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Attorneys for Third-Party Movant
CITY AND COUNTY OF SAN FRANCISCO

ENDORSED
FILED
SAN FRANCISCO COUNTY
SUPERIOR COURT

2012 MAY -7 PM 3:57

CLERK OF THE COURT ERICA ESPINOZA
BY: ERICA ESPINOZA DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. ROSS MIRKARIMI, Defendant.	Court No. 12001311 **THIRD-PARTY MOVANT CITY AND COUNTY OF SAN FRANCISCO'S OPPOSITION TO MS. L'S MOTION TO CONTINUE HEARING; DECLARATION OF PETER J. KEITH** Hearing Date: May 8, 2012 Hearing Judge: Hon. Garrett Wong Time: 1:30 p.m. Place: Department 15, 850 Bryant
CITY AND COUNTY OF SAN FRANCISCO, Third-Party Movant.	

SUMMARY OF ARGUMENT

Third party City and County of San Francisco filed a motion requesting that the Court release a video statement of Ms. L. to the City and County of San Francisco for use in the ongoing official

misconduct proceedings against Defendant, or alternatively to authorize the SFPD and the District Attorney to release the video statement if it is no longer in the Court's possession. There is good cause to release the video statement. The video statement is a court record. Moreover, release of the video statement would serve a substantial public interest. Official proceedings are pending under San Francisco's Charter to remove Defendant from the office of Sheriff of the City and County of San Francisco, based on Defendant's official misconduct including his conduct giving rise to this criminal action. The videotaped statement is valuable evidence of that conduct. It contains the victim's statement close the Defendant's acts; moreover, it shows the victim's demeanor accompanying that statement and the victim's injury. There is a compelling public interest in the tribunal considering all evidence in its official proceedings on this important question whether to remove an elected official from office.

Rather than file an opposition, Ms. L. filed a motion that questions whether Department 15 is the proper department to hear this motion, and requesting a continuance.

Department 15 is the proper department to hear this motion.

And the Court should deny Ms. L.'s motion for a continuance. The motion for a continuance was filed late without good cause for the late filing. And on the merits there is no need for a continuance, because the evidence that Ms. L. wishes to present in opposition to the City's motion is irrelevant to the motion. Finally, a continuance will prejudice the City in the official misconduct proceedings and will further delay those proceedings.

I. DEPARTMENT 15 IS THE PROPER DEPARTMENT TO HEAR SAN FRANCISCO'S MOTION FOR RELEASE OF PROPERTY

In the Notice, Ms. L. states that she "will ask this Court to determine which Judge should hear this Motion." (Mtn. to Continue, at p. 2:6-12.) Ms. L. does not state any position on this issue but states that she "reserves the right to do so in her substantive pleadings." (*Id.* at p. 2:11-12.) This hardly constitutes a valid challenge to Department 15 hearing this matter.

Nevertheless, Department 15 is the appropriate Department to hear this matter. Department 15 was the trial Department. Department 15 had custody of the evidence sought by this motion – the video statement – and reviewed the statement. Department 15 made pretrial rulings regarding that

statement, including that it was admissible evidence and that it was not protected by attorney-client privilege. Department 15 continues to supervise this case. Department 15 is the appropriate department to hear this motion. This is a routine motion for return of property properly brought in the trial Department, and properly brought by a third party, the City and County of San Francisco, acting with the consent of the original owner of the property, Ms. Madison.

This motion should not be heard by the judge who signed the search warrant. This is not a motion under Penal Code section 1538.5. Section 1538.5 provides for motions brought by a "defendant" to challenge the lawfulness of a search or seizure before conviction. That is not what the present motion is. The present motion is brought after conviction, by a third party, under Penal Code section 1536 and the Court's nonstatutory authority to regulate evidence in the proceedings before the Court. *Oziel v. Superior Court*, 223 Cal.App.3d 1284, 1294 (1990); *People v. Superior Court (Loar)*, 28 Cal.App.3d 600, 608-09 (1972).

This motion should not be heard by the judge who accepted the plea agreement. Here, the judge who accepted the plea agreement acted ministerially to return evidence to the People and the Defendant. That judge's momentary custody of the evidence is no basis for him to hear this motion.

II. THE CONTINUANCE WAS REQUESTED TOO LATE, AND THEREFORE MS. L. MUST SHOW BOTH GOOD CAUSE FOR HER LATE REQUEST, AND GOOD CAUSE FOR A CONTINUANCE

Penal Code section 1050(b) provides, in relevant part:

> To continue any hearing in a criminal proceeding, including the trial, (1) a written notice shall be filed and served on all parties to the proceeding at least two court days before the hearing sought to be continued, together with affidavits or declarations detailing specific facts showing that a continuance is necessary ...

