

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX, PART AP-2

THE PEOPLE OF THE STATE OF NEW YORK

-against-

NOTICE OF MOTION
TO DISMISS

Doc. No. [REDACTED]

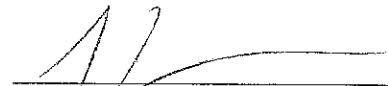
[REDACTED]
Defendant.

RECEIVED
DISTRICT ATTORNEY
BRONX COUNTY
2013 MAY 22 PM 3:09

PLEASE TAKE NOTICE that upon the annexed affidavit of Amalea Smirniotopoulos, Esq., the undersigned will move the Bronx County Criminal Court, Part AP-2, Bronx, New York on the 28th day of May, 2013, at 9:30 a.m. or as soon thereafter as counsel may be heard, for an order:

1. Dismissing the information in the interests of justice. C.P.L. §§ 170.30(g), 170.40; see, e.g., People v. Douglass, 60 N.Y.2d 194 (1983); People v. Clayton, 41 A.D.2d 204 (2d Dep't 1973); and
2. Granting such additional relief as the Court deems just and proper.

DATED: Bronx, New York
May 24, 2013


Amalea Smirniotopoulos, Esq.
THE BRONX DEFENDERS
360 E 161st Street
The Bronx Defenders, NY 10451
(718) 838-7878

RECEIVED
DISTRICT ATTORNEY
BRONX COUNTY
2013 MAY 22 PM 3:04

TO: ROBERT T. JOHNSON
District Attorney
Bronx County

Clerk of the Criminal Court
Bronx County

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX, PART AP-2

THE PEOPLE OF THE STATE OF NEW YORK

-against-

AFFIRMATION

████████████████████,

Doc. No. ████████████████████

Defendant.

Amalea Smirniotopoulos, Esq., an attorney duly admitted to practice law in New York State, affirms the following to be true:

1. I am associated with The Bronx Defenders, and am the attorney of record for ████████████████████
██████████ I am familiar with the facts of this case and the prior proceedings held in it.
2. In addition to working with me, Ms. ████████████████████ is also working with a civil legal specialist in my office, Christa Douaihy, Esq. Ms. Douaihy is representing Ms. ████████████████████
██████████ on Housing Court and Family Court matters.
3. This affirmation is made in support of Ms. ████████████████████'s Motion to Dismiss in the Interests of Justice.
4. Unless otherwise indicated, all allegations of fact are based upon inspection of the record in this case, initial investigations of the facts and circumstances surrounding the incident, and discussions with the Assistant District Attorney and Ms. Douaihy, and are made on information and belief.

Ms. [REDACTED] Served with Honor in the Military

5. Ms. [REDACTED] is an Operation Enduring Freedom/Operation Iraqi Freedom veteran who has served with honor as both an active duty and reserve member of the military.
6. In January 2002, Ms. [REDACTED] enlisted in the Army at Fort Dix in New Jersey. From 2002-2005, she was on active duty with the United States Army's 82nd Airborne Division. With that division, she served in Iraq. Her particular unit had the task of scouting, securing, and setting up forward operating camps in advance of the arrival of troops. For her service, she was awarded the National Defense Service Medal, the Global War on Terrorism Expeditionary Medal, the Global War on Terrorism Service Medal, and the Army Service Ribbon. See App. A (Certificate of Release or Discharge from Active Duty). She was honorably discharged from the Army in January 2005. See id.; App. B (Certificate of Honorable Discharge from the Army).
7. After leaving active duty in January 2005, she joined the United States Army Reserves. She served until March 2005, when she was honorably discharged.
8. In March 2005, Ms. [REDACTED] was a member of the United States Air Force Reserves. In March 2011, she was honorably discharged. See App. C (Certificate of Honorable Discharge from the Air Force).

Ms. [REDACTED] Has Pursued Her Education

9. From Fall 2010 to Fall 2012, Ms. [REDACTED] attended Hostos Community College. See App. D (Hostos Community College Transcript). She will graduate with an AAS in public interest paralegal studies with a business minor this June. She previously earned

her GED through Edison Job Corps Academy in Edison, NJ, where she also worked toward a Business Technology degree. See App. E (Letter from Edison Job Corps).

