. 1996), the Texas Court of Criminal Appeals, in striking down the Texas stalking law, utilized a three part test:

> It is well-established that criminal laws must be sufficiently clear in at least three respects. First, a person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited. Second, the law must establish determinate guidelines for law enforcement. Finally, where First Amendment freedoms are implicated, the law must be sufficiently definite to avoid chilling protected expression.

Id. at 287(citations omitted); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). Establishment of any one of these three tests will defeat the regulation. *See Adley v. State*, 718 S.W. 2d 682, 683, 685 (Tex. Crim. App. 1985). Sections 483.001(2) and 483.042(a) violate all three tests.

2. ***The dangerous drug statutes do not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited***.

What is "a device or a drug that is unsafe for self-medication"? What devices or drugs bear or are required to bear the legends enumerated in subsections A and B of § 481.001? How is a person of ordinary intelligence without medical training to know"? This language is at once so vague and so broad as to be useless in providing a person of ordinary intelligence a reasonable opportunity to know what conduct he must avoid. *See Cotton v. State*, 686 S.W. 2d 140, 142-43 (Tex. Crim. App. 1985)(a statute which made it illegal to sell beer to persons showing evidence of intoxication was declared

unconstitutional where court was unable to answer questions about meaning of statute "except with a guess"); *see also City of Akron v. Akron Center for Reproductive Freedom*, 462 U.S. 416, 451 (1983)("the word 'humane' was impermissibly vague as a definition of conduct subject to criminal prosecution"); *Smith v. Goguen*, 415 U.S. 566, 573 (1974)(finding vague a statute which made it illegal to treat a flag contemptuously, because "what is contemptuous to one man may be a work of art to another"); *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971)(statute prohibiting persons on sidewalk from annoying passers-by was vague, because "[c]onduct that annoys some people does not annoy others."); *May v. State*, 765 S.W. 2d 438, 440 (Tex. Crim. App. 1989)(the inherent vagueness of the telephone harassment statute, in attempting to define what annoys and alarms people, and its failure to specify whose sensitivities are relevant, causes it to be unconstitutionally vague); *Ex parte Chernosky*, 217 S.W. 2d 673, 674 (Tex. Crim. App. 1949)(words in reckless driving statute, "without due caution or circumspection" are unconstitutionally vague and indefinite).

3. *The dangerous drug statutes do not limit police discretion.*

A rule is also void for vagueness when it "encourages arbitrary and erratic arrests and convictions." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). If arbitrary and discriminatory enforcement is to be avoided, laws must provide explicit guidelines for those who apply them. *Grayned v. City of Rockford*, 408 U.S. at 107. According to § 483.001(2) & (3), a person could be charged with a felony offense for

selling, dispensing, giving away, or supplying in any manner "a device or a drug that is unsafe for self-medication" if that thing is not included in schedules or penalty groups in the controlled substances act and if it bears or is required to bear certain legends. This statute gives law enforcement wide reign. "A criminal statute must itself be precisely drawn so that it eliminates the risk of capricious application rather than fosters it as the present statute does." *Cotton v. State*, 686 S.W. 2d at 143; *see also Kolender v. Lawson*, 461 U.S. 352, 358 (1983)(condemning "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections"); *Adley v. State*, 718 S.W. 2d at 683 (Tex. Crim. App. 1985)(striking down gambling statute because "legislature has failed to sufficiently define the conduct of 'receiving a bet' so as to limit law enforcement and prosecutorial discretion in prosecuting only the professional, exploitive gambler"); *Baker v. State*, 478 S.W. 2d 445, 448 (Tex. Crim. App. 1972)(statutes defining vagrant as being a person who "has no visible means of support" or who has "no property to support" him gives no standard to guide officers charged with enforcing this statute as to what is meant by these terms, thus placing unfettered discretion in the hands of the police); *Meisner v. State*, 907 S.W. 2d 664, 669 (Tex. App.--Waco 1995, no pet.)(traffic ordinance unconstitutionally vague because, among other things, "the district attorney was able to construe the ordinance to fit the offense").

4. *The dangerous drug statutes are subject to greater scrutiny because of penal sanctions.*

Because the statutes at issue here impose felony penal sanctions, they are subject to a greater degree of scrutiny by a reviewing court, particularly where complaints are made about vagueness and overbreadth. In *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329 (1997), the Court was required to determine the constitutionally of the Communications Decency Act of 1996, known as the CDA:

> The vagueness of the CDA is a matter of special concern for two reasons. First, the CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech. Second, the CDA is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.

Id. at 2344(citations omitted). This is also true about §483.001 and 483.042.

X.
Inadequate Scienter

The indictment alleges that Mr. Smith intentionally or knowingly delivered or offered to deliver a dangerous drug, but it does not allege that he knew the thing delivered was a dangerous drug, or contraband of any sort. To prove one guilty of unlawfully delivering a dangerous drug, the state ought to prove, among other things, that the alleged deliverer knew that the matter delivered was contraband. *Cf. Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005)("To prove unlawful possession of a controlled substance, the State must prove that . . . the accused knew the matter possessed was

contraband"). Since this is a matter that will have to be proven at trial, the indictment should have to allege it. TEX. CODE CRIM. PROC. art. 21.03("Everything should be stated in an indictment which is necessary to be proved.) This indictment should be quashed because it does not allege that Mr. Smith knew that "25B-NBOMe" was contraband and illegal to deliver or offer to deliver. Alternatively, if the Court does not require the state to allege *scienter* properly in the indictment, it should clearly and expressly instruct the jury that Mr. Smith cannot be convicted unless he intentionally or knowingly delivered the thing, and that he did so with knowledge that delivery of the thing was prohibited by Texas law. *Cf. United States v. X-Citement Video, Inc.*, 513 U.S. 64, 79 (1994)(prosecution for knowingly shipping something that visually depicts minors engaged in sexual activity also requires that the defendant knew the persons depicted were minors).

WHEREFORE, PREMISES CONSIDERED, the Defendant moves the Court to set aside the indictment and dismiss the prosecution in this cause.

Respectfully submitted:

MARK STEVENS
310 S. St. Mary's
Tower Life Building, Suite 1920
San Antonio, Texas 78205
(512) 226-1433
State Bar No. 19184200

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Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of this Motion has been delivered to the District Attorney's Office's, Gillespie County, Texas, on this the 6th day of May, 2018.

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Mark Stevens

CAUSE NO. 0000

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

ORDER

On this day came for consideration Defendant's Motion To Quash Indictment. After consideration of same, this Court is of the opinion that said Motion is hereby

(GRANTED) (DENIED)

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JUDGE PRESIDING