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If you have questions or comments, please contact Jim Schenkel at 415-553-4000, or email info@quojure.com.

Attorney for Defendant
JOHN SMITH

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF REDWOOD

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

JOHN SMITH,

Defendant.

_____ /

Case No. _____

NOTICE OF MOTION AND MOTION TO SUPPRESS EVIDENCE;
MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JOHN SMITH

Date:
Time:
Dept:

TO THE DISTRICT ATTORNEY OF THE COUNTY OF REDWOOD:

TAKE NOTE that on June 28, 2___, at ___ a.m., in Department ___ of the above court, located at 15 State Street, Solanum, California, defendant John Smith will move under Penal Code § 1538.5 to suppress all evidence resulting from his detention and arrest on December 8, 2___, specifically but not limited to 8.35 grams of methamphetamine. Defendant makes this motion on the grounds that the officers had neither a warrant nor probable cause for his arrest and seizure. He bases the motion on this notice, the attached memorandum of points and authorities and declaration of John Smith, the entire records and proceedings on file in this action, and any evidence produced at the hearing on the motion.

1 Dated:
2

3 Attorney for Defendant John Smith
4

5 **MEMORANDUM OF POINTS AND AUTHORITIES**
6

7 The police did not have probable cause to believe that defendant John Smith had
8 made a threat that placed anyone in immediate and sustained fear. As a result, they had no
9 probable cause for his arrest, and the resulting search violated his Fourth Amendment
10 rights against unreasonable search and seizures.

11 **FACTS**
12

13 Solanum police arrested defendant John Smith on December 8, 2___, without a
14 warrant. According to the police report produced in discovery, Joseph Green, a manager
15 at defendant's employer, had reported that morning that Smith had threatened to kill his
16 co-employees. Smith had made the threat the day before when Green sent him home.
17 Green was the only person present when Smith made the statement.

18 The police stopped Smith's car when he left his home for work. Smith told them
19 that he had returned late from lunch the day before so that he could pick up his sick
20 daughter from school; when he arrived at work Green told him to leave the premises but to
21 return the following morning at 8:00. He denied saying anything to Green.

22 The police handcuffed Smith and searched his vehicle but found no weapons. They
23 told him he was under arrest and searched him incident to that arrest. In a jacket pocket
24 they found a baggy of suspected methamphetamine.
25
26
27

1 **ARGUMENT**

2 **1. The police had no probable cause to arrest Smith.**

3 The Fourth Amendment to the United States Constitution, as incorporated in the
4 Fourteenth Amendment, protects a person from the state’s unreasonable searches and
5 seizures. *People v. Camacho* (2000) 23 Cal.4th 824, 830. On motion, the court shall
6 suppress evidence the People obtained as a result of a search or seizure on the grounds that
7 the search or seizure without a warrant was unreasonable. Pen. Code § 1538.5(a)(1)(A).
8 A warrantless search or seizure is presumptively unreasonable, so that the prosecution has
9 the burden of proving some justification for it. *People v. Williams* (1999) 20 Cal.4th 119,
10 127. On a motion under § 1538.5, a defendant has the burden of showing that a search or
11 seizure was without a warrant and that it was unreasonable under the circumstances.
12 *Williams*, 20 Cal.4th at 129. The defendant meets the initial burden of production by
13 showing that the police performed a warrantless seizure. *Id.* at 130.

14 A peace officer who has reasonable cause to believe that a person has committed a
15 felony may arrest without a warrant. *People v. Turner* (1994) 8 Cal.4th 137, 185, cert.
16 den. (1995) 514 U.S. 1068. An officer who knows facts that would lead a person of
17 ordinary care and prudence to honestly and strongly suspect that the person arrested is
18 guilty of a crime has cause to arrest. *Ibid.* The officer must know facts that would lead
19 him to believe that the person had violated a particular, existing law; that the officer
20 believes that the defendant may have violated some law is not enough. See *In re Justin K.*
21 (2002) 98 Cal.App. 4th 695, 700. If the facts as the officer knows them do not constitute a
22 violation of the law, the officer does not have reasonable grounds to believe that the
23 defendant committed a crime. *Ibid.*

24 The officer had insufficient grounds to believe that Smith had made a criminal
25 threat. See *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137-1138. Under Penal Code
26 § 422, a person commits a wobbler offense if he willfully threatens to commit a crime that
27

1 will result in death or great bodily injury to another person, with the specific
2 intent that the statement . . . is to be taken as a threat, . . . which, on its face
3 and under the circumstances in which it is made, is so unequivocal,
4 unconditional, immediate, and specific as to convey to the person threatened,
5 a gravity of purpose and an immediate prospect of execution of the threat, and
6 thereby causes that person reasonably to be in sustained fear for his or her
7 own safety or for his or her immediate family's safety

8 The police had insufficient reason to believe that Smith intended that Green take his
9 statement as a threat, that it showed a gravity of purpose or an immediate prospect of
10 execution, or that it put anyone in sustained fear. According to the police report, Green
11 did not believe that Smith directed this statement towards him. Smith violated this statute
12 only if he intended that Green communicate the statement to the employees whom Smith
13 allegedly threatened to harm. *In re David L.* (1991) 234 Cal.App.3d 1655, 1659. Smith's
14 reason to know that Green would do so is not enough. See *In re Ryan D.* (2002) 100
15 Cal.App.4th 854, 864-865. In addition, Green must have actually communicated the
16 threat to those employees. *People v. Felix* (2001) 92 Cal.App.4th 905, 913. Nothing
17 shows either that Smith had any such intention or that Green did communicate his
18 statement to them.