Ms. [REDACTED] Receives Counseling and Other Services at the VA

10. Like many veterans, since she fully returned to civilian life in 2011, Ms. [REDACTED] has applied for numerous jobs, but struggled to make ends meet. For several months, she was unable to pay her rent or utilities. Until recently, she had been living in an apartment without electricity.
11. Ms. [REDACTED] has sought out support and assistance from the Department of Veterans' Affairs (VA). She currently receives individual counseling with a clinical social worker at the James J. Peters VA Medical Center. She is also working with a VA Advocate at LIFT the Bronx.
12. Currently, Ms. [REDACTED] is working in the cafeteria at the VA New York Harbor Healthcare campus in Brooklyn, NY. She was placed there through a compensated work therapy program with the VA. She enjoys the opportunity to talk to the other veterans and to help the older veterans with their meals.

The Instant Case Stems from a Sibling Argument

13. The instant criminal case resulted from an incident with Ms. [REDACTED]'s older brother, [REDACTED], on November 29, 2012. While at their mother's apartment, located at [REDACTED] [REDACTED] in the Bronx, the two siblings had a verbal argument. Crim. Compl., Dec. 3, 2013. Mr. [REDACTED] alleges that, in the course of that argument, Ms. [REDACTED] struck

him in the face with a closed fist, causing a small laceration to the skin above his eye. Id. He refused medical attention the night of the incident. Upon information and belief, he never sought medical attention for the alleged injury.

14. [REDACTED] is two years older than Ms. [REDACTED]. He is five inches taller than her and at least forty pounds heavier than her. Ms. [REDACTED] denies that she took any physical action toward her brother except in self-defense.
15. There is no prior history of Domestic Incident Reports between Ms. [REDACTED] and [REDACTED], or between Ms. [REDACTED] and any other member of her family.
16. Ms. [REDACTED] was arrested on December 3, 2012 and charged with Assault, P.L. § 120.00(1); Menacing, P.L. § 120.15; and Harassment, P.L. § 240.26. She was arraigned that day and released on her own recognizance.
17. Mr. [REDACTED] does not want Ms. [REDACTED] to get a criminal record or to go to jail as a result of this case. See App. F (Aff. of [REDACTED]). He would like for her to receive counseling. Id.

Ms. [REDACTED] Would Like to Reenlist in the Army

18. Ms. [REDACTED] intends to reenlist in the Army.
19. On April 11, 2013, Ms. [REDACTED] met with Ms. Douaihy and I in our office to discuss her criminal and housing matters. She reiterated her intention to reenlist in the Army as soon as possible. She told us that she had been in contact with Sergeant First Class [REDACTED], an Army recruiting officer working at a recruiting station based in Manhattan about how this criminal case could affect her ability to reenlist.

20. At that time, we reached out to Sergeant [REDACTED] to find out more information about the Army's enlistment requirements.
21. During our phone conversation on April 11, 2013, Sergeant [REDACTED] stated that, during the enlistment process, the Army looks at a prospective recruit's criminal record and matches the offenses under state law to similar offenses under military law. The severity of the offense under military law, not its severity under state law, determines whether the military will treat a prior conviction as a bar to enlistment.
22. Importantly, it was relayed to us that individuals with past military service are held to a higher standard than individuals with no prior service. According to Sergeant [REDACTED] individuals with prior service must undergo an additional layer of scrutiny, which increases the likelihood that any post-service criminal convictions would constitute "conduct unbecoming" barring reenlistment. See also App. G (Aff. of Christa Douaihy, Esq.).
23. Sergeant [REDACTED] stated that Ms. [REDACTED] is not eligible to enlist while she has an open case. An open case includes a sentence to a conditional discharge, as well as an ACD.
24. Sergeant [REDACTED] stated that Ms. [REDACTED] would likely be eligible to reenlist if she pled guilty to a disorderly conduct violation (P.L. § 240.20). A conditional discharge following such a plea, however, would prevent her from reenlisting for its duration. He stated that, based on his experience and her charges, a plea of guilty to a harassment violation (P.L. § 240.26) will likely make her ineligible to reenlist.
25. In order to reenlist after pleading guilty to harassment, Ms. [REDACTED] would have to obtain a moral character waiver. A moral character waiver is an agreement by military

commanders to enlist an individual despite a conviction that would otherwise bar her enlistment.

