

From: Peter Keith/CTYATT
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Cc: Shepard Kopp <shep@shepardkopplaw.com>, davidpwaggoner@gmail.com, Sherri Kaiser/CTYATT@CTYATT

Date: Wednesday, July 11, 2012 05:35PM
Subject: Mirkarimi Matter: Request for Conference Call Re: Sheriff's Subpoena Request

Dear Commission and Counsel,

We respectfully request an opportunity to be heard regarding this request for subpoenas. We are available for a conference call any time Thursday after 10am. Our major points are as follows:

In our view, good cause does not exist to issue these subpoenas. None of the witnesses has testimony relevant to the Sheriff's conduct, which is the basis for these official misconduct charges. The Mayor testified truthfully -- and the Sheriff's claim otherwise is not a defense to the charges of official misconduct against the Sheriff. Rather, these subpoenas concern only a credibility dispute on a collateral matter. None of the proposed testimony will assist the Commission in making its recommendation whether the Sheriff committed official misconduct. None of the testimony bears on what occurred on December 31, the Sheriff's actions during the police investigation and prosecution, the Sheriff's conviction and sentence, or the relationship between these facts and the Sheriff's duties. Rather, these four witnesses concern a collateral matter.

Even if these witnesses' testimony had some relevance to the Mayor's credibility (and it is doubtful that it would, based on the offer of proof), it would be wasteful to expend time and effort on this issue. The challenged testimony pertains to the Mayor's communications in connection with the decision to file charges. That is a collateral matter. "Under Evidence Code section 352, a trial court has broad power to control the presentation of proposed impeachment evidence to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." *People v. Mendoza*, 52 Cal. 4th 1056, 1089-90 (2011) (internal citations omitted). That statement of the law applies here. The Sheriff requests that the Commission issue subpoenas for four witnesses who are offered to impeach testimony on a collateral matter. Two of those witnesses (Ms. Walker and Mr. Peskin) have only hearsay to offer on that collateral matter. And the request for subpoenas does not contain any offer of proof regarding the expected content of Mr. Wong's testimony.

Finally, it is improper for the Sheriff to request a subpoena for an ultimate decisionmaker in this matter, Supervisor Olague. If Sheriff Mirkarimi wishes to make an argument for recusal of any Supervisor, he should do so before the Board of Supervisors according to Board recusal procedures, not subpoena a decisionmaker to this evidentiary hearing concerning the Sheriff's official misconduct. That subpoena would put the Commission in the untenable position of making credibility and factual findings about a decisionmaker. We must view the Sheriff's attempt to subpoena Supervisor Olague (and Ms. Walker) as an improper strategic attempt by the Sheriff to create a basis for Supervisor Olague's recusal. That is highly prejudicial to the prosecution, given the nine-vote supermajority required for removal. That unfair prejudice is reason enough not to issue a subpoena to Olague or Walker, given that this is a collateral issue of no or minimal relevance. The Sheriff has an adequate forum -- the Board of Supervisors -- to put forth any arguments for recusal.

We respectfully request the opportunity to expand on the above points.

Thank you,

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▼ David Waggoner ---07/11/2012 04:33:06 PM---Please find the Sheriff's Request for Issuance of Subpoenas attached. --

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Cc: Shepard Kopp <shep@shepardkopplaw.com>
Date: 07/11/2012 04:33 PM
Subject: Request for Subpoenas

Please find the Sheriff's Request for Issuance of Subpoenas attached.

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