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ETHICS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

In the Matter of Charges Against

ROSS MIRKARIMI,

Sheriff, City and County of San Francisco.

MAYOR'S BRIEF REGARDING ADMISSIBILITY OF MS. LOPEZ'S JANUARY 1 AND JANUARY 4 STATEMENTS ABOUT ABUSE

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INTRODUCTION

On June 13, 2012, Sheriff Mirkarimi raised hearsay objections to Ms. Lopez's videotaped statements concerning the December 31, 2012 domestic violence incident (Mayor's Exh. 4), and Callie Williams' declaration concerning Ms. Lopez's statements to her on January 4, 2012, about the same incident of abuse. We expect that Sheriff Mirkarimi will raise a similar hearsay objection to Ivory Madison's declaration concerning Ms. Lopez's statements to her on January 1 and January 4, about Sheriff Mirkarimi's abuse and Ms. Lopez's response to it.

The Commission should overrule all such objections. The January 1 statements are admissible under more than one exception to the hearsay rule, most significantly as excited utterances and recorded statements of a physical injury and to explain why Ms. Lopez chose to videotape part of the statement; all of the statements are admissible as nonhearsay evidence of Ms. Lopez's state of mind, and direct evidence of her state of mind; all of the statements are admissible as nonhearsay evidence to support the credibility of witnesses; and even if they were not otherwise admissible, all of the statements would be admissible in this administrative proceeding to supplement or explain other admissible evidence.

I. THE JANUARY 1 STATEMENTS ARE ADMISSIBLE

A. The January 1 Videotape And Ms. Lopez's Statements To Ms. Madison Are Admissible Under Evidence Code Section 1240 As Statements "Made Spontaneously While The Declarant Was Under The Stress Of Excitement"

Ms. Lopez's January 1, 2012 statements to Ivory Madison, including the recorded and unrecorded portion, were made spontaneously while Ms. Lopez was under the stress of excitement caused by the physical and verbal abuse she suffered December 31 and the ongoing fear she suffered as a result of Mirkarimi's threat to use his power to take their child if she tried to remove herself from his abuse. Section 1240 of the Evidence Code provides that

> Evidence of a statement is not made inadmissible by the hearsay rule if the statement:
>
> (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and
>
> (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

(Cal. Evid. Code § 1240.)

Under this provision of the Evidence Code, Ms. Lopez's January 1 statements (both on video and unrecorded) to Ms. Madison about the domestic violence incident and her fear that Mirkarimi would use his power to take their child are admissible. Initially, under subdivision (a), these statements "narrate[d], describe[d], or explain[ed] an act, condition or event perceived by the declarant," Ms. Lopez. In the videotaped portion of the statement, Ms. Lopez shows her bruise inflicted by Sheriff Mirkarimi while she describes acts, conditions, and events she perceived:

> [Wearing tank top, pointing to bruise] This happened yesterday um and um [crying] two thousand eleven – and this is the second time this is happening [crying]. [Starting to put sweatshirt on.] And I tell Ross I want to work on the marriage, we need help – I have been telling him we need help and I am going to use this just in case he wants to take Theo away from me, because he did – he said that, that he's very powerful and he can – he can do it [crying].

(Mayor's Exh. 4.) Likewise, Ms. Lopez's additional statements to Ivory Madison that day describe acts, conditions, and events that occurred on December 31. Therefore, these statements meet the requirements of subdivision (a).

These statements also meet the requirements of subdivision (b), because they were "made spontaneously while the declarant was under the stress of excitement caused by such perception." According to Ivory Madison, on January 1, 2012, while relating the events of December 31 and her fear that Mirkarimi would use his power to take their child, Ms. Lopez "burst into tears," apparently stopped crying for some portion of the discussion, "broke down in tears again," and was so "distraught" during the videotaping of Ms. Lopez that Ms. Madison stopped the camera. (Madison Decl. pp. 5:13, 7:9, 9:5.) Consistent with Ms. Madison's description of Ms. Lopez's demeanor during the conversation, Ms. Lopez's demeanor in the videotape is emotional, fearful, and tearful. (Mayor's Exh. 4.) And it should be: Ms. Lopez is describing her husband's physical abuse of her, and his threat to use his power to take custody of their young child. Her demeanor during the January 1, 2012 encounter with Ms. Madison, as reflected on the videotape and consistent with Ms. Madison's description, shows that Ms. Lopez was "under the stress of excitement caused" by the physical and verbal abuse and threats.