Here, Ms. L. did not comply with the notice and filing requirements of section 1050(b). Under this section, notice should have been given two court days before the Tuesday May 8 hearing, on Friday May 4. But notice was not filed and served until the day before the hearing, on Monday May 7.[1] Therefore, the motion for a continuance was late.

[1] Ms. L.'s counsel sent an email to the other parties at 7:48 pm on Sunday May 6, stating that she would be requesting a continuance. (Keith Decl. ¶ 4.)

Subdivisions (c) and (d) of section 1050 permit a party to make a motion for continuance without complying with the notice requirements of subdivision (b), upon a showing of good cause for the party's failure to comply with these notice requirements. That means that the Court undertakes a two-step analysis whether to grant the continuance. The Court must first determine whether there was good cause for the late filing, and second and separately determine whether there is good cause for a continuance:

> "[W]here a party seeking a continuance fails to comply with the notice requirements, the trial court must make a two-step decision. It must first determine whether there was good cause for failure to comply with those requirements. If there was not good cause, the court must deny the motion. [Citation.] If the court finds there was good cause for failure to comply, it must then decide whether there is good cause for granting a continuance." (*People v. Harvey* (1987) 193 Cal.App.3d 767, 771, 238 Cal.Rptr. 516.).

Mendez v. Superior Court, 162 Cal.App.4th 827, 833 (2008). Ms. L. cannot demonstrate good cause for either the late request, or for the continuance itself.

III. THE CONTINUANCE SHOULD BE DENIED, BECAUSE THERE IS NO GOOD CAUSE FOR MS. L.'S LATE REQUEST

Ms. L. does not present evidence of good cause for her late request. For three reasons, the evidence actually is to the contrary: there is no good cause for a continuance.

First, Ms. L. had sufficient time to timely seek a continuance. Ms. L.'s counsel was on vacation when San Francisco served its motion on April 23 by overnight delivery.[2] However, Ms. L.'s counsel has practiced law for 30 years and maintains a law firm with support staff and other attorneys. There is no reason why her firm could not have made an earlier request for a continuance. Moreover, Ms. L.'s counsel returned from her vacation on April 30 (a Monday) and reviewed the City's motion. (Canny Decl. ¶ 7.) That left counsel ample time to request a continuance.

Second, Ms. L.'s counsel's recent communications with the City Attorney's Office further indicate the absence of good cause for this late request for a continuance. Initially, Ms. L.'s counsel does not provide a complete and accurate account of the dates when Ms. L.'s counsel communicated to the City Attorney's Office, or Ms. L.'s counsel's request for a response. The Declaration of Ms.

[2] As Ms. L. herself made known to the Court in other filings, Ms. L. was in Venezuela when San Francisco filed its motion, and Ms. L. is still in Venezuela. That is why San Francisco served Ms. L.'s counsel.

L.'s counsel states: "8. On May 2, 2012, I wrote a letter to the Deputy City Attorneys asking that they withdraw their Motion as it relates to the videotape and asked that they respond by May 4, 2012." (Canny Decl. ¶ 8.) The first part of that statement omits information about when the letter was actually delivered to the City Attorney Attorney's Office, and the second part of that statement is demonstrably false. First, although the letter is dated May 2, 2012, it was not delivered to the City Attorney's Office until May 3, 2012. (Envelope (Keith Decl. Exh. 1).) Second, the letter does not ask for a response by May 4, a Friday. It asks for a response by May 5, a Saturday. (Canny Letter at p. 3 (Keith Decl. Exh. 2).) Saturday May 5 was not two court days before the May 8 hearing; Friday May 4 was. If Ms. L. wanted a continuance, she should not have asked the City Attorney to indicate whether it was going to withdraw the motion by Saturday May 5; she should have just filed a timely request for a continuance.

Third and finally, Ms. L.'s counsel states that she began her Opposition between May 2 and May 4. (Canny Decl. ¶ 9.) If Ms. L.'s counsel had time to begin her Opposition, she had time to file a timely motion to continue.

For all of these reasons, there was no good cause for the late request for a continuance.

