STATE OF MINNESOTA

COUNTY OF WADENA

DISTRICT COURT

SEVENTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

J. T. F. [redacted]

Defendant.

Court File No.: K7-06-606

NOTICE OF MOTION AND MOTION TO DISMISS FOR LACK OF PROBABLE CAUSE

TO: THE ABOVE-NAMED COURT; THE HONORABLE PRESIDING JUDGE OF DISTRICT COURT; AND MS. K[redacted] L[redacted], WADENA COUNTY ATTORNEY.

PLEASE TAKE NOTICE that at the *Omnibus Hearing* on **November 28, 2006 at 9:30 a.m.**, or as soon as this matter can be heard, [redacted], by and through his attorneys Ryan Garry, [redacted] and [redacted], will move this court for the following relief based upon the United States and Minnesota Constitutions, relevant case law, all of the files, records, and proceedings in this case, witness testimony, any future written briefs or memorandums that the Court may require, and arguments of counsel:

DEFENDANT HEREBY MOVES, pursuant to Minnesota Rules of Criminal Procedure 8.03, 10.01 and 11.03, and any other the applicable Rule of Criminal Procedure, at the omnibus hearing date, in the above-named matter:

1. For an order dismissing Count I, *Criminal Sexual Conduct in the First Degree*, in violation of Minn. Stat. § 609.342, subd. 1(c); ref. Minn. Stat. § 609.342, subd. 2(a), because there is an insufficient showing of probable cause to believe that the defendant committed the above-mentioned offense.

PLEASE TAKE NOTICE that at the present time, Defendant intends to introduce the following evidence at the aforementioned Probable Cause hearing:

1. Complaint.
2. Police Reports.
3. Witness interview Transcripts.

CAPLAN LAW FIRM, P.A.

Dated: November 10, 2006

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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF WADENA | SEVENTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

J. T. F.

Defendant.

Court File No.:

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF PROBABLE CAUSE

TO: THE ABOVE-NAMED COURT: THE HONORABLE PRESIDING JUDGE OF DISTRICT COURT; AND WADENA COUNTY ATTORNEY.

INTRODUCTION

The above matter is set for omnibus hearing on **January 30, 2007 at 3:15 p.m.** On November 10, 2006, Defendant, by and through his attorney, Ryan Garry, filed a Notice of Motion and Motion to Dismiss for Lack of Probable Cause. This memorandum is in support of the above-mentioned motion concerning the matter of probable cause. Depending upon the nature of the hearing on January 30, 2007, Defendant may ask for additional time to provide the Court with a supplemental written brief.

STATEMENT OF THE CASE

Defendant is charged with First Degree Criminal Sexual Conduct, in violation of Minn. Stat. § 609.342, subd. 1(c). The charges arise out of an alleged incident that occurred on or about September 1, 2006, at the White Dog Campground in Wadena County. Detective Mike Lapham of the Anoka County Sheriff's Office was assigned to investigate allegations made by (DOB: 12/21/89). told Detective L[redacted] that on Friday, September 1, 2006, she and other citizen band radio enthusiasts, most of who are known only by their CB

handles, went camping in Nimrod, MN, for Labor Day Weekend. [redacted] said that she traveled to the campground with her sister J[redacted], A[redacted], W[redacted] or "Cowboy", and Defendant, whom [redacted] knew as "Fox." [redacted] said that she had "hung out with" Defendant a "couple times" before this weekend. [redacted] planned to share a tent with J[redacted], Defendant, and S[redacted] F[redacted], another friend staying at the campsite.

Around 2:30 or 3:00 a.m. on Saturday, September 2, after sitting around the campfire consuming alcoholic beverages, [redacted] entered her tent to sleep. [redacted] said that soon after, Defendant entered her tent and lay down next to her, "which . . . I didn't . . . see anything wrong with." [redacted] reported that Defendant had been drinking that night, but she did not believe he was drunk. [redacted] told Detective L[redacted] that she went to sleep for an unspecified amount of time, and woke up to Defendant undoing her pants. [redacted] claimed she told Defendant "no," to which Defendant did not respond. [redacted] said that Defendant pulled her pants and underwear down to her ankles and put his hand over her mouth. Defendant then penetrated [redacted]'s vagina with his tongue. [redacted] estimated that this lasted "probably a couple like two minutes." When Defendant stopped, [redacted] said that she pulled her pants up and rolled over to go back to sleep. Defendant tried kissing [redacted], but she claimed she would not kiss him back and told him to stop.