The requirement that the declarant's statements be "made spontaneously" does not require any particular timing and in particular does *not* require the statements to be made while the events are

occurring. "The crucial element in determining whether a statement is admissible as a spontaneous statement is the mental state of the speaker." (*Melkonians v. Los Angeles County Civil Serv. Comm'n* (2009) 174 Cal. App. 4th 1159, 1169.) "The nature of the utterance – how long it was made after the startling incident and whether the speaker blurted it out, for example – may be important, but solely as an indicator of the mental state of the declarant." (*People v. Farmer* (1989) 47 Cal.3d 888, 903, *overruled on other grounds, People v. Waidla* (2000) 22 Cal. 4th 690, 724.) There is no requirement that statements admitted under section 1240 be made within minutes or even hours after the events that are described.

And there is no rule that the statements must be unprompted, or occur outside of a conversation. "Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statement of spontaneity if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance." (*People v. Francis* (1982) 129 Cal.App.3d 241, 253.)

Reaching a place of relative safety[1] – here a trusted friend's home - can provide the first secure opportunity for disclosure and trigger an emotional outpouring of previously withheld emotions and utterances. And those statements are admissible. For example, in *People v. Trimble* (1992) 5 Cal.App.4th 1225, a witness's "first secure opportunity for disclosure" did not occur until two days after a traumatic incident. While acknowledging that the "appreciable interval between the incident and the subject statements" might have provided an opportunity for deliberation, the court observed that the totality of the circumstances suggested otherwise. (*Id.* at 1235.) In particular, the court found that the absence of the perpetrator *and* the presence of a trusted person for the first time since the traumatic event "was a triggering event, startling enough to provoke an immediate, unsolicited, emotional outpouring of previously withheld emotions and utterances." (*Ibid.*) Here, Ms. Lopez was away from Sheriff Mirkarimi, her abuser, *and* in the safety and security of Ms. Madison's home, with her friend Ms. Madison. In this place of relative safety, Ms. Lopez broke into tears and told Ms.

[1] The place of safety was only relative given Ms. Lopez's fear of Mirkarimi's power. (Madison Decl. 13:7-9.)

Madison what happened. Thus, as in *Trimble*, Ms. Lopez's statements were spontaneous declarations offered while she was experiencing previously withheld emotions, and therefore, admissible.

The fact that this case does not involve a murder or rape does not mean this incident was not serious enough to produce emotions rendering Ms. Lopez's statement admissible. Sheriff Mirkarimi inflicted a physical injury on his wife. Sheriff Mirkarimi was a Supervisor and Sheriff-elect in the City and County of San Francisco, and he threatened to use his power to take custody of their child. Domestic violence, particularly coupled with threats by a perpetrator in an official position is sufficiently serious and frightening to produce the stress and excitement required under Evidence Code section 1240. In *Melkonians v. Los Angeles County Civil Service Comm'n, supra*, a deputy sheriff was fired for a domestic violence incident, based on statements admitted under Evidence Code section 1240. The victim had formerly dated the deputy sheriff. He climbed through a window into her apartment, and when she found him she asked him to leave. The deputy sheriff grabbed the victim by the mouth, and she bit him. The victim told the deputy sheriff she was going to get a restraining order. The deputy sheriff threatened her and left. The victim first called 911, then information, then a non-emergency number at a nearby Sheriff's station. When the on-duty deputy picked up, the victim asked about getting a restraining order. In the course of the conversation, in which the victim's voice was "halting" and "emotional," *id.* at 424, she stated that the deputy sheriff had threatened her by telling her that no one would believe her word over a deputy's, and that she would be sorry if she sought a restraining order. The victim further informed the answering deputy that the abuser had hit her in the face, and described other aspects of the incident. The victim never testified live at the hearing. The agency admitted the telephone call under section 1240, and the deputy was fired.

On appeal, the court held that the agency correctly admitted the victim's statement and correctly fired the deputy sheriff. The court rejected the deputy sheriff's argument that the incident and injuries were too minor to produce stress and excitement under section 1240. The court observed that many cases involving the spontaneous statement exception involved more serious injuries – but the seriousness of the injury was beside the point. "However, this does not mean the spontaneous statement exception applies only in such cases. The mental state of the speaker is the determinative factor." (*Id.* at 1170-71.)

