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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SAN FRANCISCO**

ROSS MIRKARIMI, SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO,

Petitioner

vs.

CITY AND COUNTY OF SAN FRANCISCO;

ED LEE, MAYOR OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

Case No: CPF-12-512077

REPLY TO RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION TO ENFORCE PETITION

DATE: April 20, 2012

TIME: 9:30AM

DEPT: 302

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## INTRODUCTION

Respondents' Opposition To Petitioner's Motion To Enforce Petition (hereafter "Opposition") is long on histrionics but short on actual legal authority which would support its position. This should come as no surprise, as Respondents' position is untenable. When confronted with the case that compels the remedy sought by Petitioner, *Mazzola v. City and County of San Francisco* (1980) 112 CA2d 141, Respondent misdirects this court's attention to irrelevant out-of-state cases, and asserts that the portion of the M*azzola* case which explicitly defines official misconduct under the San Francisco Charter is dictum, and should therefore be disregarded.

Respondent is mistaken. *Mazzola*'s definition of official misconduct was not dictum and controls this case. For these and the all reasons detailed below and in the Petition, this court should grant the relief prayed for by Sheriff Ross Mirkarimi.

## PRELIMINARY ISSUES

In a discussion of the applicable legal standard, Respondent states: "If facts are disputed, the writ will not issue without a trial. (Code Civ. P. § 1090.)" However, Respondent misstates the law. In fact, Code of Civil Procedure § 1090 indicates that the court may, *in its discretion*, order a trial if material facts are in dispute:

> If a return be made, which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had, and the verdict certified to the court.

## ARGUMENT

### I. THE EXHAUSTION OF REMEDIES DOCTRINE DOES NOT APPLY

"The case law on the exhaustion of administrative remedies is voluminous." (*Public Employment Relations Board v. Superior Court of Sacramento County* (1993) 13 Cal.App.4th 1816, 1825.) Though Respondent relies on *Abelleira v. District Court of Appeal* (1941) 12 Cal.2d 280, for the proposition that the doctrine of exhaustion of administrative remedies is a

"fundamental rule of procedure," the doctrine is by no means an inflexible dogma. (*Green v. City of Oceanside* (1987) 194 Cal.App.3d 212, 222.)

Indeed, "[E]xhaustion of administrative remedies before going to court is sometimes required and sometimes not. Although the courts often quote from *Myers* [*Myers v. Bethlehem Shipbuilding Corp.* (1938) 303 U.S. 41], 'the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted,' the quoted words are false as often as they are true." (4 Davis, Administrative Law Treatise (2nd ed. 1983) § 26:1, p. 414, emphasis supplied.)

There are many exceptions to the rule, including where the administrative procedure would be too slow; where irreparable harm would result; or where seeking an administrative remedy would be futile (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 609.) The rule is also inapplicable where the administrative remedy would be inadequate. (*Tiernan v. Trustees of Cal. State Univ. & Colleges* (1982) 33 Cal.3d 211, 217.)

**1. The Exhaustion Rule Is Inapplicable Here Because Important Questions of Constitutional Law and Public Policy Are At Issue**

When the party seeking relief is challenging "the constitutionality of the administrative agency itself or the agency's procedure," the exhaustion rule is not applicable. (*Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d 1115, 1127.) Similarly, the rule is inapplicable where "important questions of constitutional law or public policy governing agency authority are tendered." (*Public Employment Relations Board v. Superior Court of Sacramento County, supra,* 13 Cal.App.4th at p. 1827.) Here, Petitioner is challenging the constitutionality of the administrative procedure. As discussed further below, the agency's definition of official misconduct is unconstitutionally vague and the specific mechanism for adjudication of the allegations of official misconduct is nonexistent.

Respondent cites *McAllister v. County of Monterrey* (2007) 147 Cal.App.4th 253, 276, as authority for applying the exhaustion rule to the definition of official misconduct. (Opp. 12:19.) However, *McAllister* also states: "these [exhaustion] rules are inapplicable where ... the agency is given no jurisdiction to make a judicial determination of the type involved." (*County of Alpine v.*

*County of Tuolumne* (1958) 49 Cal.2d 787, 798.) There is nothing in the San Francisco Charter giving the Ethics Commission or Board of Supervisors the explicit jurisdiction to decide: (1) whether the Mayor has the authority to suspend another elected official based on his own personal understanding of official misconduct; and (2) whether the Charter's own provisions for adjudicating the Mayor's charges pass constitutional muster.

Respondent cites *Board of Police Commissioners v. Superior Court* (1985) 168 Cal.App.3d 420, 432, for authority that constitutional claims are barred by the exhaustion rule. Here again, Respondent ignores the exception to the exhaustion rule found in *Board of Police Commissioners.* Run-of-the-mill due process objections are generally barred by the exhaustion rule. However, there is an exception for "unusual factual circumstances." (Ibid. at 432.)

In the case at bar, everything about the case is unusual. The San Francisco Ethics Commission has *never before* held a hearing as to allegations of official misconduct made by one elected official against another. The last time a San Francisco Mayor suspended a public official was in 1978 (the *Mazzola* case); the Ethics Commission did not exist in 1978. The facts of this case could not be more unusual and exceptional. "It would be heroic indeed to compel a party to appear before an administrative body to challenge its very existence and to expect a dispassionate hearing before its preponderantly lay membership on the constitutionality of the statute establishing its status and functions." (*State of California v. Superior Court of Orange County* (1974) 12 Cal.3d 237, 251.) To compel Petitioner to make his case before a body where there is not even an established standard of proof is exceptional indeed. When it is further taken into account that four of five Ethics Commissioners are appointed by officials who are or have been directly involved in this case, it becomes even more bizarre. (The Mayor, District Attorney, City Attorney and Board of Supervisors each have an appointee on the Commission). Accordingly, the exhaustion rule is inapplicable to the highly unusual factual and legal questions presented by the case at bar.

