RYAN**GARRY**
Criminal **Defense** Attorney

August 18, 2011

The Honorable [redacted]
Judge of the Hennepin County District Court
Hennepin County Government Center, C1721
300 South Sixth Street
Minneapolis, MN 55487

RE: State of Minnesota v. D[redacted] P[redacted] B[redacted]
Case No: 27-CR-11-[redacted]

Dear Your Honor:

On August 19, 2011, at 2:30 p.m., Ms. B[redacted] and the Hennepin County Attorney's Office agreed to argue probable cause on the remaining misdemeanor Obstructing Legal Process charge without testimony. In that the court is familiar with the complaint, this letter is Ms. B[redacted]'s argument requesting that her case be dismissed.

Procedural History

On April 26, 2011, Ms. B[redacted] was charged via criminal complaint with *Accomplice After the Fact to Second Degree Murder*, pursuant to Minnesota Statute 609.495, Subds. 3, 5(2). On June 3, 2011, Ryan Garry, Ms. B[redacted]'s attorney, filed a *Motion to Dismiss* her case pursuant to *State v. Florence*, 239 N.W.2d 892 (Minn. 1976), and a contested omnibus hearing was scheduled for August 15, 2011. On August 11, 2011, the State filed an amended complaint charging Ms. B[redacted] with the additional offenses of felony *Aiding an Offender*, pursuant to Minnesota Statute 609.495, Subd. 1(a) and Subd. 5(2), and misdemeanor *Obstructing Legal Process*, pursuant to Minnesota Statute 609.50, Subd. 1(1) and Subd. 2(3).

On the day of the contested hearing, the State dismissed Counts I and II leaving the remaining charge, Count III, misdemeanor *Obstructing Legal Process*. A second contested omnibus hearing was scheduled for Friday, August 19, 2011. Pursuant to Minn. R. Crim. P. 11.04, subdiv. 1 and *Florence*, Ms. B[redacted] seeks a dismissal because there is insufficient probable cause to believe she committed the crime of misdemeanor *Obstructing Legal Process*.

Probable Cause Motion

D[redacted] B[redacted]'s case has received significant media attention. The allegations in the complaint have caused significant harm to her reputation, her mental well-being, and have terminated her unblemished 42-year career as a nurse practitioner. Ms. B[redacted] has no criminal history.

Ms. B[redacted] has insisted on her innocence since the day she was arrested. Thus, her case is the rare type of criminal case where she seeks to attack the complaint prior to trial and is requesting that the court dismiss the one remaining charge for lack of probable cause. Given all

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of the record evidence, there is not substantial evidence to warrant the case going forward, and it is not fair or reasonable to make Ms. B[redacted] stand trial.

A probable cause motion requires that a judge determine whether it is more probable than not that a crime was committed and that the defendant committed the crime. *State v. Florence*, 239 N.W.2d 892, 896 (Minn. 1976). Pursuant to Rule 11.03 of the Minnesota Rules of Criminal Procedure, a motion for insufficient probable cause may be brought and evidence offered in support or opposition of the motion.

Where it is believed that the record developed by the time of the omnibus hearing fails to demonstrate the existence of probable cause, the defendant is free to move the court for dismissal pursuant to Minn. R. Crim. P. 11.03. *Id.* at 900. Though a probable cause hearing should not be used as a substitute for discovery, a defendant has a legitimate concern to resolve a case lacking in probable cause before trial. *Id.* at 898. In this case, Ms. B[redacted] has a very legitimate concern in resolving this case before trial. The state's accusations have ruined her career, her licensure, her reputation, and many friendships. Ms. B[redacted] would like to put this case behind her and move forward, building back the life that she lost.

This court will have to base its decision upon "substantial evidence that would be admissible at trial" and limited hearsay evidence as described in Minn. R. Crim. P. 18.06, subd. 1. *Id.* at 900. As previously discussed with all parties, Ms. B[redacted] objects to any hearsay evidence presented by the state, especially hearsay evidence that is unreliable. "Substantial evidence" means "evidence adequate to support denial of a motion for a directed verdict of acquittal."[1] *Id.* at 902 n.21. Ultimately, the court must address whether, given all the facts disclosed by the record, it is fair and reasonable to require the defendant to stand trial. *Id.*

The Minnesota Supreme Court in *Florence* did not describe every possible situation that may arise; it did however give examples of what the court believed may commonly occur in regard to testimony at a probable cause hearing. One example given, that is relevant to this case, is that when the defense brings a motion challenging probable cause, it will be granted unless the prosecution submits substantial evidence, admissible at trial, such that this evidence would justify denying a directed verdict of acquittal. *Id.* at 903.