The court in *Melkonians* rejected other arguments that might be made in the present case. The deputy sheriff in *Melkonians* argued that the victim's statement – that she wanted to get a restraining order – showed that she was already considering future actions, making her state of mind too "reflective" for her statement to be admissible. (*Id.* at 1168.) Here, the Sheriff might argue that Ms. Lopez was considering a child custody battle when Ms. Lopez made her statement about the Sheriff's assault and threat. In *Melkonians,* the court rejected a similar argument, and instead relied – correctly – on the victim's emotional state of mind evident from the recording. The victim "was distraught and tearful during the conversation" and "spoke haltingly and with obvious emotion." (*Id.* at 1170.)[2] (Just like Lopez here.) The statement was admissible, and this statement alone supported firing the sheriff's deputy.

Finally, we note that the Superior Court addressed this issue in the criminal case against Sheriff Mirkarimi. After viewing the video statement, and extensive briefing by Sheriff Mirkarimi and the District Attorney regarding the law and Ms. Madison's statements to law enforcement, the Superior Court ruled that Ms. Lopez's statements on the video and to Ivory Madison were admissible under section 1240. The Superior Court stated the correct rule of law: "What is critical in determining whether a statement is admissible as a spontaneous statement is the mental state of the speaker." (Tr. 29:10-12, *People v. Ross Mirkarimi*, S.F. Super. Ct. No. 12001311 (Feb. 27, 2012) (Exh. A); *id.* at 21-31 (full ruling).) And the Superior Court applied this rule of law. The Superior Court found that Ms. Lopez

> is distraught and is tearful like the declarant in *Melkonians*. No questions were asked by Ms. Madison on the video to prompt her to make self-serving statements. There is no lengthy narrative. Instead, her description of her injury in the incident is brief, cryptic, and halting. Her expression of concern for her son and the custody of her son support the determination of spontaneity in this case while she is under the stress of excitement. Her immediate thoughts for her son are clearly instinctive, or instinctual. Her remarks do not reflect any hint of contrivance, nor do they reflect any hint of being scripted or staged. These statements are admissible under Evidence Code Section 1240.

[2] A witness need not be continuously crying or incoherent to qualify for this hearsay exception. (See *People v. Poggi* (1988) 45 Cal.3d 306, 319 [a victim's statements later in conversation admissible because she was still under emotional stress, "even though she had become calm enough to speak coherently"].)

(*Id.* at 29:28-30:12.) The Superior Court correctly assessed these statements. They are admissible under section 1240.

B. The Videotape Is Also Admissible Under Evidence Code Section 1370 Because It Describes The Infliction Of Physical Injury

Evidence Code section 1370 provides additional grounds for admission of the videotaped portion of Ms. Lopez's statement. Section 1370, subdivision (a) of the Evidence Code provides:

> (a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met:
>
> (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
>
> (2) The declarant is unavailable as a witness pursuant to Section 240.
>
> (3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section.
>
> (4) The statement was made under circumstances that would indicate its trustworthiness.
>
> (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official.

(Cal. Evid. Code § 1370.) All five elements are met here. First, Ms. Lopez describes Sheriff Mirkarimi's physical injury to her on December 31, and also states that "this is the second time this is happening." Second, Ms. Lopez is unavailable to testify, for at least one good reason: she is in Venezuela and beyond the reach of subpoena power. (Cal. Evid. Code § 240(a)(4),(a)(5).) Third, the statement was made at or near the time of the infliction of the physical injury.

Fourth, the statement was made under circumstances that indicate trustworthiness. (Cal. Evid. Code § 1370(b) [listing some factors to consider].) Ms. Lopez was obviously emotional and fearful of Sheriff Mirkarimi's threat to use his power to take their son if she tried to go to the police to protect herself, and the videotape was her attempt to defend herself in the event Sheriff Mirkarimi acted on this threat. Her statement was unscripted and both its tone and content refute any suggestion of fabrication; she stated that she wanted to get counseling for her marriage, not end it. Moreover, Ms. Lopez's statements describing her injury are corroborated by Sheriff Mirkarimi's admission that he bruised her, the video itself that depicts the bruise, and Ms. Madison's and Ms. Williams' observations of the bruise.

Fifth, the statement is electronically recorded.

Finally, under Evidence Code section 1370(c), there was notice to Sheriff Mirkarimi about the intent to use this statement, sufficient for him to prepare to meet the statement. Sheriff Mirkarimi obtained this video in discovery in his criminal case. The Mayor filed a motion to obtain this video from the Superior Court in April and stated an intention to use the video in these proceedings, and has indicated in past briefs to the Commission that the video would be tendered.