[redacted] told Detective L[redacted] that Defendant again pushed her pants and underwear to her ankles. [redacted] recalled that Defendant was in his boxers at this point and was not wearing a condom. Defendant then got on top of [redacted] and engaged in vaginal intercourse with her.

[redacted] said she pushed Defendant off and rolled over again. While on her side, [redacted] claimed Defendant penetrated her again from behind "for . . . probably like ten minutes." [redacted] could not recall if Defendant ejaculated.

[redacted] initially told Detective L[redacted] that when Defendant stopped, she pulled her pants up and left the tent to talk to her sister. [redacted] claimed that Defendant also left the tent "still in

his boxers and went to the bathroom." After told her sister about what happened in the tent, said that her sister told Defendant "I'm gonna F'in' kill you. Get over here." Defendant then "got in his truck and left." estimated that it was 3:00 or 3:30 in the morning. According to she had her sister or her sister's friend take her to another campsite, where she spent the rest of the weekend. Later in her statement, howeve aid that she did not go directly to her sister after the incident, but rather "went to sleep" because Defendant was "still up outside the campfire." further stated that she first talked about the incident to "T[redacted]" or [redacted]o, and then spoke to her sister.

According to sister came into tent and told her about the incident. J[redacted] told Detective L[redacted] that appeared pretty upset and was crying. J[redacted] also recalled that as she was getting out the tent, she said "that I was gonna kill him" and Defendant left the campsite. J[redacted] told Detective Lapham that she had stayed in Defendant's tent two weeks before this incident and "never thought that [this incident] would of happened."

Detective L[redacted] also spoke with n. F[redacted] said that he was the only person sitting outside the tent during the time of the alleged incident. F[redacted] told Detective L[redacted] that he did not "hear any rustling around in the tent" while G[redacted] and D[redacted] were inside. After exited the tent, and presumably after the alleged incident occurred, F[redacted] recalled that ame over to him and sat on his lap. According to F[redacted], appeared "kind've [upset] but not really" and told him that Defendant "was inside of her when she woke up." F[redacted] told Detective L[redacted] that others at the campsite confronted Defendant about the incident, but Defendant denied s allegations. At this point, F[redacted] reported, "we all went back to bed," Defendant went back into the tent, and ent into another tent. F[redacted] said that Defendant did not get into his vehicle and drive away. Some time later, F[redacted] recalled,

G[redacted] decided she did not want to be at the campsite any longer "so we went and dropped her off in Nimrod campsite." According to F[redacted], Defendant left the next morning.

Detective L[redacted] next interviewed [redacted] go, also known as "Cowboy." Earlier in the evening, according to W[redacted], [redacted] sat on Defendant's lap "all night long having a fun time, giggling laughing." W[redacted] recalled that at some point in the night, [redacted] ntered the tent, and "maybe 45 minutes to an hour later" Defendant entered as well. W[redacted] told Detective L[redacted] that he assumed [redacted] and Defendant were sleeping. W[redacted] recalled that he was approximately 30 feat away from the tent, and that "no noises what so ever came outta that tent, none." W[redacted] said that Defendant exited the tent and "[s]tarted bullshitting with us more." Shortly after that, W[redacted] said, [redacted] exited the tent and sat on F[redacted]'s lap "laughing and giggling and then all of a sudden this um outta no where this rape comes about." W[redacted] recalled that [redacted] old F[redacted], who told two other friends at the campsite, who in turn told W[redacted] of [redacted] accusations. W[redacted] was incredulous to this news, because he believes Defendant "is like afraid of women almost. I mean unless he gets like really comfortable and knows you a lot he . . . I mean the man wouldn't hurt a mouse." Wargo recalled that Defendant "got completely. . . depressed cause I mean he knew [redacted] accusations were] not true" and, at some point, left the campsite. W[redacted] told Detective L[redacted] that Defendant told him nothing happened, "[n]ot even consensual sex." W[redacted] also told the detective that [redacted] has previously lied about being raped.

ARGUMENT

I. Pursuant to a motion for a Florence hearing, the court should determine whether there is substantial evidence to show that it is more probable than not that Defendant committed the actual crime charged.

