

NO. 000000

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

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

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

I.

The information claims in conclusory form that Mr. Smith owns “altered gambling equipment,” but does not say how the equipment was allegedly altered. There are untold ways in which a piece of equipment could be altered. The Texas Penal Code defines the phrase to mean “any contrivance that has been altered in some manner, including, but not limited to, shaved dice, loaded dice, magnetic dice, mirror rings, electronic sensors, shaved cards, marked cards, and any other equipment altered or designed to enhance the actor’s chances of winning.” TEX. PENAL CODE ANN. § 47.01(5). The state should be required to specify, on the face of the information, what sort of alteration they intend to prove in this case. 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.

## II.

The information claims in conclusory form that the equipment in question was “illegal eight-liner machines,” but does not say how or in what manner, or by virtue of what statute or law the machines are “illegal.” Eight-liner machines are not necessarily illegal in Texas, but are only so under certain circumstances. In this case the state will have to prove how these machines were illegal, and, for that reason, it should have to allege this in the information. *See*, in violation of TEX. CODE CRIM. PROC. ANN. art. 21.03 (information must state “[e]verything . . . which is necessary to be proved”). Further, absent such allegation, 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.

## III.

The *complaint* in this cases alleges that Mr. Smith committed the offense of

“POSS GAMBL PARA-DEVICE.” Although it is not clear exactly what this complaint purports to charge, it may be that the state intended to charge possession of gambling paraphernalia, as provided by TEX. PENAL CODE ANN. § 47.06(c). The *information*, though, appears to attempt to allege the different offense of owning altered gambling equipment, provided by TEX. PENAL CODE ANN. § 47.06(c). This material variance between the complaint and the information violates TEX. CODE CRIM. PROC. ANN. art. 21.22, and requires that the information be set aside. *Cf. Holland v. State*, 623 S.W. 2d 651, (Tex. Crim. App. 1981)(variance “question here should have been removed from the case upon the urging of the motion to set aside the information by re-filing the complaint and information without a variance”).

#### IV.

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.

WHEREFORE, premises considered, the defendant prays that the Court set aside the information in the above-numbered and entitled cause.

Respectfully submitted:

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Attorney for Defendant

### **CERTIFICATE OF SERVICE**

I certify that a copy of defendant's Motion To Set Aside The Information has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 14th day of February, 2018.

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MARK STEVENS

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**ORDER**

On this the \_\_\_\_\_ day of \_\_\_\_\_, 2018, came on to be considered Defendant's Motion to Set Aside the Information, and said Motion is hereby

(GRANTED) (DENIED)

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JUDGE PRESIDING