26. Moral character waivers are discretionary. Furthermore, it is unclear if Ms. [REDACTED] would be eligible for a moral character waiver, as individuals with prior military service are held to a higher standard of conduct.
27. Throughout our conversation with him, Sergeant [REDACTED] emphasized that a plea to a harassment violation would be a significant obstacle to reenlisting.
28. On April 18, 2013, Ms. [REDACTED] appeared in Part AP-2 Bronx County Criminal Court for the instant case. While waiting for her case to be called, she again reached out to Sergeant [REDACTED] via text message to confirm what effect pleading guilty to a harassment violation would have on her ability to reenlist. Ms. [REDACTED] showed me both her message and his response. In his response, he again told her that a conviction for a harassment violation could bar her from reenlisting.
29. When Ms. [REDACTED]'s case was called on April 18, 2013, the prosecution stated that the offer that day was a plea to the harassment violation. I explained to the court that there was no disposition in light of the effect of that plea on Ms. [REDACTED]'s ability to reenlist. Judge Shari Ruth Michels, who was then presiding over Part AP-2, encouraged the prosecution to consider offering Ms. [REDACTED] the opportunity to plead guilty to disorderly conduct in order to allow her to reenlist in the Army. She put the case on for the following day in order for the prosecution to consider making that offer.
30. Following her court appearance on April 18, 2013, Ms. Douaihy and Ms. [REDACTED] went to speak to Sgt. [REDACTED] at the recruiting station on 125th Street in Manhattan. See

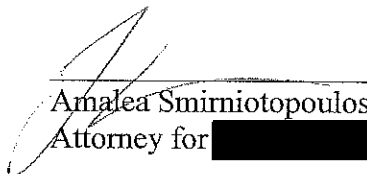
App. G (Aff. of Christa Douaihy, Esq.). In addition to reiterating that a harassment violation would, at minimum, make reenlisting an “uphill battle” for Ms. [REDACTED]—particularly in light of her former service—he also stated it may prevent her from getting a security clearance. Id.

31. Unfortunately, according to Army Regulation 601-210 Rule 4-34, recruiting personnel cannot indirectly take part in pending charges. See App. H (U.S. Army Recruiting Regulations). As such, Sergeant [REDACTED] cannot write a letter on Ms. [REDACTED]’s behalf or otherwise participate in plea negotiations.

32. On April 19, 2013, Ms. [REDACTED] again appeared in Bronx Criminal Court. The People stated that they were not willing to offer Ms. [REDACTED] the opportunity to plead guilty to disorderly conduct; the offer would remain the harassment violation. They moved to reduce the top charge against Ms. [REDACTED] to Attempted Assault, P.L. § 110/120.00(1).

33. While this case is pending, Ms. [REDACTED] is not permitted to take any further steps towards enlistment.

34. Ms. [REDACTED] plans on reenlisting as soon as the instant case is concluded.


Amalea Smimiopoulos
Attorney for [REDACTED]

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX, PART AP-2

THE PEOPLE OF THE STATE OF NEW YORK

-against-

MOTION TO DISMISS

Doc. No. [REDACTED]

[REDACTED]
Defendant.

35. This Court should dismiss the pending criminal charges against [REDACTED] in the interest of justice pursuant to C.P.L. § 170.40(1).

36. Section 170.40(1) provides that “dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant . . . would constitute or result in injustice.” See C.P.L. § 170.40(1).

37. In order to determine if dismissal of an accusatory instrument in the interest of justice is required:

“the court must, to the extent applicable, examine and consider, individually and collectively, the following:

- (a) the seriousness and circumstances of the offense;
- (b) the extent of harm caused by the offense;
- (c) the evidence of guilt, whether admissible or inadmissible at trial;
- (d) the history, character and condition of the defendant;
- (e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;

- (f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
- (g) the impact of a dismissal on the safety or welfare of the community;
- (h) the impact of a dismissal upon the confidence of the public in the criminal justice system;
- (i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;
- (j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

C.P.L. § 170.40(1).

