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SUPERIOR COURT

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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO

12 THE PEOPLE OF THE STATE OF
13 CALIFORNIA,

14 Plaintiff,

15 vs.

16 ROSS MIRKARIMI,

17 Defendant.

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21 CITY AND COUNTY OF SAN
FRANCISCO,

22 Third-Party Movant.
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Court No. 12001311

**THIRD-PARTY MOVANT CITY AND
COUNTY OF SAN FRANCISCO'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR RELEASE OF COURT RECORD**

Hearing Date: May 8, 2012
Hearing Judge: Hon. Garrett Wong
Time: 1:30 p.m.
Place: Department 15, 850 Bryant

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RELIEF REQUESTED

Third-party movant City and County of San Francisco ("San Francisco") moves for an order from this Court releasing a court record to San Francisco: namely, the videotaped statement of the victim in this action, Ms. L. Alternatively, if the Court no longer has actual possession of this record, the Court should authorize the seizing agency (the San Francisco Police Department), the District Attorney, and the Defendant to release the record to San Francisco for copying.

INTRODUCTION

This criminal action against Defendant Ross Mirkarimi arose from an incident of domestic violence that occurred on December 31, 2011. On January 4, 2012, officers of the San Francisco Police Department initiated an investigation. The officers obtained a search warrant from the Court, and executed the warrant, seizing a video recording of the statement of Defendant's wife (Ms. L.) that also depicts an injury caused by Defendant's violent act. On January 13, 2012, the People initiated a criminal complaint against Defendant and charged him with three violations of the California Penal Code: (1) section 273.5(a), for unlawfully inflicting a corporal injury on his wife; (2) section 273a(b), for endangering the person and health of his two-year-old son; and (3) section 136.1(b)(1), for attempting to prevent and dissuade his wife from making a report of the incident to law enforcement.

During pendency of this action, Ms. L. made a claim of attorney-client privilege with regard to the videotape. This Court rejected the claim of privilege, but did order the parties not to distribute the video, in order to avoid affecting the jury pool. There was, however, no trial. Rather, on March 12, 2012, pursuant to a plea agreement, Defendant entered a plea of guilty to false imprisonment of Ms. L. in violation of Penal Code section 236 and the remainder of the charges were dismissed. On March 19, 2012, Defendant was formally sentenced.

The Court retains jurisdiction to hear motions for release of evidence to third parties. Good cause exists to release a copy of the videotaped statement to San Francisco, for two reasons. First, the videotaped statement is a Court record and a public document that should be released. Second, release of the videotaped statement would serve a substantial public interest. Official proceedings are pending to remove Defendant from the office of Sheriff of the City and County of San Francisco, based on

1 Defendant's official misconduct including his conduct giving rise to this criminal action. The
2 videotaped statement is valuable evidence of that conduct. There is a compelling public interest in the
3 tribunal considering all evidence in its official proceedings on this important question whether to
4 remove an elected official from office. And there is no valid reason not to release this videotaped
5 statement. The jury pool is no longer a concern, and the Court has already ruled that there is no valid
6 claim of privilege.

7 **FACTUAL BACKGROUND**

8 **I. MS. L.'S VIDEOTAPED STATEMENT**

9 On January 4, 2012, the San Francisco Police Department (SFPD) initiated a criminal
10 investigation of Defendant's December 31, 2011 act of domestic violence. The SFPD sought and
11 obtained a search warrant from the Court, and seized a video camera, including images recorded on
12 that camera. (Return to Search Warrant No. 120009457 (Jan. 5, 2012).) Included in the images seized
13 was a video recording of the statement of the victim in this action, Ms. L., which was recorded by her
14 neighbor, Ivory Madison. (Affidavit of Inspector John Keane in Support of Search Warrant (Jan. 4,
15 2012).) In that videotaped statement, Ms. L. describes a physical injury caused by the Defendant.
16 (*Ibid.*)

17 On January 30, 2012, the People moved for an order from this Court permitting admission of
18 the videotape into evidence at trial pursuant to Evidence Code section 1240 and 1250. (Notice of
19 Motion and Motion to Admit Statements Pursuant to Evidence Code Section 1240 and 1250 (Jan. 30,
20 2012).) The Defendant filed a written opposition to that motion. (Defendant Ross Mirkarimi's
21 Opposition to Prosecution's Motion to Admit Statements Pursuant to Evidence Code Section 1240 and
22 1250 (Feb. 22, 2012).) On February 27, 2012, at a hearing in which the People and Defendant
23 presented oral argument, this Court noted that it had reviewed the videotape, and, based on that
24 review, found the statement to be a spontaneous declaration, and therefore, admissible at trial pursuant
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1 to Evidence Code section 1240. (Reporter's Transcript (RT) 22:4-9, 29:17-21 (Feb. 27, 2012) [see
2 Exhibit 1 to Declaration of Peter J. Keith (Keith Declaration) attached to this motion].)¹