IV. THE CONTINUANCE SHOULD BE DENIED, BECAUSE ON THE MERITS THE EVIDENCE THAT MS. L. WISHES TO PRESENT IS IRRELEVANT TO THE PENDING MOTION, AND A CONTINUANCE WOULD PREJUDICE THE CITY AND COUNTY OF SAN FRANCISCO IN THE ONGOING OFFICIAL MISCONDUCT PROCEEDINGS

On the merits, Ms. L. does not rely on a claim of attorney-client privilege (Mtn. to Continue at p. 3:1-3), a claim that this Court previously rejected.[3] Rather, Ms. L. contends that the videotape should not be released because of Marsy's Law and Ms. L.'s First Amendment right to privacy. (*Id.*) Ms. L. requests a continuance for the purpose of gathering certain evidence to support a claim that release of the videotape would be detrimental to Ms. L. But that is not good cause to continue this hearing.

[3] Ms. L. makes various statements in her papers that suggest that part of Defendant's plea agreement with the District Attorney was that Ms. L. would dismiss her writ petition challenging this Court's findings regarding attorney-client privilege. (*E.g.*, Mot. to Continue at p. 3:10-11, p. 3:25-27.) But Ms. L. does not present any evidence to support her claim that the District Attorney made such an agreement with Ms. L., or that Ms. L. was a party to the plea agreement with the Defendant.

Ms. L. asks this Court not to release the videotape to anyone, relying on Marsy's Law and her First Amendment right to privacy, and requests time to prepare and present an expert declaration to address the detrimental effect dissemination of the video will have on Ms. L. (Canny Decl. ¶¶ 13-15.) This Court should reject the request for a continuance because neither Marsy's Law nor the more general First Amendment right to privacy confer on crime victims the right to control dissemination of judicial records, and therefore, any expert declaration to support a claim based on those grounds would be irrelevant to these proceedings.

The Victims' Bill of Rights, also known as Marsy's law, creates specific and enumerated rights, which include the right to restitution, notice, and the right to appear in connection with sentencing. Cal. Const., art. I, §28(b). However, neither Marsy's Law nor the more general constitutional right to privacy, accord individual crime victims rights beyond those specifically enumerated or create a judicially enforceable general right of privacy with respect to evidence of crime. *Dix v. Superior Court*, 53 Cal.3d 442, 452-53 (1991) (observing that there is "no scheme for intervention by a victim pursuing personal concerns about a case[,]" and that Victim's Bill of Rights did not create any substantive rights other than the enumerated right to notice and to be heard regarding sentencing and other matters). Given that Ms. L. may not prevent disclosure of the videotape based on any constitutional right to privacy, any expert declaration to support such claim is irrelevant.

Moreover, any present claim of privacy in this case is not colorable. The underlying acts by Sheriff Mirkarimi against Ms. L., and the video statement have been the subject of intense media coverage. The videotape itself was extensively discussed by the Court and the parties in connection with the evidentiary hearings in the underlying action, and Ms. L. herself has made public statements about this incident and about the videotape.

Finally, a continuance of this hearing would unacceptably delay the City from receiving this video, and prejudice the City in the ongoing proceedings to remove Sheriff Mirkarimi from office for official misconduct. The Ethics Commission has met once already, and the next hearing is set for May 29. The parties are briefing the evidentiary and procedural issues in these official misconduct proceedings, and the Ethics Commission is expected to address these issues at the May 29 hearing. In

addition, on May 29 the Commission is expected to set dates for the presentation of evidence. (Keith Decl. ¶ 5.) If hearing on the present motion is continued, and the Court's decision is delayed, then the City will not have this evidence at the time of the next hearing. Further delay could mean that the City will lose the right to present this evidence for consideration in the Sheriff's official misconduct proceedings.

CONCLUSION

The Court should deny Ms. L.'s request for a continuance, for two independent reasons. First, it is untimely without good cause. Second, there is no good cause for a continuance.

Dated: May 7, 2012

DENNIS J. HERRERA
City Attorney
JESSE C. SMITH
Chief Assistant City Attorney
SHERRI SOKELAND KAISER
PETER J. KEITH
Deputy City Attorneys

By: _____
PETER J. KEITH
Attorneys for Third-Party Movant
CITY AND COUNTY OF SAN FRANCISCO

DECLARATION OF PETER J. KEITH

I, Peter J. Keith, declare as follows:

1. I am employed as a Deputy City Attorney for the San Francisco City Attorney's Office. Deputy City Attorney Sherri Sokeland Kaiser and I are lead counsel for Mayor Edwin M. Lee in the official proceedings to remove Ross Mirkarimim from the office of Sheriff of City and County of San Francisco, which are currently before the Ethics Commission of the City and County of San Francisco. I have personal knowledge of the contents of this declaration, and if called upon to testify, I could and would testify competently to the contents of this declaration.