The exhaustion rule is also inapplicable where the only method of attacking the validity of the procedure or underlying law is by resort to the courts. (*Bernstein v. Smutz* (1947) 83 Cal.App.2d 108, 115.) Here, Petitioner has no method of attacking the Charter definition of

official misconduct either before the San Francisco Ethics Commission or before the San Francisco Board of Supervisors. Similarly, Petitioner has no means of attacking the constitutionality of the procedure itself before either body. Neither the Ethics Commission nor the Board has jurisdiction to rule on the constitutionality of the Charter. Accordingly, the exhaustion doctrine can not preclude Petitioner's request for judicial review of the administrative procedure at issue or its underlying law.

**2. There Is No Specific Administrative Procedure for the Submission, Evaluation and Resolution of the Allegations**

The doctrine of exhaustion of administrative remedy is inapplicable where there is "no specific remedy provided, permitted or authorized by statute or by rule of the administrative agency involved." (*Rosenfield v. Malcolm* (1967) 65 Cal.2d 559, 566.) "[A]n opportunity for administrative review does not constitute the sort of 'remedy' which a party must exhaust before invoking the assistance of the courts unless the statute or regulation under which such review is offered 'establishes clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties.' (*Endler v. Schutzbank* (1968) 68 Cal.2d 162, 168.)

In the case at bar, there is no specific means of adjudication of Respondent's charges before the Board of Supervisors or the Ethics Commission. San Francisco Charter § 15.105 (a), merely says the Mayor can suspend an official, the Ethics Commission will hold a hearing on the suspension, and the Board will vote on the record. There is a "complete lack of any mention in the rules of specific administrative procedure." (*Larwood Company v. San Diego Federal Savings and Loan Assoc.* (1960) 185 Cal.App2d 450.) Neither the Charter nor any existing regulations mention any rules of evidence, standard of proof, or any administrative procedure for the hearing whatsoever.

"Our courts have repeatedly held that the mere possession by some official body of a continuing supervisory or investigatory power does not itself suffice to afford an 'administrative remedy.'" (*Endler v. Schutzbank, supra,* at p. 68.) The Charter's mere requirement that the Ethics Commission shall hold a hearing and the Board will vote later is little more than granting

supervisory and investigatory power to the Commission and Board. There are no rules or regulations regarding how the hearing will be conducted. The Charter is silent as to whether the parties will have the right to call witnesses, make opening and closing statements, issue subpoenas, depose witnesses, conduct discovery, etc. The Charter similarly makes no provision as to whether the parties may address the Board of Supervisors.

In fact, the Ethics Commission intends to promulgate rules of procedure on an *ad hoc* basis, beginning with the first proposed "preliminary hearing," on April 23, 2012. (See Exhibit 1, Email from St. Croix to Waggoner, March 23, 2012, and Exhibit 2, Memo from St. Croix to Counsel for Sheriff Mirkarimi and Counsel for Mayor Lee, March 28, 2012). There is nothing in the Charter that allows the Commission to make up the rules as it goes along. Indeed, the Commission's stated intent to decide the rules for this specific hearing is outrageous. There is no precedent whereby an administrative agency can simply make up the law to suit itself. Where, as here, that same agency is being advised by the very same attorneys who are prosecuting the case, the law of due process has been effectively eviscerated.

Where, as here, those same attorneys are also representing Respondent, due process becomes rule by undue fiat; as President Nixon remarked, "Well, when the President does it, that means it's not illegal." However, the law does not permit the Mayor to be judge, jury and executioner. The law does not permit the Ethics Commission to do essentially whatever it wants, after consulting with the Mayor's lawyers. Respondent would have Petitioner exhaust an administrative remedy that Respondent controls every step of the way.

The Charter also provides for no deadline as to when the Ethics Commission must hold a hearing or conclude its proceedings. There is no language at all about Petitioner's right to have the matter resolved in a reasonable timeframe. This fact alone is a constitutional due process violation; there is no basis in the law for an indefinite administrative process. If the Commission's past practice of holding hearings and resolving complaints of wrongdoing is any indication, this case could be drawn out anywhere from 4-6 years. (See Exhibit 3, Decl. of Waggoner).

Respondent attempts to invalidate the complete absence of a timeline for adjudication by stating that Petitioner "insisted on delay." (Opp. 13:22). In fact, the Executive Director of the Ethics Commission, John St. Croix, contacted counsel for Petitioner on March 23, 2012, and expressed the intent to have a "preliminary hearing" one week later, on April 5, 2012. (See Exhibit 1, Email from St. Croix to Waggoner). Counsel for Petitioner responded on March 26, 2012, requesting one additional week, to April 12, 2012. (See Exhibit 4, Email from Waggoner to St. Croix.) The assertion that Petitioner insisted on delay misstates the facts.

The doctrine of exhaustion of administrative remedies is therefore inapplicable because the nature of this case raises exceptional constitutional and public policy questions and there are absolutely no rules of procedure to adjudicate the proceedings. Either basis alone would render the doctrine inapplicable; taken together, they provide a more than compelling basis for rejecting the doctrine of exhaustion of administrative remedies.

## II. THE WRITTEN CHARGES DO NOT ALLEGE CONDUCT THAT MEETS THE WELL-SETTLED DEFINITION OF OFFICIAL MISCONDUCT UNDER THE SAN FRANCISCO CHARTER

### 1. The Attempted Removal of Petitioner Cannot Be Justified by the Fact that He Was in Office as a Supervisor Prior to January 8, 2012.

Respondent initially argues that Petitioner can be removed for official misconduct because he was "in office" as a Supervisor until January 8, 2012, and thus any actions he took prior to being sworn in as Sheriff could be used to remove him from the office -- not of Supervisor -- but of Sheriff. This argument beggars belief. If this were so, serious equal protection problems would arise as, under this tortured reading of the law, a person who was not previously an office-holder, yet who won election to office, could commit misconduct in the period between the election and being sworn in, yet remain immune from removal, while a person who previously held a different elective office, such as Petitioner, would be subject to removal from his new office. While it might be arguable that Petitioner could have been removed from the office of Supervisor for his conduct between the election and January 8, 2012 – a position we assume for the sake of argument but do not concede – it does not follow that he

is subject to removal from the office of Sheriff for conduct which occurred before he assumed that office.