Ms. B[redacted] is charged with one count of misdemeanor *Obstruction of the Legal Process or Arrest*, in violation of Minn. Stat. § 609.50, Subd. 1(1). The complaint alleges that:

> *while attempting to locate T[redacted] B[redacted] officers went to Defendant's home. She refused to speak with them and stated she wanted an attorney. Later that day, officers were able to locate T[redacted] B[redacted] and he was taken into custody.*

[1] Motions for a directed verdict are abolished and motions for judgment of acquittal are used in their place. Minn. R. Crim. P., Rule 26.03, subd. 17(1).

Under the standard set forth in *Florence*, and pursuant to the case law below, it cannot be said that there is substantial evidence in the record that would be admissible at trial to justify denying a motion for judgment of acquittal in this case, and thus it is not fair or reasonable to require Ms. B[redacted] to stand trial for the last remaining charge listed in the complaint.

Minnesota Cases Supporting Dismissal of Obstructing Legal Process

As stated in the statute, to be guilty of obstructing the legal process or arrest, Ms. B[redacted] must have:

> *...intentionally...obstruct[ed], hinder[ed], or prevent[ed] the lawful execution of any legal process, civil or criminal, or apprehension of another on a charge or conviction of a criminal offense.*

Minn. Stat. § 609.50, Subd. 1(1), Subd. 2(3). To prove beyond a reasonable doubt that Ms. B[redacted] obstructed the legal process or arrest, the government must prove (1) that the police were "attempting to lawfully execute legal process," and (2) that Ms. B[redacted] "physically obstructed, hindered, or prevented the execution of the legal process," meaning that the actions Ms. B[redacted] took "substantially frustrat[ed] or hinder[ed] the officer in the performance of the officer's duties." 10A Minn. Prac. Jury Instr. Guides CRIMJIG 24.26 (2010).

In *State v. Tomlin*, the Minnesota Supreme Court affirmed the court of appeals' decision to reverse the defendant's conviction of obstructing the legal process due to insufficient evidence. 622 N.W.2d 546, 549 (Minn. 2001). In *Tomlin*, the defendant (a police officer), his brother-in-law, and a friend were out drinking. *Id.* at 547. The defendant's wife drove him home but his brother-in-law and friend followed in separate cars. *Id.* On the road, the defendant's brother-in-law and friend tried to pass the defendant and his wife; his brother-in-law quickly swerved back into the lane when he saw a pedestrian, but his friend could not do so in time and thus hit the pedestrian. *Id.* All three vehicles stopped. The defendant went to a nearby house, introduced himself as a police officer, and ordered them to call 911 and remain in the house. *Id.* The defendant then went back to the accident, his wife and brother-in-law had fled the scene in vehicles. The defendant told his friend, who was still present at the scene, to leave the scene before the police arrived. *Id.* When the police arrived and throughout interviews, the defendant withheld information, lied, and changed his fabricated story before eventually telling the truth, by which time the blood-alcohol evidence had vanished. *Id.* at 547–48.

The *Tomlin* court, in determining whether that conduct constituted "obstructing legal process" looked carefully at the statute and its previous decisions. *Id.* at 548. The court analyzed Minn. Stat. § 609.50, Subd. 1(1), and 1(2). *See Id., footnote 1* ("the formal complaint and summons later filed by the city attorney alleged that Tomlin violated § 609.50, subd. 1(2). The court of appeals ruled on § 609.50, subd. 1(1). This discrepancy does not affect our analysis because the *Krawsky* decision, on which this case turns, applies to both provisions).