II. ALL OF MS. LOPEZ'S STATEMENTS ARE ADMISSIBLE TO SHOW MS. LOPEZ'S STATE OF MIND – THAT SHE WAS FEARFUL OF SHERIFF MIRKARIMI AND READY TO REPORT THIS DOMESTIC VIOLENCE INCIDENT – AND TO EXPLAIN WHY SHE VIDEOTAPED HER STATEMENT

A hearsay objection is not appropriate when the declarant's statements are offered to show her state of mind – and her state of mind tends to show that other contested facts are true. (*People v. Green* (1980) 27 Cal.3d 1, 26, *overruled on other grounds, People v. Hall* (1986) 41 Cal.3d 826, 834 n.3.) That is the case here. All of Ms. Lopez's statements – on video and to Ms. Madison on January 1, and to Ms. Madison in the morning on January 4 and to Ms. Williams around 1pm – are admissible as evidence of Ms. Lopez's fearful state of mind. Ms. Lopez's fearful state of mind tends to show that other facts relevant to the Charges are true. (*See Green*, 27 Cal.3d at 26 [existence of fearful state of mind tended to show whether other facts were true].) If Ms. Lopez was fearful, that would tend to show that the December 31 incident with Sheriff Mirkarimi was a frightening intentional incident of domestic violence and abuse of power plain and simple, not just an uncharacteristic mistake, accident, or misunderstanding, as Sheriff Mirkarimi has claimed elsewhere. Moreover, if Ms. Lopez was fearful, that would tend to show that Sheriff Mirkarimi's actually made statements that he was "very powerful" and "he can do it" – take custody of her son.

Moreover, all of these statements are admissible under Evidence Code sections 1250 (evidence of present state of mind). Section 1250 of the Evidence Code provides:

> Subject to section 1252, evidence of a statement of the declarant's then-existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
>
> (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or …

(Cal. Evid. Code § 1250.) These statements show Ms. Lopez's fearful state of mind and her plan to report this domestic violence incident. The decision in *People v. Escobar* (2000) 82 Cal.App.4th 1085 applied section 1250 to statements substantially similar to those at issue here. In *Escobar*, the court held that statements of a murder victim – expressing her desire to leave the defendant and the defendant's threats to kill her if she did – were admissible under section 1250 to prove the victim's state of mind, which the court found relevant to disprove the defendant's story that the victim had provoked him into a quarrel that resulted in her death. The court found further that the circumstances surrounding the statement did not suggest a motive for fabrication. The victim made the statements to a trusted friend, during a ride home from work, and after the friend had asked why the victim was crying and whether it had anything to do with the defendant. The court concluded that the victim, "was confiding in her friend, and expressing her then-existing state of mind" and that therefore, the statements were admissible. (*Id.* at p. 1103.) Here, like in *Escobar*, Ms. Lopez's statements to her neighbors and friends clearly evidence her state of mind – she is fearful of Mirkarimi's power and in particular his threats to use that power to take her child if she told the police about the abuse. The totality of the circumstances surrounding the statements, including their consistency, the corroborating physical evidence of the bruise, Sheriff Mirkarimi's admissions, and Ms. Lopez's distraught demeanor on the videotape all support the trustworthiness of the statements. Thus, under section 1250, the statements are admissible.

Ms. Lopez's out of court statements to Ms. Madison on January 1 are also admissible to explain her conduct, in particular to explain why she recorded part of her statements to Ms. Madison. Evidence Code section 1241 provides that statements offered to explain or make understandable the conduct of the declarant are not made inadmissible by the hearsay rule so long as they are made while the declarant was engaged in the conduct. (Cal. Evid. Code § 1241.) Ms. Lopez's January 1 statements to Ms. Madison leading up to the videotaping evidence her fear of Sheriff Mirkarimi and in particular her fear that she would not be believed or protected because of his political position and power and therefore, explain why she had Ms. Madison videotape her statement. Therefore, the statements are also admissible under Evidence Code section 1241.

Ms. Lopez's statements on January 4, to Ms. Madison in the morning and to Callie Williams around 1pm, are admissible to show the shift in Ms. Lopez's attitude toward reporting this incident on January 4. In the morning, she was willing to report the incident to police (Ms. Madison). By 1pm she was planning to go to the doctor for her injury and was uncertain about law enforcement (Ms. Williams). By midafternoon, she was asking her neighbors to destroy evidence and not to cooperate with the police (Ms. Madison), an attitude that continued into the evening with requests not to talk to the police if asked (Ms. Williams). That change in attitude occurred amid a series of communications between Ms. Lopez and Sheriff Mirkarimi's campaign manager Linnette Peralta Haynes, and Sheriff Mirkarimi himself.