Indeed, much of the Opposition is devoted to showing that petitioner was in some fashion acting as Sheriff of San Francisco for the period between the November 2011 election and his swearing in on January 8, 2012. However, it is abundantly clear that he was serving as a Supervisor during that time period as he attended Board meetings regularly and voted on items that came before the Board.

As further support for this seemingly obvious point, the doctrine of incompatibility of offices would have prevented Petitioner from serving as both Sheriff and Supervisor at the same time. (*See, e.g., People ex rel. Deputy Sheriffs' Ass'n v. County of Santa Clara* (1996) 49 Cal. App. 4th 1471, 1481: "The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other." In San Francisco, there is inherent incompatibility between these two offices because the Board of Supervisors votes on the City budget, which includes the budget of the Sheriff. (San Francisco Charter section 9.100.) Thus, from the November 2011 election through January 8, 2012, Petitioner held the office of Supervisor, not Sheriff.

Respondent next argues that Petitioner's actions on or after January 8, 2012 might constitute official misconduct, and refers to public comments made by Petitioner on January 8 allegedly calculated to avoid responsibility for his own crime of domestic violence. One glaring problem with this argument is that these public comments are not even referenced in the Written Charges of Official Misconduct.

Moreover, with respect to any public comments Petitioner may have made regarding the investigation by the police, such comments could not constitute official misconduct as they were in no way related to his duties as Sheriff, which are set forth in Charter section 6.105. In this regard, some unspecified "mission" of the Sheriff to "encourage victims and witnesses of

domestic violence to come forward" is asserted by Respondent as having the characteristic of a duty of the sheriff, without any legal justification. Charter section 6.105 spells out the Sheriff's duties, and they don't include victim encouragement programs.

Respondent next argues that Petitioner's admission of a misdemeanor on March 12, 2012 was official misconduct, citing two irrelevant out-of-state cases as support. First, with respect to out-of-state law, California's courts have stated the following: "While the decisions of other states are not controlling, they are persuasive and serve as guides in the initial interpretation of local statutes of like import." (*In re Setrakian's Estate* (1959) 169 Cal. App. 2d 795, 803, underscoring supplied.) No case cited by Respondent concerns a statute similar to the San Francisco Charter provision at issue here, i.e., section 15.105.

Additionally, "Decisions from other jurisdiction... while persuasive when they follow in all essential features the case under consideration, are not controlling when the law in this state is well settled." (*People v. Towell* (1932) 127 Cal. App. 623, 625, underscoring supplied.)

Two points are important here: first, the out-of-state cases cited by Respondent do not "follow in all essential features" the case at bar; and, second, the law in this state is well-settled as to what constitutes official misconduct under the San Francisco Charter, and when that misconduct must occur for removal to be warranted. It must consist of the violation or omission of a proscribed act done while in office. (*Mazzola, supra*, 112 CA3d at 150.)

Moreover, official misconduct does not "relate forward" from the time of its commission to the time that it is admitted, and the out-of-state cases cited by Respondent, *State v. McInnis* (1979) 586 SW2d 890, and *Application of Baker* (1976) 386 NYS2d 313, do not even stand for that proposition. In fact, the Supreme Court of New York -- which, in that state, is the trial court -- explicitly stated that it was deciding the case without resorting to the principle of "condonation" or "full disclosure". (*Application of Baker, supra*, 386 NYS2d at 316.)

The fact that Petitioner entered a plea of guilty and was placed on probation after he became Sheriff does not somehow magically transport the time of the underlying conduct from before January 8, 2012, to some time afterwards. The significance of the alleged misconduct,

whatever it may be, is fixed at the time it occurred – not the time a plea and sentence related to that conduct was later imposed.

To answer Respondent's contention that the plea and sentence itself could constitute misconduct, there exists a useful analogy in the area of a court's ability to revoke the probation of a defendant in a criminal case. Penal Code § 1203.2 permits a court to revoke probation and find the defendant in violation thereof for any of defendant's conduct that occurs while he or she is on probation. A court, however, may not revoke probation for any conduct by the defendant that occurred prior to the time defendant was placed on probation – even if the defendant pleads guilty to a crime based on that conduct after he has been placed on probation. The same principle applies here. Respondent may not be permitted to seek the removal of Petitioner because he exercised his constitutional right to enter a plea of not guilty and insist on a jury trial for a period of time, for conduct occurring before he became Sheriff.

**2. Official Misconduct, As Set Forth in the Charter and Defined by the Mazzola Court, Requires that the Conduct Occur While the Official Is in Office**

Respondent next argues that the Charter does not explicitly require that official misconduct take place while the official is in office. But Respondent misses the point: the Charter's phrase "official misconduct" has been defined already by the *Mazzola* court in a way that neither this court, nor Respondent, are free to disregard.

Because the sole authority on point eviscerates his position, Respondent is compelled to argue that the portion of the *Mazzola* case that says that official misconduct means conduct done while the officer is in office is meaningless. But, as shown below, it is not.

In arriving at its definition of official misconduct, it is true that the *Mazzola* court was not addressing the assertion the pre-term conduct could not constitute official misconduct; it was addressing a claim that that term was unconstitutionally vague. In overruling that claim, however, the court made a careful and deliberate survey of the legal authorities that supported its ruling, i.e., numerous California cases and learned treatises. The reason the court was able to arrive at its conclusion that the term "official misconduct" was not unconstitutionally vague was

precisely because these legal authorities has considered the term and already decided what it meant. And, one of the things it meant was that the misconduct had to be done in the officer's "official capacity" – which obviously denotes an officer who is in his office at the time the misconduct occurs. (*See Mazzola, supra*, 112 CA3d at 150, citing 63 Am.Jur.2d, Public Officers and Employees, § 190, p. 743.) Thus, it was entirely expectable that the court, after spending a page or more of the decision describing the term "official misconduct," stated that it was conduct done while in office.

Indeed, the very emphasis used by the court in its definitional summation of the term belies Respondent's argument that the definition was dicta. The court emphasized the definition by using italics – something the court repeated later in the opinion in several places where it obviously wanted to stress the importance of the point being made. When the *Mazzola* opinion is read in its entirety, it is disingenuous to assert that the the italicized portions of the opinion are unimportant; in fact, they are the most critical portions of the opinion.