3 On February 24, 2012, Ms. L. filed a Notice of Claim of Privilege pursuant to Evidence Code
4 section 954, in which she claimed that all statements made to Ivory Madison, including all statements
5 in the videotape, were confidential attorney-client communications and therefore, barred from
6 disclosure. (Notice of Claim of Privilege Pursuant to Evidence Code § 954 (Feb. 24, 2012).) On
7 February 27, 2012, Ms. L. asked this Court for an order imposing sanctions on the San Francisco
8 District Attorney's Office on the grounds that dissemination of still photographs taken from the
9 videotape and a transcript of the audio portion of the videotape violated her right to privacy. (Ms. L.'s
10 Notice of Motion and Motion for Sanctions Against the San Francisco District Attorney's Office for
11 Violating Ms. L.'s Constitutional Right to Privacy (Cal.Const. Art. I § 28(b)(1)) (Feb. 27, 2012).) The
12 request for sanctions was based on the SFDA's attachment of the still photographs and transcript to
13 their Reply Brief. (See Reply Brief to Defendant's Opposition to Admit Statements Pursuant to
14 Evidence Code Section 1240, Exhibits 5-13 (Feb. 24, 2012).) At the February 29, 2012 hearing before
15 this Court, this Court noted that it had before it the motions relating to privilege and the right to
16 privacy. (RT 4:1-8 (Feb. 29, 2012) [see Keith Declaration Exh. 2].) After hearing argument from the
17 People and counsel for Ms. L., this Court held that the videotape would be admissible at trial. (RT
18 25:5-17 (Feb. 29, 2012).)

19 With regard to public dissemination of the video, the Court ordered that "[t]he video is still
20 going to be ordered not to be released to the media yet, because on Friday we have a jury that's going
21 to come in. And I've got to make sure that both sides have a fair and impartial jury in this case." (RT
22 45:18-22 (Feb. 29, 2012).)

23 Following this Court's ruling that the videotape would be admissible at trial, Ms. L. then
24 petitioned the Appellate Division of this Court for a writ of mandate or other appropriate relief,
25 specifically requesting an order prohibiting Ms. Madison from disclosing her communications with

26 _____
27 ¹ Although the Court held that the "statements" were admissible, it is clear from both the
28 context of this Court's ruling and the earlier comments of counsel that this Court's ruling was meant to
apply to admission of the videotape. (RT 9:18-19 (Feb. 27, 2012).)

1 Ms. L., including the videotape. (Petition for Writ of Mandate or Other Appropriate Relief (Mar. 2,
2 2012).) On March 9, 2012, the Appellate Division of this Court denied that petition. (Order Denying
3 Petition for Writ of Mandate or Other Appropriate Relief (Mar. 9, 2012) [see Keith Declaration Exh.
4 3].)

5 **II. DISPOSITION OF THE CRIMINAL ACTION AND DISPOSITION OF EVIDENCE**

6 On March 19, 2012, the Court pronounced judgment and sentence in this action. (RT 3:17-18
7 (March 19, 2012) [see Keith Declaration Exh. 4].) Defendant entered a plea of guilty to false
8 imprisonment of Ms. L. in violation of Penal Code section 236 and the remainder of the charges were
9 dismissed. Defendant was sentenced to a day in jail, three years of probation, a fine, community
10 service, and counseling. At the close of that proceeding, the Court released to the parties all exhibits
11 entered into evidence or lodged with the Court. (RT 5:12-22 (Mar. 19, 2012).)

