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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.

**RESPONSE TO SHERIFF MIRKARIMI'S
OBJECTION TO THE EXPERT
DECLARATION OF NANCY LEMON**

Sheriff Mirkarimi has objected to the Lemon declaration and its exhibits in their entirety on the following grounds:

1. "[E]ach one of the opinions rendered by Ms. Lemon on pp. 2-3 of her declaration is irrelevant to this Commission's determination of whether Sheriff Mirkarimi committed official misconduct."
2. "Ms. Lemon lacks foundation to opine that 'Sheriff Mirkarimi's crime relates directly to his duty as Sheriff to enhance public safety and reduce the incidence and severity of domestic violence.' "
3. "The declaration is replete with much of the same irrelevant and/or prejudicial information this Commission has already excised from many of the Mayor's fact witnesses."

The Mayor hereby submits a brief written response.

I. MS. LEMON'S TESTIMONY IS RELEVANT TO EVERY COUNT IN THE AMENDED CHARGES AND TO THE CREDIBILITY OF WITNESSES AND DECLARANTS.

Ms. Lemon's expert testimony is relevant and will be helpful to both the Commission and the Board. Under the California Evidence Code, expert testimony is admissible when the testimony is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." Cal. Evid. Code § 801(a). Expert testimony is particularly appropriate in cases involving allegations of domestic violence. Battering and its effects are beyond common experience, so expert testimony can help to "disabuse . . . commonly held misconceptions" and to "explain a behavior pattern that might otherwise appear unreasonable to the average person." *People v. Humphrey*, 13 Cal.4th 1073, 1088 (1996) (quoting *People v. Day*, 2 Cal. App. 4th 405 (1992)). Understanding the typical patterns in an abusive relationship will assist the Commission and the Board to explain otherwise confounding behaviors and statements of Ms. Lopez and Sheriff Mirkarimi, including Ms. Lopez's contradictory statements about whether the abuse happened at all.

Ms. Lemon's testimony is relevant to each of the counts in the Amended Charges. It is directly relevant to Count 1, which states that Sheriff Mirkarimi "engaged in wrongful behavior by committing domestic violence against his wife." Count 2 states that Sheriff Mirkarimi abused his office by threatening to use his public power for personal gain against his wife, and Count 3 states that he impeded a police investigation. Ms. Lemon's testimony about patterns of domestic violence provides important context for evaluating evidence offered in support of both counts. Count 4 alleges official misconduct on the basis of the Sheriff's conviction and sentence, and Ms. Lemon's testimony is relevant to establish that the conviction was for a domestic violence offense, which is a crime of moral turpitude. Ms. Lemon's expert testimony is also relevant to Counts 5 and 6 of the Amended Charges, which incorporate by reference Sheriff Mirkarimi's entire course of wrongful conduct.

Ms. Lemon's expert opinions also relate to the credibility of witnesses and hearsay declarants, and such evidence is always relevant. *See* Cal. Evid. Code § 210 (defining "relevant evidence" to include "evidence relevant to the credibility of a witness or hearsay declarant"); *People v. Brown* (2004) 33 Cal.4th 892, 906-07 (expert testimony that domestic violence victims often later deny or

minimize assailant's conduct was admissible to explain possible reasons for inconsistencies in victim's testimony); *People v. Humphrey* (1996) 13 Cal.4th 1073, 1087 (expert testimony relevant to determining the credibility of a domestic violence victim).

The Sheriff's relevance objection is a bald assertion that domestic violence is not at issue in these misconduct proceedings. Sheriff Mirkarimi admits, as he must, to the fact of the guilty plea and sentence addressed in Count 4 of the Amended Charges, and in his declaration he admits that he caused a bruise on his wife's arm, but he does not admit that he committed an act of domestic violence or that he was convicted for a crime of domestic violence. Instead, he takes the position that the entire issue is off the table. This is flatly wrong.