Examining *State v. Krawsky*, the court held that the statutory language "was directed solely at a particular kind of physical act that physically obstructs or interferes with an officer... [where] physically obstructing or interfering...conduct [is that] that 'involves * * * substantially frustrating or hindering the officer in the performance of his duties.'" *Id.* (quoting *Krawsky*, 426

N.W.2d 875, 877 (Minn. 1988)); *see also State v. Ihle*, 640 N.W.2d 910, 915 (Minn. 2002); *State v. Yeazizw*, 2003 WL 21789013, No. CX-02-1486, at *3–4 (Minn. Ct. App. Aug. 5, 2003). This statute also includes "fighting words" as conduct that may physically obstruct or interfere with an officer's duties. *Id.*

In using the analysis in *Krawsky* and *Ihle*, the court in *Tomin* concluded that while the defendant's lies and withholding of information delayed the officers in their investigation, his lies did not physically obstruct the officers. *Id.* at 549. Nor did the defendant's conduct rise to the level of "fighting words." *Id. See also State v. Morin*, 736 N.W.2d 691, 698 (Minn. Ct. App. 2007) ("[f]leeing a police officer, although a physical act, is of a significantly different nature from obstructing or resisting a police officer" and is not an obstruction of the legal process);

Other Minnesota cases also show this court that Ms. B[redacted]'s actions are far less egregious than conduct of previous defendants who were *not* determined to have obstructed legal process. *See State v. Richmond*, 602 N.W.2d 647 (Ct. Appeals 1999) *review denied* (defendant's conduct in failing to answer police officer's questions following traffic stop, in failing to immediately produce his driver's license, and in twice removing his hands from squad car after having been ordered by officers to place them there *did not* constitute obstruction of legal process, and thus crack cocaine discovered by officers in defendant's coat pocket was not admissible under search incident to arrest exception to warrant requirement); *see also State v. Patch*, 594 N.W.2d 537 (Ct. Appeals 1999)(defendant's conduct in informing individual for whom police had outstanding arrest warrants that officers were coming to arrest her, assisting individual's flight by keeping lookout for officers, and offering individual ride, did not support conviction for obstructing legal process).

The State is asking this Court to rule that Ms. B[redacted]'s actions of refusing to speak with police constitute probable cause for *Obstructing Legal Process*. The complaint alleges that:

> *while attempting to locate T[redacted] B[redacted], officers went to Defendant's home. She refused to speak with them and stated she wanted an attorney. Later that day, officers were able to locate T[redacted] B[redacted] and he was taken into custody.*

According to all of the record evidence, Ms. B[redacted] simply chose not speak with officers. She said she wanted an attorney—one of the most deeply rooted constitutional rights in the United States. She did not lie or present a fabricated story, much less multiple stories as the defendant in *Tomlin*. She did not flee the police, as in *Morin*, did not disobey police officer orders, as in *Richmond*, and did not assist in Timothy's flight, as in *Patch*. Even if she had done the above acts, the courts have ruled that those acts do not constitute obstructing legal process.

The government has presented absolutely no evidence that Ms. B[redacted] knew her son T[redacted] had committed a crime, or that she was taking action to destroy evidence or hide T[redacted]'s whereabouts. Nor has the government presented any evidence that police were attempting to lawfully execute legal process, as required by the statute. Rather, all of the reports indicate that when Sgt. K[redacted] spoke with Ms. B[redacted] e was not there to arrest T[redacted] because the case was an "ongoing investigation." The same report indicates that Ms. B[redacted] "knew nothing of what happened regarding her son.

The complaint and police reports only indicate that police were seeking to speak with Ms. B[redacted]. The only evidence in the complaint supposedly supporting the misdemeanor charge is that Ms. B[redacted] did not want to talk with police in discussing T[redacted]'s case, which certainly is not a criminal action, but rather arguably one of a loving mother. This case fits snugly within the holding of *Tomlin*: Ms. B[redacted]'s lack of willingness to talk may have been inconvenient for the police, but there was no physical obstruction—moreover, there was no obstruction whatsoever.

Ms. B[redacted] instead of choosing to lie, chose to say nothing at all. This is hardly an obstruction of the legal process; it is simply a choice not to talk, a choice that is well within her rights to make.

CONCLUSION

> *"Any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.*
>
> Justice Robert H. Jackson, *Watts v. Indiana*, 338 U.S. 49, 59 (1949)

It is quite simply not fair or reasonable to make Ms. B[redacted] stand trial in this case, and this Court should grant her motion to dismiss pursuant to *Florence* for lack of probable cause.

Respectfully submitted,

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Dated: August 18, 2011

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Cc: Ms. [redacted] Hennepin County Attorney's Office
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