Finally, even if this definition could somehow be branded as dicta, it would still have to be followed. In *Paley v. Superior Court* (1955) 137 Cal.App.2d 450, 460, the Court of Appeal stated: "Because the issue was not necessary to the decision in a narrow sense, real parties in interest argue that what the Supreme Court said was dicta and need not be followed. We do not agree. Dicta are not to be ignored. Dicta may be highly persuasive, particularly where made by the Supreme Court after that court has considered the issue and deliberately made pronouncements thereon intended for the guidance of the lower court upon further proceedings. (*Id.*, underscoring supplied.)

*County of Fresno v. Superior Court* (1978) 82 Cal. App. 3d 191, 194 is to the same effect: "Even when part of an opinion is not relevant to material facts, if it is responsive to an argument raised by counsel and intended for guidance of the court and attorneys upon a new hearing, it probably constitutes the basis of the decision and cannot be disregarded by a lower court as mere dictum."

"And, of course, even if part of a higher court's opinion may be dictum, lower courts are bound to follow it." (*Fogerty v. Cal.* (1986) 187 Cal. App. 3d 224, 234, fn. 7.)

For all these reasons, the *Mazzola* definition of official misconduct as requiring that the conduct be done while in office may not be ignored.

### 3. The Amendment to the Charter Did Not Alter the Timing of Official Misconduct; It Merely Added Additional "Definition" of the Phrase that is Unenforceably Vague

To the extent that Respondent argues the 1995 amendment to that portion of the Charter dealing with official misconduct has been substantively changed as to when the misconduct must occur, he is again mistaken. The amendment merely expanded the definition of official misconduct – using language so vague its meaning could not be gleaned by reasonable persons – and did nothing to expand the time limitation for that phrase, as defined by the *Mazzola* court.

### 4. Respondent Attempts to Import Legal Concepts from Other States and Statutory Schema that Have No Application Here

Lastly, Respondent argues that the temporal line for official misconduct should be drawn at the time of election or before. Here again, there is an attempt to import other states' legal concepts which have nothing in common with the Charter as construed by *Mazzola*. As noted before, these out-of-state cases are meaningless to the case at bar.

Respondent also cites *People v. Cherry* (1989) 209 CA3d 1131, for the proposition that "California law permits removal from office for official misconduct at any time within six years immediately preceding the presentation of an accusation." (Opposition at 19-20.) What Respondent fails to tell the court is that the *Cherry* case concerned a proceeding held under Govt. Code §§3060-3075 -- not under the San Francisco Charter -- and that GC §3074 explicitly permits the removal of City or county officers for "willful or corrupt misconduct in office occurring at any time within the six years immediately preceding the presentation of an accusation by the grand jury." That is not the situation in the case at bar.

## III. SAN FRANCISCO CHARTER § 15.105(e) IS UNCONSTITUTIONALLY VAGUE ON ITS FACE AND AS APPLIED

### 1. It Is Impossible to Be On Notice of an Arbitrary Standard of Decency that Has Never Been Tested Before

A statute violates due process of law if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.* (1926) 269 U.S. 385, 391.) Here, no San Francisco Mayor, Ethics Commission or Board of Supervisors has ever before applied San Francisco Charter § 15.105(e) and succeeded. The "decency, good faith and right action" clause of the Charter is about as vague as a statute can be and still be called a government statute and not a holy scripture. Respondent's argument amounts to an assertion that any public officer knows what decency means to the Mayor, even thought the Mayor's particular standard of decency has never been tested in court.

The case most directly on point is *Mazzola v. City and County of San Francisco* (1980) 112 Cal.App.3d 141. The *Mazzola* court rejected a vagueness challenge to "official misconduct," because "by its very definition, there exists the requisite nexus between the act or mission and the position held." *Mazzola v. City and County of San Francisco, supra,* at p. 151. However, here, Respondent's application of the Charter definition of official misconduct rejects the *Mazzola* court's requirement that there be a nexus as between the office and the conduct. "[The Charter], not *Mazzola* controls this case." (Opp. 17:24.) Respondent admonishes the *Mazzola* court for not having chosen its words more carefully. (Opp. 18:4-5.).

However, *Mazzola* makes abundantly clear that the only reason "official misconduct" survived a vagueness challenge was because "official misconduct" could be sufficiently defined: the conduct must have a "direct relation to and be connected with the performance of official duties." (*Mazzola v. City and County of San Francisco, supra,* quoting 63 Am.Jur.2d, Public officers and Employees, § 190, p. 743.) The definition of official misconduct under attack here, by Respondent's own admission and argument, needs no direct connection to the performance of official duties. Accordingly, the Charter § 15.105(e), as applied here, is unconstitutionally vague. There is absolutely no basis for upholding the application of a law that would permit a

finding of official misconduct on the basis of alleged conduct that occurred before office that has no direct relationship to the office.

**2. Respondent Mischaracterizes the Conduct at Issue**

Respondent's argument that Charter § 15.105(e) is not unconstitutionally vague as applied essentially amounts to an argument that Petitioner should have known that any allegation made by Respondent, no matter how baseless, is a sufficient basis of suspension. Respondent alleges Petitioner committed official misconduct by committing "domestic violence" and an "attempted cover-up." Nowhere in Respondent's 25-page brief does Respondent mention the actual basis for Mayor Lee's suspension of Petitioner: a plea to misdemeanor false imprisonment. (See Exhibit 5, Mayor Lee's Press Release, March 20, 2012). Rather, Respondent seeks to characterize the alleged wrongdoing in the most prejudicial manner possible. "Petitioner criminally assaulted his wife and threatened to use the power of his office to gain custody of their son… and participated in an attempted cover-up." (Opp. 5:12-13.)

It is as if Respondent seeks to add an additional salacious allegation with each new characterization of the alleged misconduct. The melodramatic rhetoric is an attempt to remove the focus from the language of the Charter and instead place it on Respondent's fantastic allegations. Moreover, in the Mayor's Charges of Official Misconduct, the "cover-up" language is considerably more restrained: Petitioner "**may have** acted or directed others acting with him or on his behalf to discourage and dissuade witnesses… and encourage the destruction of evidence." (Opp. Ex. A, 8:5-8, emphasis added.) Thus, Respondent fabricates a "cover-up" out of thin air. This prejudicial accusation is unexplained.