38. These statutory factors weigh in favor of dismissing the instant case in the interests of justice. In particular, a conviction by plea or trial on any of the charges Ms. [REDACTED] currently faces will likely bar her from reenlisting in the military. This collateral consequence is a compelling factor demonstrating that conviction of Ms. [REDACTED] would result in injustice.

The Seriousness And Circumstances Of The Offense

39. The offenses charged are not serious, and the circumstances surrounding those offenses demonstrate that Ms. [REDACTED] alleged conduct was not so egregious that dismissal is not warranted. Ms. [REDACTED] is alleged to have engaged in a single incident in which she hit her brother while in the midst of a verbal dispute with him. See Aff. ¶ 13; Crim. Compl., Dec. 3, 2013. Any physical action she may have taken towards her brother was in self-defense. Id. ¶ 14. There is no allegation that her actions were part of a pattern of domestic violence between her and her sibling. See id. ¶ 15. Nor are the misdemeanor charges against her so serious that dismissal in the interest of justice is not permissible. See People v. Reets, 597 N.Y.S.2d 577 (Kings Co. Sup. Ct. 1993) (finding that the

relative seriousness of P.L. § 220.39, a class B Felony, did not militate against a finding that the defendant was entitled to the dismissal of his indictment in the interest of justice); see also People v. Colon, 620 N.Y.S.2d 935 (1st Dep't . 1994) (affirming dismissal in the interests of justice where defendant was accused of criminal sale of a controlled substance in the fourth degree, a class D felony, and criminal possession of a controlled substance in the fifth degree, a class C felony).

The Extent Of Harm Caused By The Offense

40. Ms. [REDACTED]'s alleged conduct did not cause significant harm to Mr. [REDACTED]. He is alleged to have sustained a small laceration to the skin above his eye. He refused medical attention at the scene, and never sought medical attention thereafter. See Aff. ¶ 13. He has suffered no permanent injury or disfigurement.

The Evidence Of Guilt

41. On the night of November 29, 2012, any action Ms. [REDACTED] took was motivated by her reasonable belief that her conduct was necessary to defend herself from an unprovoked assault by her physically larger older brother, [REDACTED]. See Aff. ¶ 14; P.L. § 35.15.

42. Even if Ms. [REDACTED] would be unable to make out a full defense, the remedy of a dismissal in the interest of justice is available even where the evidence of guilt against a defendant is unquestioned. See People v. Hirsch, 85 A.D.2d 902 (4th Dep't 1981).

The History, Character And Condition Of The Defendant.

43. Ms. [REDACTED] is thirty-two years old. She has no criminal record. She served with honor in both the active duty Army and the Army and Air Force Reserves. See Aff. ¶¶ 5-8. Although not in combat herself, she was deployed in Iraq and faced many of the same dangers as those in combat. Id. ¶ 6. She received numerous awards in recognition of her service in the armed forces. Id. ¶ 6.
44. Since returning home, Ms. [REDACTED] has continued to work to better herself. She returned to school and will soon be graduating from Hostos Community College. Id. ¶ 9. She has proactively sought assistance from the VA and LIFT the Bronx. Id. ¶ 11. She attends individualized counseling sessions with a social worker at the Bronx VA. Id. She is currently employed at the VA New York Harbor Healthcare campus in Brooklyn, NY through a compensated work therapy program. Id. ¶ 12.
45. Ms. [REDACTED] would like the opportunity to serve our country again as a member of the military. She intends to reenlist in the active duty Army as soon as possible. Id. ¶¶ 18, 34.
46. In early April, she went to an Army recruiting station in Manhattan, where she spoke to Sergeant First Class [REDACTED] about her criminal case and whether it would be a barrier to her reenlisting. Id. ¶ 18. She has spoken to him several times about enlisting. Id. ¶¶ 19-28, 30. Each time, she was informed that, while a plea to a disorderly conduct violation would permit her to reenlist, a plea to a harassment violation would pose a significant barrier, particularly as individuals with prior military service are held to a higher standard. Id.