2. Attached as Exhibit 1 to this declaration is a true and correct copy of the envelope in which Ms. Canny's letter dated May 2, 2012 was delivered to the City Attorney's Office. Per the

normal business practice of the City Attorney's Office, the date stamp and signature indicate that the letter was received on May 3, 2012 at 10:03am by the receptionist in the City Attorney's Office.

3. Attached as Exhibit 2 to this declaration is a true and correct copy of Ms. Canny's letter dated May 2, 2012, contained in that envelope.

4. According to the City Attorney Office office email system, my email account received an email from Ms. L.'s counsel at 7:48 pm on Sunday May 6, stating that she would be requesting a continuance. The email was cc'd to the District Attorney and Defendant.

5. The Ethics Commission has met once already, and the next hearing is set for May 29. The parties are briefing the evidentiary and procedural issues in these official misconduct proceedings, and the Ethics Commission is expected to address these issues at the May 29 hearing. In addition, on May 29 the Commission is expected to set dates for the presentation of evidence.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 7, 2012, at San Francisco, California.

PETER J. KEITH

EXHIBIT 1

MAY 3 2012

10:03

LAW OFFICES OF
PAULA CANNY

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Sherri Sokeland Kaiser, Deputy City Attorney
Peter J. Keith, Deputy City Attorney
San Francisco City Attorney's Office
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San Francisco, CA 94102-5408
VIA HAND DELIVERY

EXHIBIT 2

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May 2, 2012

Jesse C. Smith, Chief Assistant City Attorney
Sherri Sokeland Kaiser, Deputy City Attorney
Peter J. Keith, Deputy City Attorney
San Francisco City Attorney's Office
1390 Market Street, Suite 700
San Francisco, CA 94102-5408

Re: *People v. Mirkarimi*
San Francisco Superior Court Case No. 12001311
Hearing on May 8, 2012 at 1:30 p.m.

Dear Attorneys Smith, Kaiser, and Keith,

I represent Eliana Lopez. I was out of town and recently returned to work. I have received and reviewed a copy of a Pleading that you caused to be filed in Judge Wong's department for hearing on May 8, 2012 at 1:30 p.m. The Motion is entitled "*Third-Party Movant City And County Of San Francisco Notice Of Motion And Motion For Release Of Court Records*".

Before I file a Pleading in the matter, I thought I would attempt to discuss this matter with you. This letter is my attempt to discuss the matter. I have reviewed your Motion. It is unfortunate that you neglect to include some important facts in your Statement of Facts. The Statement of Facts portion of your Points and Authorities concludes on Page 4. While it is true that the Appellate Department of the Superior Court of California in and for San Francisco County ultimately denied the initial Writ that I filed, it is also true that on that same day I filed a *Petition For Writ Of Mandate Or Other Appropriate Relief* with the Court of Appeal. As a part of Ross Mirkarimi's Plea Agreement, I agreed to dismiss the Writ. For your convenience, I am attaching a copy of the Writ that I filed in the Court of Appeal. It is a file endorsed copy. I am also attaching a copy of the *Request For Dismissal* that I caused to be filed.

The point is that the issue was <u>not</u> resolved. Rather, due to the fact that the District Attorney's Office extended an acceptable Plea Bargain to Sheriff Mirkarimi, I agreed to dismiss the Writ that I had filed in the Court of Appeal. I continue to assert that the video tape constitutes a privileged and protected document.

I know that your Office has an interest different than the District Attorney's Office. I understand that right now it is your Office's job to prosecute Ross Mirkarimi for the allegations of misconduct advanced by Mayor Lee. But, I want you to think about what it is you are asking

of the Court. I would hope that your Office has some concern for the privacy rights of Eliana Lopez. Your argument does not at all take into account the privacy rights of my client or of Theo. Theo is Ross Mirkarimi and Eliana Lopez' son.

Your assertion that the video-taped statement is important evidence is without a factual basis. The only function that video tape serves is to humiliate and embarrass Eliana Lopez. Is that really how the City of San Francisco wants to treat crime victims? In your efforts to prosecute Ross Mirkarimi, I would ask that you temper your desire to remove him from office with the moral consideration of how a crime victim is to be treated by a Governmental agency.

Please think about what you are doing. In this instance, you seek a video tape in an effort to remove somebody from office. In another instance, perhaps you would seek to obtain a SART report from a rape victim as well as photographs from that person in order to discipline an employee who plea bargained a rape case into some non-sexual offense. How do you think that crime victim is going to feel if photographs of her are disseminated to your agency. In that regard, who is to say that if the City Attorney's Office has standing as a third party claimant to obtain materials, that a non-governmental third party entity would not have that same right.