**3. Respondent's Cases Are Distinguishable**

Similarly, Respondent also discusses two cases that are distinguishable to the case at bar. The first case, *Cranston v. City of Richmond* (1985) 40 Cal.3d 755, is about a police officer who was fired for speeding and thereby endangering the lives of others. The second, *Monserrate v. New York State Senate* (2d Cir. 2010) 599 F.3d 148, is about a state senator who smashed a glass into a woman's face. (See Exhibit 6, Report of the New York State Senate Select Committee).

In the case at bar, Petitioner plead guilty to misdemeanor false imprisonment and the District Attorney's office thereafter opined that justice had been served. This case has nothing to do with possible reckless homicide or actual mayhem. While Respondent lists the original criminal charges against Petitioner, those charges were dropped. The question here is whether the criteria of San Francisco Charter § 15.105(e) can reasonably be understood to encompass a conviction for misdemeanor false imprisonment relating back to conduct which occurred before Petitioner assumed office that had absolutely nothing to do with the office.

Charter § 15.105(e) provides:

> OFFICIAL MISCONDUCT. Official misconduct means any wrongful behavior by a public officer in relation to the duties of his or her office, willful in its character, including any failure, refusal or neglect of an officer to perform any duty enjoined on him or her by law, or **conduct that falls below the standard of decency, good faith and 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.

This definition of official misconduct can be broken down thus:

i. **Any wrongful behavior** by a public officer **in relation to the duties** of his or her office, willful in its character;

ii. **Including any failure, refusal or neglect** of an officer to perform **any duty** enjoined on him or her by law;

iii. Or conduct that falls below **the standard of decency, good faith and right action** impliedly required of all public officers;

iv. And including **any violation** of a **specific** conflict of interest or governmental ethics law.

The final sentence, "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," can be simplified: when a city law says that its violation is official misconduct, then it is official misconduct. The implication is that there may be city laws the violation of which do not constitute official misconduct.

The first two clauses are about official duties: "in relation to the duties" of the office; "any duty enjoined." Thus, the conduct at issue requires a direct nexus between the conduct and the office. While this would appear to be relatively specific, a poll on wrongful behavior in relation to one's duties will vary widely. What may be acceptable in one office may not be acceptable in another. Thus, this language itself would seem to capture every conceivable instance of wrongdoing in relation to the duties of office, from failing to turn out the lights at the end of the day, to falsifying a report.

Respondent suggests that this broad conception can be narrowed by taking into account the "common knowledge and experience among others in the challenger's position or occupation." (Opp. 21:10). However, there are no others who have been in the position of Petitioner; it is exceptionally rare for the Mayor to suspend public officials, regardless of what they may have been accused or convicted. Moreover, § 15.105(e) in its current form has been used to suspend a public official only one other time (Mayor Newsom suspended Supervisor Ed Jew, who resigned before further proceedings). The last time a San Francisco mayor suspended a public official for official misconduct, upheld by the Board, was in 1978, later overturned by the *Mazzola* court. In that case, official misconduct was much more narrowly construed. Respondent now thinks it reasonable that any public official is on notice as to what might violate a clause never before applied with no direct relationship to the office for conduct that can occur at any time, before, during or after the office is held.

**4. The Mayor May Not Arbitrarily Decide What Is Official Misconduct**

Here, the Mayor suspended Petitioner for conduct that occurred before Petitioner even assumed the office from which he was suspended. The conduct at issue had nothing to duty with the duties of Sheriff. Under respondent's theory, it is reasonable to expect that one may be suspended in the future for past actions based on the whim of the Mayor in charge for conduct that has no relation to one's office. However, "a law that is 'void for vagueness' not only fails to provide adequate notice to those who must observe its strictures, but also 'impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.'"

(*People v. Acuna* (1997) 14 Cal.4th 1090, 1116, quoting *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-109.) The problem with Charter § 15.105(e) is that the Mayor can apply it however and whenever he sees fit, with no guidance whatsoever from any other authority.

Petitioner negotiated the terms of the plea with the District Attorney precisely in order to be able to maintain his position as Sheriff. The District Attorney said justice had been served. Now Respondent argues that Petitioner should have known his plea would be the basis for suspension. Just the opposite is true: Petitioner had absolutely no notice or expectation that his plea for misdemeanor false imprisonment would lead to his suspension by the Mayor.

The second two clauses of the § 15.105(e) definition are even less definitive. The standard of decency, good faith and right action impliedly required of all public officers will change depend on who is being asked. Here, Respondent asserts that the Mayor alone knows what all other public officials consider decent, right and in good faith, and that Petitioner should have known the Mayor's views on the subject in advance.

Finally, the fourth clause can be read as a necessary corollary of the third: "*and* including any violation of a specific conflict of interest or governmental ethics law." Respondent does not allege any violation of a specific conflict of interest or government ethics law. In fact, insofar as Respondent ignores the underlying misdemeanor false imprisonment plea in favor of unsubstantiated, prejudicial and inflammatory accusation, Respondent does not mention a violation of any law. "It is, however, difficult to conceive of an act constituting 'willful or corrupt misconduct in office' which does not violate one of the long list of crimes of public officers or the many prohibitions in local ordinances." (*Mazzola v. City and County of San Francisco, supra,* quoting 2 Witkin, Cal. Crimes, § 874, p. 820.) There is no allegation here of any such violation of a specific crime of a public officer.

While Respondent emphasizes alleged "domestic violence and an attempted cover-up," the actual issue is whether Petitioner could have possibly been on notice that his plea for misdemeanor false imprisonment would trigger the arbitrary and indirect application of a decency clause scarcely ever used in the history of San Francisco. The obvious answer is no.

## IV. RESONDENT'S UNPRECEDENTED SUSPENSION OF PETITIONER WITHOUT PAY VIOLATES FUNDAMENTAL DUE PROCESS

### 1. The Mayor Can Not Suspend Without Pay Absent Due Process

What is at issue here is whether Respondent may suspend Petitioner indefinitely without pay for a plea to a misdemeanor related to conduct which occurred while Petitioner was not in the office from which Petitioner was suspended. The courts have upheld suspension without pay of public employees in very limited circumstances; typically, at a minimum, the employee must have been charged with a felony. (*Gilbert v. Homar* (1997) 520 U.S. 924.) "While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." (*Arnett v. Kennedy* (1974) 416 U.S. 134, 167.)

