

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR  
BROWARD COUNTY, FLORIDA

CASE NO.: 14013288CF10A  
JUDGE: MERRIGAN

STATE OF FLORIDA,

v.

MICHAEL OSBURN,

Defendant.

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**MOTION TO DISMISS**

COMES NOW, the Defendant, MICHAEL OSBURN (“OSBURN”), by and through undersigned counsel, pursuant to Florida Rule of Criminal Procedure 3.190(c)(4), moves this Honorable to dismiss Count I of the Information in the above-styled cause, and as grounds in support thereof alleges that there are no material facts in dispute and the undisputed facts do not establish a *prima facie* case of guilt against the Defendant for Writing Threats to Kill.

**UNDISPUTED FACTS**

1. The State’s Information charges that OSBURN, on the 1<sup>st</sup> day of October, A.D. 2014, in the County and State aforesaid, pursuant to one scheme or course of conduct, did unlawfully write or compose and send or procure the sending of a letter, inscribed communication, or electronic communication containing a threat to kill or to do bodily injury to STEVEN SMITH (“SMITH”), the person to whom said letter, inscribed communication or electronic communication was sent or to any member of the family of said person, contrary to F.S. § 836.10, (L6).

2. According to the Probable Cause Affidavit, “[a]ll of these incidents have culminated in to [sic] texts sent by the Def. to the victim on 10/1/2014. The texts stated the following: ‘I want

*porky pigs* name, the fat one with the mole on his cheek [...] When I find *them* they will cease to breath. I know where you live... somebody's watching you. Pay your insurance ... not too bright pretty boy.” “In the name if [sic] self defense... lettuce pray.”

3. The full conversation that occurred on October 1, 2014, which is attached forthwith as (“Exhibit A”), shows that SMITH received the following text message on October 1, 2014 at 10:14PM: “I want *porky pigs name, the fat one with the mole on his cheek, and I want grandpas name ... porky pugs [sic] butt buddy* from 1243 NE 12<sup>th</sup> Ave. *When I find them they will cease to breath.* I know where *you* live ... somebody's watching you. *You're* a stupid young punk. Pay your insurance ... not too bright pretty boy.”

5. The State does not allege that OSBURN sent any other messages to SMITH on October 1, 2014 that would constitute a written threat to kill.

6. Neither of the individuals referred to as “porky pig” and “grandpa” are members of SMITH's family. It is uncertain whether these two individuals are actual or fictitious law enforcement officers.

7. SMITH is not overweight and he does not have a mole on his cheek.

### LEGAL ARGUMENT

1. “[T]he question at the motion to dismiss stage is not whether the State can obtain a conviction or even if the State can survive a motion for judgment of acquittal. Instead, the question is whether there are disputed facts and whether the undisputed facts establish a *prima facie* case.” *State v. Gay*, 960 So.2d 864, 869 (Fla. 2d DCA 2007). When considering a defendant's rule 3.190 (c)(4) motion to dismiss, all questions and inferences from the facts must be resolved in favor of the State. *Boler v. State*, 678 So.2d 319, 323 (Fla. 1996).

2. Florida Statute, § 836.10 states that “[a]ny person who writes or composes and also sends or procures the sending of any letter, inscribed communication, or electronic communication, whether such letter or communication be signed or anonymous, to any person, containing a threat to kill or to do bodily injury to the person to whom such letter or communication is sent, or a threat to kill or do bodily injury to any member of the family of the person to whom such letter or communication is sent commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.”

3. A violation of the statute prohibiting written threats to kill or do bodily injury occurs when: (1) a person writes or composes a threat to kill or do bodily injury; (2) a person sends or procures the sending of that communication to another person; and (3) the threat is to the recipient of the communication or a member of his or her family. *State v. Wise*, 664 So. 2d 1028 (Fla. 2d DCA 1995).

4. In the criminal threat statute, “***the threat is to the recipient of the communication or a member of his family.***” [emphasis added] *Suggs v State*, 72 So.3d 145, 147 (Fla. 4th DCA 2011); (quoting *State v. Wise*, 664 So.2d 1028, 1030 (Fla. 2d DCA 1995)). Thus *Dudley v. State*, implies that a threat must be communicated to the person threatened for criminal liability to attach under the criminal threat statute. 634 So.2d. 1094, 194 (Fla. 2d DCA 1994).

5. Assuming that a reasonable person would interpret “when I find them they will cease to breath” as a written threat to kill, it is clear from the entire message that the threat was directed to “porky pig” and “grandpa,” not SMITH.

6. Applying the principle in *Dudley* that the threat must be communicated to the person threatened for criminal liability to attach under F.S., § 836.10, it is clear in the instant case that SMITH was never the object of the threat. While SMITH received what could be interpreted as a



threat, according to the plain meaning of the message it was directed to “porky pig” and “grandpa,” not SMITH. The writer of the threat purposely distinguished between “them” and “they” when referring to “porky pig” and “grandpa,” and “you” and “you’re” when referencing SMITH.