Defendant has requested a probable cause hearing pursuant to Rule 11.03 of the Minnesota Rules of Criminal Procedure and State v. Florence, 239 N.W.2d 892 (Minn. 1976). A

probable cause motion requires a judge to determine whether it is more probable than not that a crime was committed and that the defendant committed the crime. Id. at 896. Though a probable cause hearing should not be used as a substitute for discovery, the defendant has a legitimate concern to resolve a case lacking in probable cause before trial. Id. at 898. The defendant has a right to call witnesses to attack probable cause for the crimes alleged in order to "protect a defendant who is unjustly or improperly charged from being compelled to stand trial." Id. at 900. An evidentiary hearing must be held in every case where the defendant produces witnesses, who if believed, would exonerate the defendant. Id. at 902. When the defense brings a motion challenging probable cause, it will be granted unless the prosecution possesses substantial evidence that would be admissible at trial, and that would justify denying a directed verdict of acquittal. State v. Rud, 359 N.W.2d 573, 579 (Minn. 1984) (modifying Florence to clarify prosecution's evidentiary burden at a probable cause hearing).

The standard for the Court to consider is whether "substantial evidence admissible at trial" would be "adequate to bring the charge against the defendant within reasonable probability." Florence, 239 N.W.2d at 902. "Substantial evidence" is defined in Florence as "evidence adequate to support denial of a motion for a directed verdict of acquittal." Id. This standard is codified in Rule 26.03 of the Minnesota Rules of Criminal Procedure, which provides that a court "shall order the entry of a judgment of acquittal of one or more offenses charged in the tab charge, indictment or complaint if the evidence is insufficient to sustain a conviction of such offense or offenses." Minn.R.Crim.Pro. 26.03, subd. 17(1).

II. Criminal sexual conduct in the first degree is the most serious criminal sexual conduct charge, and requires proof that the alleged victim had reasonable fear of imminent great bodily harm.

There are five categories of criminal sexual conduct chargeable by the state. These range from Gross Misdemeanor Fifth Degree to the most serious Felony First Degree. For purposes of

this memorandum, and to simplify this discussion with regard to the instant allegations, each increasing level of criminal sexual conduct can be understood as requiring greater harm or threat of harm. To support a charge of fifth degree criminal sexual conduct, the state merely has to prove that the defendant engaged in nonconsensual sexual contact. Minn. Stat. § 609.3451, subd. 1(1) (2006). For a fourth degree charge, the state must show that the defendant used force or coercion to accomplish nonconsensual sexual contact. Minn. Stat. § 609.345, subd. 1(c) (2006). Third degree criminal sexual conduct is supported by proof that the defendant used force or coercion to accomplish nonconsensual sexual penetration. Minn. Stat. § 609.344, subd. 1(c) (2006). The state must prove a second degree criminal sexual conduct charge with evidence that the defendant engaged in sexual contact and caused reasonable fear of imminent great bodily harm. Minn. Stat. § 609.343, subd. 1(c) (2006).

As charged in this matter, Defendant is guilty of first degree criminal sexual conduct if the state can prove that he "engage[d] in sexual penetration with another person" and "circumstances existing at the time of the act cause[d] the complainant to have a *reasonable fear of imminent great bodily harm* to the complainant or another." Minn. Stat. § 609.342, subd. 1(c) (2006) (emphasis added). "Great bodily harm" is defined as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of an bodily member or organ or other serious bodily harm." Minn. Stat. § 609.02, subd. 8 (2006). Probable cause in this case, then, must be supported by substantial evidence that Defendant caused the alleged victim to reasonably fear immediate bodily injury of the kind defined above.

In this case, sufficient probable cause to charge Defendant with first-degree criminal sexual conduct does not exist. Defendant concedes that if in fact the state believes Ms. is telling the truth, there may be more appropriate criminal charges. However, the current charge

cannot stand. Defendant requests that the court consider Minnesota court precedent in evaluating this matter.

III. This Court must look at all the circumstances to determine whether evidence is sufficient to support the allegation that Defendant caused reasonable fear of imminent great bodily harm.

The Minnesota Supreme Court in Peterson v. State, 282 N.W.2d 878, 879 (Minn. 1979), upheld the defendant's conviction of criminal sexual conduct in the first degree under Minn. Stat. § 609.342(c) (1978). Specifically, the defendant was accused of slapping, choking, hitting, threatening, and urinating on the complainant while forcing her to perform oral sex and masturbate him. Id. at 880. The Court determined that such evidence of "physical abuse, threats, and degrading conduct" was sufficient to support the jury's finding that the complainant was in reasonable and imminent fear of great bodily harm as defined in the relevant statute. Id. at 881.