### 2. Petitioner Was Not Afforded a Meaningful Hearing

Due process requires that "a public employee with a property interest in his or her employment be granted a meaningful pre-termination hearing." (*Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532, 545-546.) Respondent concedes Petitioner was never offered a pre-suspension hearing. Respondent's contention that the Mayor offered Petitioner an opportunity to respond to the charges against him is unsubstantiated. The Mayor's post-suspension demand that Petitioner be interrogated was a vain attempt to cure the Mayor's original due process violation while simultaneously an effort to conduct discovery for use before the Ethics Commission. (See Opp. 24:25-28).

### 3. Indefinite Suspension Without Pay Is a Due Process Violation

"[I]n those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay. (*Cleveland Bd. of Educ. v. Loudermill*, *supra,* 470 U.S. at pp. 544-545, emphasis supplied) "[I]n determining what process is due, account must be taken of 'the *length'* and '*finality'* of the deprivation. (*Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422, 434.) Here, Petitioner was suspended indefinitely without pay. The suspension is indefinite because there is no deadline by which the Ethics

Commission must decide on the charges of official misconduct. Such an indefinite deprivation of pay is itself a fundamental violation of due process.

**4. Arbitrary Suspension Without Pay Is a Due Process Violation**

In the *Gilbert* case, *supra,* the Court determined that the suspension without pay, absent a pre-suspension hearing, of a police officer charged with a felony did not offend due process because "an independent third party has determined that there is probable cause to believe the employee committed a serious crime." (*Gilbert v. Homar, supra,* 520 U.S. at p. 934.) Here, the Mayor arbitrarily determined that, by virtue of Respondent's plea to misdemeanor false imprisonment, Petitioner had committed official misconduct. Accordingly, the facts at bar neither indicate the involvement of an independent third party nor do they indicate the presence of a serious crime, where "serious crime" means a felony. For these reasons, the Mayor's suspension of Petitioner without pay fails the *Gilbert* test.

**CONCLUSION**

For all the reasons stated above, the Petition for a Writ of Mandate and/or Prohibition and Complaint for Injunctive and/or Declaratory Relief and/or Other Extraordinary Relief Should Be GRANTED. In the alternative, Petitioner must be suspended with pay.

Dated: April 13, 2012

By: 

DAVID P. WAGGONER
Attorney for Petitioner
ROSS MIRKARIMI

## PROOF OF SERVICE

David P. Waggoner certifies as follows:

I am over the age of 18 years, and not a party to this action. I am a citizen of the United States. My business address is 1777 Haight Street, San Francisco, CA, 94117.

On April 13, 2012, I served the following documents(s) described as follows:

REPLY TO RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION TO ENFORCE PETITION

on the following persons(s) in this action at the following addresses:

Mayor Ed Lee
City Hall, Room 200
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682

Office of the City Attorney
Attn: Sherri Kaiser and Peter Keith
1390 Market Street, Suite 700
San Francisco, CA 94102-5408

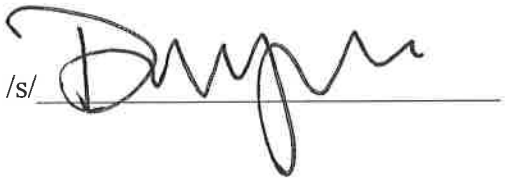
[ ] (BY PERSONAL SERVICE) by personal delivery to the address listed above.

[ ] (BY MAIL) by placing a true copy of the above documents in a sealed envelope with postage fully prepaid in the mail at San Francisco, California, addressed to the person(s) above at the above address(es)

[X] (BY ELECTRONIC MAIL) by causing a copy of such document to be transmitted via electronic mail from the electronic address: davidpwaggoner@gmail.com

[ X ] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 13, 2012, in San Francisco, California.

/s/ 

**PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION**

**TO PETITION FOR WRIT OF MANDATE, ET AL.**

# CPF-12-512077

# Exhibit 1

Gmail by Google

David Waggoner <davidpwaggoner@gmail.com>

## Preliminary Hearing

**john.st.croix@sfgov.org** <john.st.croix@sfgov.org> Fri, Mar 23, 2012 at 11:42 AM
To: David Waggoner <davidpwaggoner@gmail.com>

The Ethics Commissioin would like to schedule the preliminary hearing on Friday, April 5 from 1 - 5 pm. At the first hearing, the Commissioners will establish the protocols, rules, boundaries and procedures for the remaining session(s) of the hearing and provide directives to both parties in terms of filing briefs. I expect that three weeks will elapse until the second session of the hearing so that there is time to prepare briefs and rebuttals. The hearing will be in Room 263 of City Hall.

Please let me know as soon as possible.

Thank you.

jsc

John St. Croix
Executive Director, San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102-6053

**PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION**

**TO PETITION FOR WRIT OF MANDATE, ET AL.**

# CPF-12-512077

# Exhibit 2

# ETHICS COMMISSION
# CITY AND COUNTY OF SAN FRANCISCO



**Memorandum**

**To:** **Counsel for Sheriff Mirkarimi, Counsel for Mayor Lee**

**From:** **John St. Croix, Executive Director**

**Re:** **Scheduling for Preliminary Hearing**

**Date:** **March 28, 2012**

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The Chair has identified potential dates for the preliminary hearing on the matter of the Mayor's suspension of the Sheriff. These dates include April 6, 2012 at 1 pm and April 23, 2012 at 5:30 pm. The earlier date is preferable as it means the issues before the Commission will move more expeditiously. Please let me know if you are available on these dates and if not, please state the reasons -- in writing –why you cannot attend.

Your cooperation is appreciated.

25 Van Ness Avenue, Suite 220 • San Francisco, CA 94102• Phone (415) 252-3100 • Fax (415) 252-3112
E-Mail Address: ethics.commission@sfgov.org Web site: www.sfethics.org

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION

TO PETITION FOR WRIT OF MANDATE, ET AL.