47. The prosecution is not willing to offer Ms. [REDACTED] the opportunity to plead guilty to a disorderly conduct violation. *Id.* ¶¶ 29, 32. They are only willing to offer her the plea to the harassment violation, *id.*, which could bar her from further military service.
48. Because an open criminal case is a bar to enlistment, Ms. [REDACTED] cannot take any further steps toward her goal until this case is resolved. *Id.* ¶¶ 23, 33.
49. Should Ms. [REDACTED] be convicted at trial of any of the charges against her—including the harassment violation—she would likely be barred from reenlisting.
50. Furthermore, any conviction in this case will also likely negatively affect her ability to find steady employment outside of the military.

Any Exceptionally Serious Misconduct Of Law Enforcement Personnel In The Investigation, Arrest And Prosecution Of The Defendant

51. The defense is unaware of any exceptionally serious misconduct of law enforcement personnel at this time.

The Purpose And Effect Of Imposing Upon The Defendant A Sentence Authorized For The Offense

52. Each of the B misdemeanors which Ms. [REDACTED] is currently charged with is punishable by a maximum of three months of imprisonment.
53. Moreover, as noted above, the effect of imposing a sentence authorized for the offenses charged will be to deprive Ms. [REDACTED] of her ability to once again serve the country as a member of the armed forces. *See* ¶¶ 43-49, *supra*.

54. To impose a criminal conviction on Ms. [REDACTED] would serve little social, penological, or moral purpose. The only possible purpose of imposing sentence on her would be to punish her. Punishment of such severity is out of proportion with the nature of the charges and the seriousness of the offense. See ¶ 39, supra.

The Impact Of A Dismissal Upon The Confidence Of The Public In The Criminal Justice System

55. In light of the severity of the charges, the nature of the case, and the significant collateral consequences that a conviction would impose, dismissal of this case will not negatively impact the confidence of the public in the criminal justice system.

The Impact Of A Dismissal On The Safety Or Welfare Of The Community

56. A dismissal in this case will not negatively impact the safety or welfare of the community. Ms. [REDACTED] has no criminal record. There is no indication that she poses any danger to the community.

Where The Court Deems It Appropriate, The Attitude Of The Complainant Or Victim With Respect To The Motion

57. Mr. [REDACTED] does not want Ms. [REDACTED] to go to jail or have a criminal record. See Aff. ¶ 17. He has expressed that he would like his sister to receive anger management. Id.

The individual counseling she is currently receiving through the VA is suited to address this concern.

Other Relevant Facts Indicating That A Judgment Of Conviction Would Serve No

Useful Purpose

58. A judgment of conviction in this case would serve no useful purpose, and would brand Ms. [REDACTED] a criminal for the rest of her life. The stigma of a criminal conviction would have far-reaching, damaging, and permanent collateral consequences on Ms. [REDACTED]'s ability to work, keep her home, and support herself.

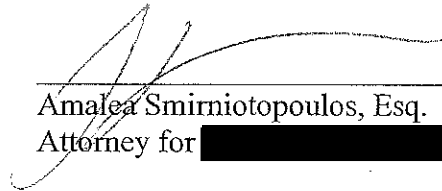
CONCLUSION

59. Ms. [REDACTED] served with honor in multiple branches of the military, both as an active duty soldier and in the reserves. She has sought to better herself through education, and has been proactive in getting additional help and support through the VA and other organizations serving veterans. Now, she would like to return to military service.

60. Ms. [REDACTED] will suffer significant collateral consequences should she be convicted at trial of any of the charges against her or plead guilty to the harassment violation offered by the People. A conviction on any of these charges will likely prevent her from reenlisting. This penalty significantly outweighs the severity of the charges against her and the circumstances of the offense.

61. For the forgoing reasons, dismissal of all of the charges against Ms. [REDACTED] is in the interest of justice.

Dated: Bronx, New York
May 24, 2013



Amalea Smirniotopoulos, Esq.
Attorney for [REDACTED]