In subsequent first degree criminal sexual conduct cases, the Minnesota Supreme Court has found the following evidence sufficient to find that the defendant caused the complainant reasonable fear of imminent great bodily harm: discovery of a knife and a pair of thongs in the defendant's apartment, which were described by the complainant as used by the defendant in the attack, State v. Graffice, 294 N.W.2d 324, 325 (Minn. 1980), reh'g denied (Minn. July 18, 1980); unlawful entry into complainant's apartment and identification of the defendant as the intruder, State v. Zernechel, 304 N.W.2d 365, 366 (Minn. 1981); pre-dawn presence of an intruder who threatened to kill the complainant, State v. Morrison, 310 N.W.2d 135, 137 (Minn. 1981); violent pulling of the complainant's hair, choking, and threatening to "choke her 'for good,'" State v. Jensen, 322 N.W.2d 608, 609 (Minn. 1982); covering the complainant's mouth and threatening to hurt or kill her if she did not stop screaming, State v. Smith, 333 N.W.2d 879 (Minn. 1983); scientific evidence connecting the defendant, who threatened the complainant and

was caught fleeing from the scene, to the crime, State v. Lattin, 336 N.W.2d 270, 271 (Minn. 1983); and, while claiming he had a knife, the defendant kidnapped the complainant from a parking lot and drove her to a different location, State v. Booker, II, 348 N.W.2d 753, 754 (Minn. 1984).

The Minnesota Court of Appeals has also repeatedly addressed this issue in first degree criminal sexual conduct cases. Reasonable fear of imminent great bodily harm has been supported by evidence of brandishing and use of a gun to threaten and hit the complainant, State v. Jones, 381 N.W.2d 44, 47 (Minn. Ct. App. 1986); choking, hitting, and threatening to kill the complainant during repeated rapes, State v. Yanez, 469 N.W.2d 452, 454 (Minn. Ct. App. 1991), review denied (Minn. June 19, 1991); and, in a particularly horrifying case, a stranger in the complainant's home pulling out her hair while penetrating her multiple times in multiple ways, State v. Hart, 477 N.W.2d 732, 734-735 (Minn. Ct. App. 1991), review denied (Minn. Jan. 16, 1992).

Courts must look at all the circumstances to determine if an alleged victim was in reasonable fear of imminent great bodily harm. Smith, 333 N.W.2d at 880. Despite the level of violence and threats detailed in the above cases, there is no requirement of "some other form of physical assault (such as choking) in addition to the sexual assault," of "a verbal threat," or of "proof that the defendant intended to harm the victim if she did not comply." Id. This begs the question, though, of how the reasonableness of the alleged victim's fear could be assessed if not through some demonstration of a physical threat. Even if the overtly violent acts in each of the above cases are removed from consideration, all still involve some form of threat of great harm, or action implying a threat of great harm. For example, the Hart court determined that the victim reasonably feared imminent great bodily harm because she could identify her assailant and she thought her son had been seriously injured by the intruder as well. Hart, 477 N.W.2d at 737.

The above case precedent, both by the Minnesota Supreme Court and Court of Appeals, clearly indicates, then, that in first degree criminal sexual conduct cases, substantial evidence to support probable cause must include, at a minimum, some threat of imminent bodily injury that would cause death or permanent disfigurement or impairment. On the face of the complaint, and even in reviewing the discovery in this matter, no such threat existed. This Court should conclude that the alleged victim had no reasonable apprehension of imminent great bodily harm.

IV. Because there is no substantial evidence to support probable cause in this matter, Defendant's motion should be granted.

In this case, there is no allegation that Defendant engaged in degrading conduct with as in Peterson. There is no allegation that Defendant used a weapon or threatened to use a weapon, as in Graffice and Booker, II. There is no allegation that Defendant verbally threatened , as in Morrison and Smith. There is also no allegation that Defendant choked, hit, or otherwise physically abused , as in Jensen, Yanez, or Hart. Nowhere in statement to Detective L does she indicate that she feared immediate bodily injury amounting to death or permanent disfigurement or impairment. Nowhere in 's statement does she indicate Defendant threatened such imminent great bodily harm. In fact, no one interviewed by Detective L stated or implied that apprehended, or that Defendant threatened, such injury.

On the basis of the complaint and witness interviews, there is no substantial evidence showing that Defendant caused to reasonably fear imminent great bodily harm. Without such evidence, there is insufficient probable cause to charge Defendant with criminal sexual conduct in the first degree. Therefore, this Court should dismiss these charges against Defendant.

CONCLUSION

This Court's role at the upcoming hearing is to determine whether probable cause exists to charge Defendant with First Degree Criminal Sexual Conduct. Based on the criminal complaint filed in this case, the Court should find that substantial evidence to support this charge is lacking. Accordingly, Defendant requests that the charges against him be dismissed.

CAPLAN LAW FIRM, P.A.

Dated: January 26, 2007

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