III. ALL OF MS. LOPEZ'S STATEMENTS ARE ADMISSIBLE TO SUPPORT MS. MADISON AND MS. WILLIAMS' CREDIBILITY

Ms. Lopez's January 4 statement to Ms. Williams is also admissible to defend Ms. Madison from attacks on her credibility – and vice versa. The credibility of a witness is always relevant. (Cal. Evid. Code § 210.) Out of court statements can properly be used to "rebut the inference of bias raised by the defense." (*People v. Nichols* (1970) 3 Cal.3d 150, 157, *disapproved of on other grounds, People v. Henderson* (1977) 19 Cal.3d 86, 96.)

Here, Ms. Lopez and Sheriff Mirkarimi have suggested in the press that Ms. Madison is politically motivated to fabricate evidence based in part on her friendship with Sheriff Mirkarimi's alleged enemies, and the Mayor expects that a claim of bias will be made in these proceedings. This claim of bias is frivolous. And it is disproven by the similarity of these statements. The fact that Ms. Williams' account of Ms. Lopez's statements is in material respects consistent with Ms. Madison's account rebuts any claim that either witness is unreliable, biased, or otherwise lacks credibility. Therefore, Ms. Lopez's out of court statements may be properly used to rebut any such inference made in these proceedings.

IV. EVEN IF NO HEARSAY EXCEPTION APPLIED, ALL OF THESE STATEMENTS WOULD BE ADMISSIBLE UNDER GOVERNMENT CODE SECTION 11513(D), BECAUSE THEY SUPPLEMENT OR EXPLAIN OTHER EVIDENCE

Finally, even if these Evidence Code provisions did not apply, all of these statements would be admissible under Government Code section 11513(d), which permits an administrative agency to

admit hearsay "supplementing or explaining other evidence." (See *Komizu v. Gourley* (2002) 103 Cal.App.4th 1001, 1005-1008 [at license revocation hearing, Government Code section 11513(d) permits admission of alcohol analysis report over hearsay objection to supplement officer's in-field observations of driver's probable intoxication]; see also *Berg v. Davi* (2005) 130 Cal.App.4th 223, 229-230 [at hearing regarding denial of real estate license, over hearsay objection, Government Code section 11513(d) allows consideration of circumstances surrounding attorney's disbarment, set forth in state bar opinion, to supplement fact of disbarment, which could be judicially noticed].) Here, Sheriff Mirkarimi admitted to a December 31 argument and to bruising his wife. (Mirkarimi Decl. ¶ 4.) That admissible statement alone permits the admission of hearsay to explain and supplement it. (*E.g.*, *Lake v. Reed* (1997) 16 Cal. 4th 448, 461-462 [party admission a basis to allow hearsay to explain and supplement admission, under section 11513(d)].) For the reasons described above, the January 1 statements are admissible for their truth – and they also provide a basis for admission of the January 4 statements under section 11513(d). All of these statements supplement and explain otherwise admissible evidence and, therefore, may be properly considered in these proceedings.

CONCLUSION

The Commission should overrule Sheriff Mirkarimi's hearsay objections to Ms. Lopez's January 1 videotaped statements, January 1 statements to Ms. Madison, and January 4 statements to Ms. Madison and Ms. Williams. All of these statements are admissible to prove official misconduct.

DATED: June 18, 2012

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EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN THE CITY AND COUNTY OF SAN FRANCISCO

HONORABLE GARRETT WONG, JUDGE PRESIDING

DEPARTMENT NO. 15

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THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. ROSS MIRKARIMI, Defendant.	Court No. 12001311 **MOTIONS**

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Monday, February 27, 2012

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Official Court Reporter

are statements made on January 4th from different individuals under different circumstances.

MS. AGUILAR TARCHI: And Your Honor, there is evidence, and Ms. Stiglich is aware of that, that suggests that during the conversation, there were outside parties coming into the scene, not literally, but via phone calls, that the People at trial will proffer played a role also in the concern, and the reasons why she did not report that to the dissuade. But primarily, the conversation the very next day, January 1st, 2012, they're pretty much in the delivery room, was the setting, of her neighbor, Ms. Ivory Madison, and the video that was taken by Ms. Madison also in her own home.

THE COURT: Very well. Submit it?

MS. AGUILAR TARCHI: Submit it, Your Honor.

MS. STIGLICH: Submit it, Your Honor.

THE COURT: All right. Thank you, counsel.