12 **III. THE PENDING PROCEEDINGS TO REMOVE DEFENDANT FROM THE OFFICE
13 OF SHERIFF, AND THE CITY ATTORNEY'S INVESTIGATION OF MISCONDUCT**

14 The Charter of the City and County of San Francisco vests the Mayor, the City's chief
15 executive, with the power to suspend and charge an elected officer for official misconduct.² Under the
16 Charter, an elected officer charged with official misconduct receives a hearing before the Ethics
17 Commission, and the accused officer may be represented by counsel. The Ethics Commission
18 forwards the "full record" of the hearing to the Board of Supervisors and makes a recommendation
19 whether, in its view, the charges should be sustained. The Board then must consider that full record
20 and vote whether to sustain the charges. The accused officer will be removed if nine or more of the
21 Board members vote to sustain. (S.F. Charter § 15.105 [see Keith Declaration Exh. 5].) This process
22 is mandated by the San Francisco Charter under the authority of the California Constitution, which
23 grants a charter city the power to provide for "the manner in which, the method by which, the times at

24 ² In 1995, the voters added the current definition of the term "official misconduct: "Official
25 misconduct means any wrongful behavior by a public officer in relation to the duties of his or her
26 office, willful in its character, including any failure, refusal or neglect of an officer to perform any
27 duty enjoined on him or her by law, or conduct that falls below the standard of decency, good faith and
28 right action impliedly required of all public officers and including any violation of a specific conflict
of interest or governmental ethics law. When any City law provides that a violation of the law
constitutes or is deemed official misconduct, the conduct is covered by this definition and may subject
the person to discipline and/or removal from office." (S.F. Charter § 15.105(e).)

1 which, and the terms for which the several municipal officers and employees whose compensation is
2 paid by the city shall be elected or appointed, and for their removal, and for their compensation.”

3 (Cal. Const. art. XI, § 5(b).)

4 On March 21, 2012, the Mayor of San Francisco initiated official misconduct proceedings to
5 suspend and remove Defendant from the office of Sheriff of the City and County of San Francisco.
6 The Mayor suspended Defendant effective immediately, served Defendant with written charges of
7 official misconduct, and transmitted the charges to the San Francisco Ethics Commission and the San
8 Francisco Board of Supervisors. (Charges [see Keith Declaration Exh. 6].) The Charges alleged,
9 among other things, that: On or about December 31, 2011, during a domestic dispute, Defendant
10 physically assaulted his wife, Ms. L., grabbing her with such force that he bruised her upper right arm.
11 (Charges ¶ 16.) Defendant also restrained Ms. L. and violated her personal liberty. (*Id.* ¶ 17.)
12 Defendant also attempted to dissuade witnesses from talking to the police about this incident,
13 encouraged witnesses to lie to the police, and asked a witness to destroy the videotaped statement of
14 Ms. L. Defendant did so through intermediaries and by telephone. (*Id.* ¶ 22.) This conduct and other
15 conduct by Defendant was official misconduct. (*Id.* ¶¶ 30-31.)

16 The City Attorney is investigating Defendant’s acts. Here, the City Attorney has officially
17 requested that Defendant provide the records received in criminal discovery in this action – a request
18 that would include all three pieces of evidence sought by this motion. (Letter of April 16, 2012 [see
19 Keith Declaration Exh. 7].) Defendant has a duty to cooperate with the City Attorney. Section
20 3.240(b) of the San Francisco Campaign and Governmental Conduct Code provides: “Duty to
21 Cooperate and Assist. The Ethics Commission, District Attorney or City Attorney may request and
22 shall receive from every City officer and employee cooperation and assistance with an investigation
23 into an alleged violation of this Chapter.” As of the filing of this motion, Defendant has not provided
24 these records and has not committed to provide these records. (Keith Declaration ¶ ____.)

25 The seizing agency (the San Francisco Police Department), the District Attorney, and the
26 Defendant have copies of the videotaped statement. The SFPD holds this videotape for the Court.
27 Penal Code § 1536. The District Attorney will not release this evidence without a court order

1 authorizing it to do so. And Defendant has not provided this evidence to the City Attorney,
2 notwithstanding his duty to cooperate and assist with the City Attorney's investigation of the
3 allegations of misconduct. (*Ibid.*) Therefore, San Francisco is making the present motion.