# CPF-12-512077

# Exhibit 3

# DECLARATION OF DAVID P. WAGGONER

I, David P. Waggoner, declare as follows:

1. Since 2005, I have represented individuals accused of violating local campaign finance and governmental ethics laws before the San Francisco Ethics Commission.

2. Attorney Shepard S. Kopp and I are lead counsel for Petitioner in this action.

3. Over the past six years, I have represented individuals before the San Francisco Ethics Commission during multiple public and private hearings.

4. Upon information and belief, I am the only attorney who has represented accused parties before the Commission in hearings.

5. Upon information and belief, in each of those cases that resulted in a hearing, the underlying case was drawn out for at least four years before an actual hearing occurred.

6. The Ethics Commission's own statute of limitations for a finding of probable cause regarding violations of campaign finance laws is four years from the date the Ethics Commission learned of an alleged violation.

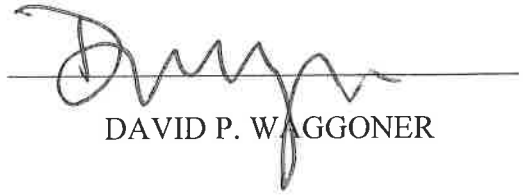
7. There is no statute of limitations as to when a hearing must occur.

8. With regard to allegations of official misconduct, the Ethics Commission has no statute of limitations.

9. There is no statute of limitations requiring the Ethics Commission to act on any allegation of official misconduct.

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

Executed on April 13, 2012, at San Francisco, California.



DAVID P. WAGGONER

**PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION**

**TO PETITION FOR WRIT OF MANDATE, ET AL.**

# CPF-12-512077

# Exhibit 4

Gmail by Google

**David Waggoner <davidpwaggoner@gmail.com>**

## Preliminary Hearing

**David Waggoner** <davidpwaggoner@gmail.com> Mon, Mar 26, 2012 at 12:12 PM
To: john.st.croix@sfgov.org
Bcc: ross mirkarimi <rmirk@msn.com>, Lidia Stiglich <stiglich@stiglichhinckley.com>

Director,

My client's wife, Eliana Lopez, will be out of the country until April 28. I will also be unavailable from April 25 - May 2. I understand that scheduling is difficult, given all of the parties involved. However, at this point, I respectfully request at least an additional week to prepare for the preliminary hearing, to April 12. Similarly, I would request a second hearing in mid-May.

Regards,
David Waggoner
[Quoted text hidden]

**PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION**

**TO PETITION FOR WRIT OF MANDATE, ET AL.**

# CPF-12-512077

# Exhibit 5

**Office of the Mayor**
City & County of San Francisco

**Edwin M. Lee**

**FOR IMMEDIATE RELEASE:**
Tuesday, March 20, 2012
Contact: Mayor's Office of Communications, 415-554-6131

## *** PRESS RELEASE ***

# MAYOR LEE SUSPENDS ROSS MIRKARIMI & APPOINTS LAW ENFORCEMENT VETERAN VICKI HENNESSY

**San Francisco, CA**—Mayor Edwin M. Lee today announced he is suspending Sheriff Mirkarimi following his guilty plea for false imprisonment and appointing veteran law enforcement official Vicki Hennessy as Sheriff.

"Ross Mirkarimi has now pled guilty to falsely imprisoning his wife. After careful review of the City Charter and the evidence before me, I am suspending and formally charging Ross Mirkarimi with official misconduct," said Mayor Lee. "I take this action with every conviction that I am acting on a firm legal basis and doing what is in the best interest of the people of San Francisco. I am appointing law enforcement veteran Vicki Hennessy as the Sheriff. With her nearly 35 years of experience, I have no doubt that she will get the job done, lead the Sheriff's Department and support the good work of our Sheriff's staff and deputies."

Hennessy served as the Executive Director of the San Francisco Department of Emergency Management and Chief Deputy in the Sheriff's Department. Hennessy joined the Sheriff's Department in December 1975 and quickly rose through the ranks becoming the youngest captain in California law enforcement in 1983. She became Chief Deputy in 1997. She has worked in nearly every division of the Sheriff's Department including Captain of the old San Bruno jail, City prison, the high security jail at the Hall of Justice and the intake jail at 425 7th Street. She was at various times in charge of Training, Administration, Field Services, and the Custody Division.

In 2006, Hennessy was the Deputy Director of the San Francisco Department of Emergency Services and Homeland Security where she developed a comprehensive Citywide strategic plan for preparing for, mitigating, responding to and recovering from disasters.

In 2008, Hennessy was named the Director of Emergency Management, where she brought a level of stability to the new department, oversaw the completion of the City's state-of-the-art Emergency Operations Center, ensured the completion of the redesign and update of the 911 Emergency Call taking center, developed the first Combined Emergency Communications Operations Manual and decreased the DEM operating budget by $11 million. Hennessy retired in 2011. She is a native San Franciscan and a Lowell High School graduate. She currently lives in San Francisco with her husband, a retired San Francisco police officer. They have two grown children.

Mayor Lee initiated official misconduct proceedings against Mirkarimi by directing the City Attorney to prepare the appropriate documents and notify the Board of Supervisors and the Ethics Commission, suspending Mirkarimi as Sherriff as early as tomorrow. After five days, the Ethics Commission will begin a process to make a recommendation to the Board of Supervisors.

###

**PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION**

**TO PETITION FOR WRIT OF MANDATE, ET AL.**

# CPF-12-512077

# Exhibit 6

# REPORT OF THE NEW YORK STATE SENATE SELECT COMMITTEE TO INVESTIGATE THE FACTS AND CIRCUMSTANCES SURROUNDING THE CONVICTION OF HIRAM MONSERRATE ON OCTOBER 15, 2009

## III. FACTS

Part A of this Section provides a summary of the uncontested facts relating to the events of December 18-19, 2008. These facts were not disputed by either the prosecution or the defense at Senator Monserrate's criminal trial, although the inferences to be drawn from many of these facts were hotly contested. Part B provides an overview of the criminal proceedings against Senator Monserrate, including the positions advocated by the prosecution and defense and the evidence presented by both sides in support of their arguments. Part C of this Section reviews the additional evidence that the Select Committee considered as part of the investigation.