So for clarification purposes, I wanted to make sure I knew what the sequence of statements was. And so I believe this is a correct statement of what took place.

So I'll begin my ruling by stating that the motions in the oppositions and the papers here involved admissibility of hearsay statements by the complaining witness, that would be Ms. Lopez to Ms. Ivory Madison on the morning of January 1, 2012, and subsequent statements by Ms. Lopez to Ms. Madison after that morning, and to Ms. Callie Williams during the early afternoon of January 4th, 2012. And the Court has determined that these statements all pertain to the allegations in the complaint of domestic violence committed,

allegedly, by defendant on on December 31, 2011.

According to the parties, the complaining witness made statements to Ms. Madison before, during and after a video recording. And the record should reflect that the Court has reviewed the video recording that was provided to the Court in the form of a compact disk on Friday, February 24th. And the Court will indicate that the first thing that it did and before it was saddled with the papers was to review the disk. So with that, let me summarize the arguments here.

The People argue that all of the complaining witness' statements should be admitted as relevant evidence under Evidence Code Section 1240, which is the spontaneous statement exception to the hearsay rule.

The People further request that the evidence also be admitted under Evidence Code 1250, the state-of-mind exception to the hearsay rule:

I think the essence of the defense case is that none of these statements meet the requirements for admission under either exception to the hearsay rule and should not be admitted as evidence during trial.

So that, I believe, are the parameters of this particular set of motions, or set of papers.

Under what circumstances may a trial court admit a hearsay statement as a spontaneous utterance exception under California Evidence Code Section 1240? The law to be applied is well settled. And I think all the parties would agree that evidence of a statement is not inadmissible hearsay if it purports to narrate describe, or explain an act, condition, or

event perceived; and was made spontaneously while the declarant was under the stress of excitement caused by such perception. In other words, a hearsay statement may be admitted if it describes an act witnessed by the declarant and was "made spontaneously while the declarant was under the stress of excitement caused by" witnessing the event, Evidence Code Section 1240.

"To render statements admissible under the spontaneous declaration exception, the Court is required to do the following, it's required to evaluate the following elements: (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent; while the utterance must have been -- while the nervous excitement may be supposed still dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstances of the occurrence preceding it." And that's what both sides cite, the **Poggi**, I think that's the decision, P-o-g-g-i, **People vs. Poggi**, a 1988 decision, 45 Cal.3d, 306, 318.

And I think both parties, again, have cited cases which I think, on the one hand, the defense has cited, I think it was **Guiterrez**, but it doesn't really matter. **Poggi** says that the second admissibility requirement relates to particular facts of the individual cases more so than the first or third, such that "the discretion of the trial court is at its broadest when it determines this requirement is met."

And I'm going read that second element, again, into the record, because the Court doesn't believe it quoted it quite accurately.

The second element of that is that "the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance." That is the focus of the **Poggi** decision.

All right. So I turn now to a brief reiteration of the facts. It seems to me on the morning of January 1, the complaining witness left her home and went to her friend and neighbor, Ms. Ivory Madison. The People allege that within a short time of arriving at Ms. Madison's apartment, she burst into tears and gave an account of physical and verbal abuse by defendant that occurred the day before in front of their son, Theo.

The complaining witness showed the neighbor a bruise on her upper right bicep allegedly caused by defendant. Ms. Madison initiated and then recorded the complaining witness' statements in a video of about somewhere between 45 and 55 seconds in length. In the recording, the complaining witness points to the bruise on her arm and states: "This is the second time this has happening. And I tell Ross -- who is the defendant -- I want to work on this marriage. We need help. I've been telling him we need help, and I'm going to use this just in case he wants to take Theo away from me. Because he did -- he said that -- that he's very powerful and he can. And he can do it."

During the recording, Ms. Madison does not ask any questions of the complaining witness. However, the People allege that during the meeting, the complaining witness asked Ms. Madison several questions about changing locks, the consequences of file a complaint with the police and defendant's response. Ms. Lopez, the complaining witness, reported to Ms. Madison that the defendant asked her not to report the bruise, talk about the fight, or tell anybody about what happened. On the afternoon of January 4th, the complaining witness talked to another neighbor, Ms. Callie Williams, about what happened on New Year's Eve.