4 DISCUSSION

5 **I. BECAUSE THE SAN FRANCISCO POLICE DEPARTMENT SEIZED THE** 6 **VIDEOTAPE PURSUANT TO A WARRANT ISSUED BY THIS COURT, THIS** 7 **COURT HAS THE INHERENT POWER TO ORDER ITS RELEASE OR** 8 **DISCLOSURE.**

9 Items seized pursuant to a warrant are in the constructive possession of the court that
10 authorized the seizure regardless of whether in the physical possession of the police or district
11 attorney. (*People v. Super. Ct. (Loar)* (1972) 28 Cal.App.3d 600, 608; *Oziel v. Super. Ct. (CBS, Inc.)*
12 (1990) 223 Cal.App.3d 1284, 1293.) Penal Code section 1536 empowers a court in constructive
13 possession of seized items to entertain nonstatutory motions for the return or release of seized items
14 whether or not those items were introduced into evidence. (Pen. Code § 1536; see *People v. Super. Ct.*
15 (*Loar*), *supra*, 28 Cal.App.3d at p. 609.) Moreover, this power survives the close of the underlying
16 criminal case. (*Id.* at p. 608.)

17 As set forth above, SFPD seized the videotape pursuant to the January 4, 2012 warrant issued
18 by this Court. To the extent that the Court no longer has the videotape because it has returned it to the
19 seizing officers or the District Attorney, they hold the videotape on behalf of this Court. Therefore,
20 this Court may entertain nonstatutory motions for its release or disclosure.

21 **II. THE VIDEOTAPED STATEMENT OF MS. L. IS PART OF THIS COURT'S RECORD** 22 **TO WHICH THE PUBLIC HAS A FIRST AMENDMENT RIGHT OF ACCESS**

23 Exhibits, whether admitted into evidence, refused, or lodged with the court, are part of the
24 court record. (Cal. Rules of Court, Rule 2.550(b)(1) and Rule 8.320(e); see also *Baugess v. Webster*
25 *Paine* (1978) 22 Cal.3d 626, 637, fn. 6, superseded by statute on other grounds.) Unless the law
26 requires confidentiality and/or the records are sealed based on an "overriding interest" that overcomes
27 the right of public access, court records are presumed to be open to the public. (Cal. Rules of Court,
28 Rule 2.550; see Advisory Committee Comment to Cal. Rules of Court, Rule 2.550 [recognizing a First
Amendment right of access to court records used at trial or as a basis of adjudication]; see generally

1 *Press-Enterprise Co. v. Super. Ct.* (1986) 478 U.S. 1, 9; *NBC Subsidiary v. Super. Ct.* (1999) 20
2 Cal.4th 1178, 1181-1209; *Copley Press v. Super. Ct.* (1992) 6 Cal.App.4th 106, 111 [finding that First
3 Amendment provides "broad access rights to judicial hearings and records"].) Examples of
4 confidential records to which public access is restricted by law include records of family courts (Cal.
5 Fam. Code § 1818(b)), in forma pauperis applications (Cal. Rules of Ct., Rule 3.54, 8.26), and under
6 certain circumstances, search warrant affidavits. (See Advisory Committee Comment to Cal. Rules of
7 Ct., Rule 2.550.) Examples of "overriding interests" found to support sealing a record include
8 statutory privileges and privacy. (*Ibid.*, relying on *NBC Subsidiary v. Super. Ct.* at p. 1222, fn. 46.)
9 Any order to seal court records, however, requires express factual findings, including a finding that an
10 "overriding interest supports sealing the record[.]" (Cal. Rules of Ct., Rule 2.550(d)(2).)

11 Here, the videotape, which remains in the constructive possession of this Court, was an exhibit
12 that this Court reviewed in adjudicating the motions to exclude the videotape. (RT 22:4-5 (Feb. 27,
13 2012) [Keith Decl. Exh. 1].)

14 The videotape is part of this Court's record to which the public has a First Amendment right of
15 access, in the absence of a legally mandated confidentiality requirement. Despite Ms. L.'s claims of
16 privilege and privacy, this Court ruled that the videotape would be admissible at trial, made no express
17 factual findings that an overriding interest supported sealing the record, and did not order the exhibit
18 sealed. (*Ibid.*) Rather, the Court simply ruled that the videotape should not be disclosed before trial,
19 in order to avoid affecting the jury pool. (RT 45:18-22 (Feb. 29, 2012).) That is no longer a concern,
20 however, because this action was resolved by a plea agreement. Thus, in the absence of any currently
21 valid legal reason not to disclose the videotape, the videotape should be disclosed.