California Constitution, Article 1, Section 28(b)(1) grants Eliana Lopez a constitutional right to be treated with fairness and respect for her privacy and dignity. On November 4, 2008 the People of the State of California approved Proposition 9, the Victim's Bill of Rights. That Constitutional provision is also known as Marsy's Law. That measure amended the California Constitution to provide substantive rights to alleged crime victims. As Ross Mirkarimi has entered a plea of guilty to the charge of Penal Code Section 236 and because Eliana Lopez is identified as the victim of that act, she is a crime victim within the meaning of that Constitutional provision.

Article 1, Section 28 of the California Constitution sets forth the Victim's Bill of Rights. The substantive rights bestowed upon Ms. Lopez by virtue of being a crime victim are set forth in Article 1, Section 28 Subsection (b) of the California Constitution. The California Constitution also affords Ms. Lopez certain procedural rights.

Article 1, Section 28(b)(1) provides as follows:

> In order to preserve and protect a victim's right to justice and due process, a victim shall be entitled to the following rights:
>
> 1. To be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process... (Cal. Const., Art. 1, § 28(b)(1)).

Article 1, Section 28(b)(4) provides:

> 4. To prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, or any other person

> acting on behalf of the defendant, which could be used to locate or harass the victim or the victim's family or which discloses confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential by law.
> (Cal. Const., Art. 1, § 28(b)(4)).

My argument is essentially that as a crime victim, my client has standing to ask that her privacy rights be protected. Eliana Lopez has the Constitutional right to privacy and dignity. She has the right to be free from intimidation, harassment, and abuse. The Constitutional provision seems to focus on protecting the victim from the defendant. But, in this instance, the use for which you seek to obtain the privileged material is humiliating to her. Regardless of who seeks information if the consequence is to damage and injure a crime victim, the California Constitution prohibits the dissemination.

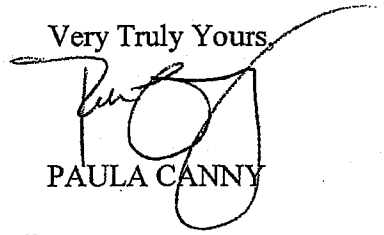
In all aspects of practicing law that have such a great effect on public policy, attorneys are duty bound to consider the short run consequences of their actions as well as the long range consequences. A Governmental agency such as the City Attorney's Office as well as the Mayor's Office should consider the effect of their actions on crime victims. The video tape is not necessary to prosecute any of the alleged acts of official misconduct against Sheriff Mirkarimi. The consequence of dissemination of that video tape will be dire to my client's emotional well being, as well as her son's well being.

If you think about the long term implications of what you are asking the Court to do, I would hope that you would conclude that it is not the right thing to do.

Please let me hear from you by May 5, 2012 with respect to your position on this matter.

If you seek to go forward, I will file something with the Court. Instead, I ask that you dismiss your Motion. Again, please let me hear from you by May 5, 2012. Thank you for your consideration of this matter.

Very Truly Yours,



PAULA CANNY

PKC:jj
Enclosures

PROOF OF SERVICE

I, COLLEEN M. GARRETT, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Sixth Floor, San Francisco, CA 94102.

On May 7, 2012, I served the following document(s):

THIRD-PARTY MOVANT CITY AND COUNTY OF SAN FRANCISCO'S OPPOSITION TO MS. L'S MOTION TO CONTINUE HEARING; DECLARATION OF PETER J. KEITH

on the following persons at the locations specified in the manner indicated below:

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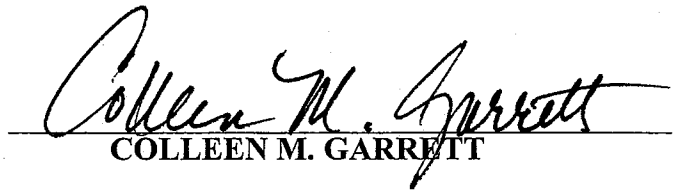
Counsel for Ms. L.

☒ **BY OVERNIGHT DELIVERY**: I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and delivery by overnight courier service. I am readily familiar with the practices of the San Francisco City Attorney's Office for sending overnight deliveries. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be collected by a courier the same day.

☒ **BY ELECTRONIC MAIL:** I caused a copy of such document to be transmitted *via* electronic mail in portable document format ("PDF") Adobe Acrobat from the electronic address: colleen.garrett@sfgov.org.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed May 7, 2012, at San Francisco, California.



COLLEEN M. GARRETT