The thrust of defendant's argument is that the passage of time, more than 20 hours after the incident, precludes the admission of her statements, especially where there is overwhelming evidence that the complaining witness had the opportunity to reflect between the time of the incident and her statements to her neighbors. Defendant further contends that evidence belies any claim that she was under the stress of excitement while speaking to Ms. Madison, who, along with her husband, Abraham Mertens, M-e-r-t-e-n-s, opined that the complaining witness "seemed okay" and "did not appear distressed." And that would be found in the Defendant's Opposition to Admit Statements under Evidence Code Sections 1240 and 1250, page 12, line 12.

The Court has reviewed the case law. And based on what I've seen, while the timing of the statement appears to be a factor for the Court to consider in its analysis, it is not determinative of admissibility where there is other evidence

that the statement occurred as a result of the stress of the excitement and reflective powers are still in abeyance. And I will cite to **People vs. Raley**, 2 Cal.App.4th, 870, at 893 and 894, a 1992 decision.

The essence of the defense argument is that the complaining witness had the opportunity reflect, and did so, when talking with Ms. Madison, thus, rendering her statements nonspontaneous. Defense relies on **People vs. Ramirez**, a 2006 case, 143 Cal.App.4th, 1512 and 1523, where the Court concluded that the victim of a sexual assault, a rape, had the opportunity to reflect and deliberate. The Court there found there was not substantial evidence supporting the trial Court's finding that the victim's mental state was not consistent with detached reflection or deliberation. The Court concluded that the trial court abused its discretion when it admitted those statements.

The Court concluded in **Ramirez** that the "narrative style, as well as the quantity, detail, and content of the declarant's statements suggests that they were not spontaneous statements made under the stress of excitement without deliberation or reflection, but rather, that they were made after the declarant had engaged in a deliberative or reflective process."

The theory underlying Evidence Code Section 1240 is that the declarant's lack of opportunity for reflection and deliberate fabrication supply an adequate assurance of the statement's trustworthiness. **Box vs. California Date Growers Association**, 57 Cal.App.3d, 266, at 272, a 1976 decision.

"Spontaneous" as used in Evidence Code Section 1240 means "actions undertaken without deliberation or reflection . . . The basis for the circumstantial trustworthiness of spontaneous utterances is that in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief."

Melkonians, M-e-l-k-o-n-i-a-n-s, vs. **Los Angeles County Civil Service Commission**, a 2009 case, 174 Cal.App.4th, 1159, 1169. In **Melkonians**, the defendant, a deputy sheriff, entered his ex-girlfriend's, Ms, Morales' apartment, and called her stating he was inside her apartment. Ms. Morales arrived at her apartment and asked defendant to leave. The defendant refused to leave, grabbed her by the mouth. And Ms. Morales, who had recently undergone facial surgery, bit defendant to stop him from grabbing her face. Defendant continued to hold her mouth. Ms. Morales told defendant to leave her alone and that she was going to get a restraining order. Defendant stated that if she did, that she would be sorry, and that a piece of paper would not stop him. When defendant left, she called 911, then called information, and then called the non-emergency line at a police station. Ms. Morales spoke with a deputy who answered the non-emergency line at the police station. She, speaking in a "halting and emotional latent voice" stated that she had a few questions if the person had time to answer and stated "I have a boyfriend and he is a cop, and he broke into my house, broke the window." She told the dispatcher that the defendant told her that she

would be in trouble if she called the cops, that he had been instruct in the face, and stated that she did not want a police report and just wanted to know how to get a restraining order.

In reviewing whether the statement was admissible under the spontaneous hearsay statement, the Court of Appeal found sufficient evidence that Ms. Morales was under the stress of the excitement. The Court emphasized that she spoke haltingly and with emotion, her statements were not self-serving, and she cried openly at the end of the conversation. The Court rejected defendant's assertion that the incident was not sufficiently stressful to render Ms. Morales' statements spontaneous. The Court stated "concededly, criminal cases in which the spontaneous statement exception arises frequently involve more serious injuries or more egregious conduct than the injuries suffered by Morales or the conduct of defendant."

In **People vs. Lynch**, a case which the defense cites, the California Supreme Court emphasized, and its cite is a 2010 case, 50 Cal.4th, 693, at 751. And **Lynch** was overruled on other grounds in **People vs. McKinnon**, M-c-K-i-n-n-o-n, 52 Cal.4th, 610, at 636-643, a 2011 case. The California Supreme Court emphasized that the trial court should consider a variety of factors to determine the mental state of the declarant. "These factors include the length of time between the startling occurrence and the statement, whether the statement was blurted out or in response to questioning, how detailed the questioning was, whether the declarant appeared excited or frightened, and whether the declarant's physical

condition was such that it would inhibit deliberation."