22 **III. IN ADDITION, A COMPELLING PUBLIC INTEREST WOULD BE SERVED BY**
23 **RELEASING THE VIDEOTAPED STATEMENT OF MS. L. TO SAN FRANCISCO,**
24 **BECAUSE IT IS IMPORTANT EVIDENCE IN THE ONGOING OFFICIAL**
25 **PROCEEDINGS TO REMOVE DEFENDANT FROM THE OFFICE OF SHERIFF**

26 When Defendant pled guilty on March 12, 2012 and was sentenced on March 19, 2012,
27 Defendant held the office of Sheriff of the City and County of San Francisco. Moreover, when he
28 committed the criminal acts of December 31, 2011, Defendant was a sitting Supervisor and the

1 Sheriff-Elect. Consequently, on March 21, 2012, the Mayor of the City and County of San Francisco
2 filed written charges of official misconduct against Defendant.

3 Those charges were the first step in official proceedings to remove Defendant from office.
4 Those formal proceedings require a full evidentiary hearing before the San Francisco Ethics
5 Commission and then a vote by the Board of Supervisors on the "full record" whether to sustain the
6 official misconduct charges. The videotaped statement is important evidence in those official
7 proceedings to remove Defendant from office. As discussed above, the Mayor's Charges are in part
8 based on Defendant's criminal acts on December 31. The videotaped statement of the victim is
9 important evidence of those acts. In addition, the videotaped statement is relevant to the allegations
10 that Defendant sought to dissuade witnesses, because one allegation is that Defendant was involved in
11 efforts to dissuade Ivory Madison from giving this videotape to police. These are also part of the City
12 Attorney's investigation. Thus, release of the evidence to San Francisco for use in these proceedings
13 would serve a substantial public interest. Indeed, the public interest in release of this evidence could
14 not be more vital: it is to ensure that the decision whether to remove Defendant from the office of
15 Sheriff is based on consideration of all relevant evidence.

16 **IV. BECAUSE THIS COURT REFUSED TO FIND THAT EITHER THE ATTORNEY**
17 **CLIENT PRIVILEGE OR THE RIGHT TO PRIVACY PREVENTED DISCLOSURE**
18 **OF THE VIDEOTAPED STATEMENT, AND BECAUSE THE JURY POOL IS NO**
19 **LONGER A CONCERN, THIS COURT SHOULD ORDER ITS RELEASE**

20 As set forth above, this Court made no express finding that an overriding interest supported
21 sealing the videotape and made no order sealing the videotape, despite Ms. L's request that the
22 videotape not be made public. Ms. L. argued that disclosure of the videotape would violate Evidence
23 Code section 954 and her right to privacy. (Notice of Claim of Privilege pursuant to Evidence Code §
24 954 (Feb. 24, 2012); Ms. L.'s Notice of Motion and Motion for Sanctions Against the San Francisco
25 District Attorney's Office for Violating Ms. L.'s Constitutional Right to Privacy (Cal.Const. Art. I §
26 28(b)(1) (Feb. 27, 2012).) Following a full and fair hearing of those claims, this Court rejected them;
27 there is no reason for this Court to revisit those rulings. (RT 25:5-17 (Feb. 29, 2012) [see Keith
28 Declaration Exh. 2]; Order Denying Petition for Writ of Mandate or Other Appropriate Relief (Mar. 9,
2012) [see Keith Declaration Exh. 3].)

1 Moreover, there is no longer a concern about the jury pool.

2 The only remaining privacy interest in the videotape belongs to Ivory Madison and Abraham
3 Mertens because the videotape captures images of the interior of their home. (See Reply Brief to
4 Defendant's Opposition to Admit Statements Pursuant to Evidence Code Section 1240, Exhibits 5-13
5 (Feb. 24, 2012).) Both have waived any right to privacy they may have had in the videotape.
6 (Declaration of Ivory Madison and Declaration of Abraham Mertens [see Keith Declaration Exhs. 8 &
7 9].)

8 In the absence of a valid countervailing interest, the Court should order the release of the
9 videotaped statement of Ms. L. to San Francisco, based on the public's First Amendment right to
10 access the videotape and based on the substantial public interest in this videotape being considered in
11 the ongoing official proceedings to remove Defendant from office. Therefore, this Court should
12 release this evidence to San Francisco for copying, and alternatively should authorize the seizing
13 agency (the San Francisco Police Department), the District Attorney, and the Defendant to do so.

14 **CONCLUSION**

15 The Court should order that the videotaped statement of the victim in this action, Ms. L., may
16 be released by the Clerk to the City and County of San Francisco. Alternatively, if the Court no longer
17 has actual possession of this evidence, the Court should authorize the seizing agency (the San
18 Francisco Police Department), the District Attorney, and the Defendant to release it to San Francisco
19 for copying.

20 Dated: April 23, 2012

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