7. Furthermore, SMITH is not overweight, elderly, and he does not have a mole on his cheek. Unequivocally, the individuals referred to as “porky pig” and “grandpa” are not members of SMITH’s family.

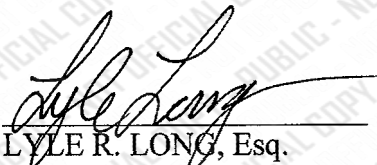
8. In sum, SMITH was never the object of the threat in the message where the words “cease to breathe” were used, and therefore the State has not established a *prima facie* case of F.S., § 836.10.

### CONCLUSION

WHEREFORE, based on the foregoing reasons, the Defendant MICHAEL OSBURN, prays that this Honorable Court Dismiss Count I of the Information.

Pursuant to Florida Statute 92.525(2), under penalties of perjury, I declare that I have read the foregoing and that the facts stated are true.

Respectfully submitted on this 26<sup>th</sup> day of August, 2015.



LYLE R. LONG, Esq.  
Fla. Bar No.: 101740  
Office for the Public Defender  
201 SOUTHEAST 6TH STREET, SUITE 3872  
FORT LAUDERDALE, FL 33301  
Telephone: (954) 831-8865

  
MICHAEL OSBURN

# EXHIBIT “A”



20140919\_114354.jpeg  
393K

Deputy ██████ <+██████████@unknown.email>  
To: mgosburn@gmail.com

Fri, Sep 19, 2014 at 12:13 PM

Who dis??

mgosburn@gmail.com <mgosburn@gmail.com>  
To: Deputy ██████ <+██████████@unknown.email>

Fri, Sep 19, 2014 at 1:04 PM

Www.threemuchinc.com

Deputy ██████ <+██████████@unknown.email>  
To: mgosburn@gmail.com

Fri, Sep 19, 2014 at 1:21 PM

Yo dog, I keep getting text from u. I don't know who u r. U need to quit contacting me

Deputy ██████ <+19543260291@unknown.email>  
To: mgosburn@gmail.com

Fri, Sep 19, 2014 at 1:22 PM

Whoever gave u dis number is wrong

mgosburn@gmail.com <mgosburn@gmail.com>  
To: Deputy ██████ <+██████████@unknown.email>

Wed, Oct 1, 2014 at 7:07 PM

You might have remembered if you hadn't been on the phone the whole time, precious

mgosburn@gmail.com <mgosburn@gmail.com>  
To: Deputy ██████ <+██████████@unknown.email>

Wed, Oct 1, 2014 at 10:14 PM

I want porky pigs name, the fat one with the mole on his cheek, and I want grandpas name...porky pugs butt buddy from 1243 NE 12th Ave. When I find them they will cease to breathe. I know where you live...somebody's watching you. You're a stupid young punk. Pay your insurance...not too bright pretty boy

mgosburn@gmail.com <mgosburn@gmail.com>  
To: Deputy ██████ <+██████████@unknown.email>

Wed, Oct 1, 2014 at 10:15 PM

In the name if self defense...luttuce pray

Deputy ██████ <+██████████@unknown.email>  
To: mgosburn@gmail.com

Wed, Oct 1, 2014 at 10:15 PM

Who is this!



Deputy [REDACTED]@unknown.email>

To: mgosburn@gmail.com

Wed, Oct 1, 2014 at 10:15 PM

Where do I live?

mgosburn@gmail.com <mgosburn@gmail.com>

To: Deputy [REDACTED]@unknown.email>

Wed, Oct 1, 2014 at 10:15 PM

Boca

Deputy [REDACTED]@unknown.email>

To: mgosburn@gmail.com

Wed, Oct 1, 2014 at 10:17 PM

Wrong number

mgosburn@gmail.com <mgosburn@gmail.com>

To: Deputy [REDACTED]@unknown.email>

Wed, Oct 1, 2014 at 10:17 PM

Tattoo, left arm

mgosburn@gmail.com <mgosburn@gmail.com>

To: Deputy [REDACTED]@unknown.email>

Wed, Oct 1, 2014 at 10:19 PM

You're hotter than Blocker...Gary that is...

mgosburn@gmail.com <mgosburn@gmail.com>

To: Deputy [REDACTED]@unknown.email>

Wed, Oct 1, 2014 at 10:19 PM

Wink wink sweetness

mgosburn@gmail.com <mgosburn@gmail.com>

To: Deputy [REDACTED]@unknown.email>

Wed, Oct 1, 2014 at 10:19 PM

Didn't yo mama tell you to look before you leap?

mgosburn@gmail.com <mgosburn@gmail.com>

To: Deputy [REDACTED]@unknown.email>

Wed, Oct 1, 2014 at 10:21 PM

My mug shot



20140426\_180759.jpg  
589K

Deputy [REDACTED]@unknown.email>

To: mgosburn@gmail.com

Wed, Oct 1, 2014 at 10:26 PM

Don't know u and I've told u not to text me numerous times

**mgosburn@gmail.com** <mgosburn@gmail.com>  
To: Deputy [REDACTED] @unknown.email>

Wed, Oct 1, 2014 at 10:34 PM

You're a gay rapist