In **Lynch**, the Court found that the victim's description of the attack was "far more comprehensive and inclusive of detailed descriptions of such non-essential matters as her engagement in routine household chores." The victim also made the statements in response to questioning. Further, there was no testimony or evidence that when the victim spoke, she was "excited or frightened" or that her physical condition at the time of her statements precluded deliberation.

What is critical in determining whether a statement is admissible as a spontaneous statement is the mental state of the speaker. "The nature of the utterance; how long it was made after the startling incident; and whether the speaker blurted it out, for example, may be important, but solely as an indicator of the mental state of the declarant." That's the **Melkonians** decision at 174 Cal.App.4th at 1169.

In this matter, the complaining witness' statements to Ms. Madison preceding the video recording and the recording, itself, are sufficiently spontaneous and related to the incident on December 31, 2011, to fall within the hearsay exception articulated by Evidence Code Section 1240. The issue here is the mental state of the speaker. The statements made to Ms. Madison are not akin to the statements made in **Ramirez**. Contrary to her neighbor's assessment that she is not in distress, the evidence shows that this is a woman who is still crying and visibly upset the following day. In the video, she does not provide the detailed narrative responses that were made by the victim in **Ramirez**. Rather, she is

distraught and is tearful like the declarant in **Melkonians**. No questions were asked by Ms. Madison on the video to prompt her to make self-serving statements. There is no lengthy narrative. Instead, her description of her injury in the incident is brief, cryptic and halting. Her expression of concern for her son and the custody of her son support the determination of spontaneity in this case while she is under the stress of excitement. Her immediate thoughts for her son are clearly instinctive, or instinctual. Her remarks do not reflect any hint of contrivance, nor do they reflect any hint of being scripted or staged. These statements are admissible under Evidence Code Section 1240.

I've heard very little with regard to Evidence Code Section 1250 which allows for the evidence of a declarant's state-of-mind to be admissible subject to the Court determining indicators of trustworthiness under Evidence Code Section 1252. And I have not yet heard a theory, and I think the defense correctly points out, from the People yet, as to admissibility under Evidence Code Section 1250. The declarant's state-of-mind has to be at issue in this case. It is not yet at issue in this case. It may be.

So the Court will allow evidence of the statements under 1240 to Ms. Madison but not -- well, let me rephrase that. Under 1240, the Court's ruling is that the statements to Ms. Williams before the video and during the video are definitely coming into evidence. So with respect to what happened after the video, it's clear that there were statements made to a Ms. Williams, who is another neighbor,

and those statements do not come in. Those are not spontaneous by any stretch of the imagination.

And further, with respect to the statements to Ms. Madison after the video recording, I'm unaware of the nature of those. But I think I would need to have an offer of proof from the People with respect to their admissibility. If it's the same conduct, the Court will have to review that information.

So let me be clear again. The statements of Ms. Madison -- I may have misspoken, I said to "Ms. Williams" before the video, but it's Ms. Madison who is the recipient of the victim's, or Ms. Lopez's remarks on January 1st are admitted under the spontaneous utterance exception under Evidence Code Section 1240.

With respect to the admissibility of any statements made and offered under Evidence Code Section 1250, they are denied without prejudice. The Court will entertain other motions by the People if they believe that they have a basis upon which to offer that evidence. Very well.

We turn now to the next issue in this case, which I think is sort of on everyone's mind, and that is the People's Motion to Have Evidence Admitted under Evidence Code Section 1109. And I'll hear argument on that.

MS. AGUILAR TARCHI: Thank you, Your Honor. The People, again, thank the Court for reading our brief to admit evidence of other acts pursuant to Section 1109 of the Evidence Code. In this case, specifically, the People proffer to call, in our case-in-chief, one Christina, with an h, Marie Flores, F-l --

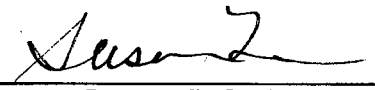
THE COURT: All right. Let's just stop for a moment. If

STATE OF CALIFORNIA)
: ss.
CITY AND COUNTY OF SAN FRANCISCO)

REPORTER'S CERTIFICATE

I, Susan Lee, Official Court Reporter for the Superior Court of the State of California, in and for the City and County of San Francisco, do hereby certify that the foregoing transcript is a full, true and correct transcription of the shorthand notes taken as such reporter of the proceedings in the above-entitled matter, as reduced to computer-aided transcript form under my direction and control to the best of my ability.

Dated: April 6, 2012



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Official Court Reporter