19 Both Green's and Smith's conduct tend to show that Smith did not intend a threat.
20 If Green believed that Smith meant his threat to be taken seriously, he would not have
21 waited until the following morning to call the police. See *In re Ryan D.*, 100 Cal.App.4th
22 at 864-865; *In re Ricky T.*, 87 Cal.App.4th at 1138. If Smith had actually meant to put his
23 coworkers in fear for their lives, he would have returned to his place of employment only
24 if accompanied by a gun or an apology. But when the police stopped him, they found no
25 weapon, and he denied making any such threat. Even though a violation of the statute
26 requires only an intention to threaten, not an intention to carry out the threat, Smith's later
27 actions help show that he never intended to threaten anyone. See *People v. Solis* (2001) 90
28 Cal.App.4th 1002, 1014.

Even if he did intend a threat, Smith would have violated § 422 only if his

1 statement caused the victim “sustained fear.” *People v. Solis*, 90 Cal.App.4th at 1024.
2 Green’s conduct shows an absence of sustained fear. Instead, he waited until the
3 following morning to report the matter to the police.

4 Nor could the police have believed that Smith’s statement was “so unequivocal,
5 unconditional, immediate, and specific as to convey to the person threatened, a gravity of
6 purpose and an immediate prospect of execution of the threat” as § 422 requires. The use
7 of *so* suggests that the statute does not mandate complete unequivocation, uncondition-
8 ality, immediacy, and specificity; instead, the threat and the surrounding circumstances
9 must reflect them enough to convey a gravity of purpose and the immediate prospect of
10 execution. *In re Ricky T.*, 87 Cal.App.4th at 1137. A threat may violate the statute even
11 though it does not specify a precise time or manner of execution. *People v. Gaut* (2002)
12 95 Cal.App.4th 1425, 1432. But whether conditional, vague, or ambiguous language
13 constitutes a threat depends on all the surrounding circumstances, including the
14 defendant’s mannerisms, affect, and actions. *People v. Solis*, 90 Cal.App.4th at 1013. The
15 police had no knowledge of any surrounding circumstances that would give a “gravity of
16 purpose” to the vague statement—bordering on ridiculous—that Smith would kill
17 everyone.

18 The police had no reason to believe that Smith’s statement was anything but a mere
19 angry utterance. See *In re Ryan D.*, 100 Cal.App.4th at 861. However violent, it did not
20 violate § 422. *Ibid.* The statute does not “punish emotional outbursts[;] it targets only
21 those who try to instill fear in others.” *Ibid.* (internal quotation omitted).

22 The courts have held that a violent statement did not, as a matter of law, fall within
23 § 422. See *In re George T.* (2004) 33 Cal.4th 620, 637 (student’s violent poem was not a
24 criminal threat). For example, in *Ricky T.*, 87 Cal.App.4th 1132, a teacher accidentally hit
25 the minor opening a classroom door that had locked while the minor was using the
26 bathroom. The minor cursed the teacher and told him either, “I’m going to get you” or
27

1 “I’m going to kick your ass.” The court found neither an unlawful threat: despite the
2 minor’s language, the surrounding circumstances showed a lack of immediacy or gravity
3 of purpose. *Id.* at 1137. As here, no one called the police until the next day. However
4 intemperate, rude, and insolent the minor’s remarks, nothing, such as a display of physical
5 violence, showed any gravity of purpose. *Ibid.* The facially ambiguous statement, “I’m
6 going to get you,” was “no more than a vague threat of retaliation without prospect of
7 execution.” *Ibid.*

8 *In re Ryan D.*, 100 Cal.App.4th 854, held that, as a matter of law, no evidence
9 showed that the minor intended to put anyone in fear. He had submitted an art assignment
10 showing a bullet entering the back of the head of the officer who had earlier arrested him
11 for marijuana possession. The court pointed out that the People had not shown that he
12 intended to put the officer in fear; one intending to make a threat to a police officer would
13 not do so by communicating it through a teacher. *Id.* at 863-864. Additionally, no
14 surrounding circumstances showed that the minor actually would accomplish the result he
15 showed in the picture; thus there was no evidence of a gravity of purpose. *Id.* at 864.
16 Similarly, in this case, nothing showed that Smith meant his vague—albeit angry—
17 statement that he would kill the employees as a threat, or that anyone took it as one.

18
19 **2. Because the police had no probable cause to arrest Smith, they had no**
20 **grounds to search him.**

21 If the police had probable cause to arrest Smith, they could have made a
22 substantially contemporaneous search of his person. See *In re Lennies H.* (2005) 126
23 Cal.App.4th 1232, 1239-1240. But they had no probable cause to arrest Smith for
24 violating § 422 or any other law. As a result, they had no grounds on which to search him,
25 and this court should suppress the evidence they found.

1 **CONCLUSION**

2 Probable cause to arrest Smith under Penal Code § 422 required more than the
3 vague statement that he would kill his co-employees. It required that the police know facts
4 showing that he intended that Green would communicate the threat to them to put them in
5 sustained fear. The police must know facts showing that the threat had a gravity of
6 purpose and an immediate prospect of execution. The police knew no facts showing a real
7 threat to kill anyone. As a result, their arrest and incidental search of Smith was
8 unreasonable, and this court should suppress any evidence found during it.

9

10 Dated:

Respectfully submitted,

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Attorneys for Defendant John Smith

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DECLARATION OF JOHN SMITH

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I, John Smith, declare as follows:

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1. I am the defendant in this action.

19

2. At no time when the police arrested and searched me on December 8, 2___, did

20

they show me a warrant to do either.

21

I declare under penalty of perjury under California law that the foregoing is true

22

and correct.

23

24

Dated:

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26

John Smith

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