### A. UNCONTESTED FACTS RELATING TO THE EVENTS OF DECEMBER 18-19, 2008

On December 18, 2008, Karla Giraldo attended a holiday party hosted by Jesus Peña, an attorney, at the World's Fair Marina in Flushing, New York. Jasmina Rojas, Ms. Giraldo's cousin, and Rojas' son, Javier Icaza, picked up Ms. Giraldo from her apartment at approximately 9:00–9:30 p.m. to transport her to the party. Senator Monserrate did not attend the party. At the party, Ms. Giraldo consumed at least two alcoholic beverages. At approximately 12:00–12:30 a.m. on the morning of December 19, 2008, Ms. Giraldo left the party and Ms. Rojas and her son drove Ms. Giraldo to Senator Monserrate's apartment located at 37-20 83rd Street, Jackson Heights, New York. Ms. Rojas accompanied Ms. Giraldo into Senator Monserrate's apartment, located on the second floor of the building. Ms. Rojas greeted the Senator, used the bathroom in his apartment, and then left. Senator Monserrate's apartment building has a surveillance video system with video cameras located at various points both outside and inside the building, including the vestibule and the first and second floor hallways.

Sometime after Ms. Giraldo arrived at the apartment, Senator Monserrate opened her purse in order to place a Patrolmen's Benevolent Association ("PBA") card in her wallet. At that time, Senator Monserrate discovered that Ms. Giraldo had another PBA card in her wallet that was given to her by a male acquaintance, and removed that card. As captured by video surveillance, at approximately 12:54 a.m., Senator Monserrate left his apartment and went into the second floor hallway, opened a trash chute in the middle of the hallway, placed a white trash bag down the chute, then reached into his pocket, pulled out an object, and displayed it in the direction of his apartment. He then threw the object down the chute, and began walking back to the apartment. The object was recovered by the NYPD from the trash chute and was identified as the PBA card that had been removed from Ms. Giraldo's wallet by Senator Monserrate. On the video recording, as Senator Monserrate threw the card down the chute, Ms. Giraldo left the apartment, came into contact with Senator Monserrate (who moved to the side and continued into the apartment), opened the trash chute, looked down it for a moment, and then returned with some haste into the apartment.

Approximately two hours later, Ms. Giraldo's face was lacerated when it came into contact with one of Senator Monserrate's water glasses. Carolyn Loudon, tenant of the apartment directly below Senator Monserrate's, testified that she heard a body hit the floor above her, a woman's scream, and then a man's voice state, in English, "listen to me." At approximately 2:50 a.m., the building's video surveillance showed Ms. Giraldo leaving Senator Monserrate's apartment while holding a white towel to the left side of her face with her left hand. Senator Monserrate then exited the apartment a few paces behind her. The video next captured Ms. Giraldo walking down the stairs until she stepped toward the door of the apartment located at the bottom of the stairs and began ringing the doorbell. Ms. Loudon, the resident of that apartment, testified that she heard her doorbell ring, but did not answer the door. As Ms. Giraldo was ringing Ms. Loudon's doorbell,

Senator Monserrate reached for her arm and proceeded to pull her by her right arm through the first floor hallway, into the vestibule, and out the front door of the apartment building. Ms. Giraldo appeared visibly upset and resistant to Senator Monserrate's actions, grabbing a banister in the hallway (losing the white towel she was holding to her face in the process), and then holding on to the interior doorframe in the vestibule. After pulling Ms. Giraldo out of the apartment building, Senator Monserrate led her to his car.

At approximately 3:27 a.m., 37 minutes after leaving Senator Monserrate's apartment, Senator Monserrate and Ms. Giraldo entered the North Shore Long Island Jewish Medical Center ("LIJ"), located at 270-05 76th Avenue, New Hyde Park, New York, as depicted on surveillance video recovered from LIJ. Senator Monserrate and Ms. Giraldo did not enter the hospital at the emergency room entrance, but used the main entrance of the hospital. A hospital surveillance video shows a security guard leading Senator Monserrate and Ms. Giraldo through the hallways of the hospital for several minutes until they arrived at the emergency room. From approximately 3:50 a.m. to 4:54 a.m., LIJ video surveillance recorded Senator Monserrate sitting in the emergency room waiting area, making telephone calls, and talking to one of Ms. Giraldo's treating physicians. Throughout this period, Ms. Giraldo received treatment. LIJ personnel contacted the NYPD, who subsequently placed Senator Monserrate under arrest.

Ms. Giraldo suffered lacerations to her face, described by Dr. Homayoun N. Sasson, her treating plastic surgeon. The first was "an approximately 1.5 centimeter crushed and deep laceration that extended through the underlying muscle tissue, with no underlying bone injuries noted." Dr. Sasson described the shape of the laceration as "a straight line laceration which was horizontal, but it had crushed tissue edges, which are irregular tissue edges." He described the depth of the laceration as "through the whole thickness of the skin until the skull bone reached . . . that's where the injury stopped." Dr. Sasson described another laceration, on the corner of Ms. Giraldo's left eye, which was a "multidirectional" wound and equally as deep as the larger laceration. Finally, Dr. Sasson testified to other smaller injuries on Ms. Giraldo's face, including "multiple small lacerations below the left eye, in the lower left eyelid region, and in the left check areas." Additionally, Ms. Giraldo's medical records also note that she had brownish, circular bruising (ecchymosis) to her left forearm and a skin tear on her left inner forearm.

Sometime after Senator Monserrate's arrest at LIJ, the NYPD searched his apartment and took photos of the scene, and retrieved the building's surveillance video. The police also collected physical evidence, including, among other things, the PBA card found in the trash chute, a number of white towels stained with blood found in the bathroom and bedroom, a green t-shirt found in the bathroom sink, an unstained, but torn, men's white sleeveless undershirt found in an unlined garbage can, and pieces of a broken water glass found in the bedroom. At the request of the prosecution, the pieces of the broken glass were tested to determine how the glass was broken (*i.e.*, whether an opinion could be reached as to whether the glass was broken intentionally or accidentally), but the tests were inconclusive.