First, it is both proper and necessary for the Commission to look beyond the four corners of the Sheriff's conviction. This is not a case in which the Sheriff faces removal on the ground that has been convicted of a particular type of crime, such as a felony of moral turpitude. *See* S.F. Charter § 15.105(c). In that type of removal proceeding, the Charter directs the Ethics Commission to hold a hearing to determine whether "the crime for which the official was convicted warrants removal." *Id.*, § 15.105(c)(1)(A)(ii). In this proceeding under Section 15.105(e), in contrast, the Sheriff's *conduct* is at issue, not his conviction.¹ *Id.* (defining official misconduct as "wrongful behavior" or ill-becoming "conduct"). Ms. Lemon's testimony is relevant to determining the nature of the Sheriff's conduct.

Second, a partial or ambiguous admission does not settle a disputed issue; further evidence on the issue is relevant and admissible. *Fuentes v. Tucker* (1947) 31 Cal.2d 1, 7. Here, although the Sheriff admits causing a bruise, the remaining facts and circumstances remain hotly in dispute. For example, Sheriff Mirkarimi has made public statements to the effect that Ms. Lopez was bruised by her own force when she pulled away from his grip as he attempted to "guide" her; that his only act of "false imprisonment" occurred when he turned the family van around and headed for home instead of a restaurant; and that Ms. Lopez, as a non-native English speaker, simply misunderstood him to be saying that he would get custody of their child because he was a very powerful man, when actually he

¹ The Sheriff's guilty plea to misdemeanor false imprisonment is certainly probative of his conduct and conclusively establishes that he unlawfully violated his wife's personal liberty.

said only that the law is very powerful. The Mayor has submitted evidence that disputes each of these characterizations. Ms. Lemon's expert testimony is directly relevant to and will aid the Commission in resolving these disputes.

The Commission should overrule the Sheriff's relevance objection.

II. MS. LEMON'S EXPERTISE PROVIDES A STRONG FOUNDATION FOR HER OPINION THAT "SHERIFF MIRKARIMI'S CRIME RELATES DIRECTLY TO HIS DUTY AS SHERIFF TO ENHANCE PUBLIC SAFETY AND REDUCE THE INCIDENCE AND SEVERITY OF DOMESTIC VIOLENCE."

Ms. Lemon's more than three decades of experience with every aspect of domestic violence—and every facet of the law enforcement and criminal justice responses to domestic violence—demonstrates that she has the "special knowledge, skill, experience, training, and education," Cal. Evid. Code § 801(b), that qualify her to provide her expert opinion that there is a direct (and adverse) relationship between committing a crime of domestic violence and the duties of the office of Sheriff. *See* Exhibit 63 (Ms. Lemon's CV).

III. MS. LEMON'S OPINIONS PROPERLY RELY ON HEARSAY EVIDENCE, INCLUDING SOME EVIDENCE THAT THE COMMISSION EXCLUDED.

A domestic violence expert may properly rely on hearsay or other excluded or inadmissible evidence if it is "of a type that reasonably may be relied upon" by experts in her field. Cal. Evid. Code § 801(b). Ms. Lemon testifies in her declaration that the materials she has reviewed and relied upon in formulating her opinions in this case meet that standard:

A reasonable professional in my field would rely on this type of material for several reasons. First, domestic violence expert witnesses virtually always rely on hearsay in formulating their opinions. ... [¶] Second, evidence of statements made by victims of domestic violence close in time to the abusive incident are more likely to be accurate, while those made later are more likely to be false.

(Lemon Dec. ¶¶ 5-6.) *See also* *People v. Humphrey*, 13 Cal.4th 1073 (1996) (approving domestic violence expert testimony based on hearsay); *People v. Brown*, 33 Cal.4th 892 (2004) (same).

The expert may also affirmatively present the otherwise inadmissible evidence in her testimony to explain the basis for her opinions where, as here, there is no risk of confusing a jury about the purposes for which the evidence is offered. *See* *People v. Coleman* (1985) 38 Cal.3d 69, 91. And

even in cases where there is a jury, an expert will ordinarily be allowed to present the otherwise inadmissible evidence to explain the basis for her opinion as long as a limiting instruction is given. *Id.* at 92 ("Ordinarily, the use of a limiting instruction that matters on which an expert based his opinion are admitted only to show the basis of the opinion and not for the truth of the matter cures any hearsay problem involved"). For these reasons, Ms. Lemon may properly rely on matter that the Commission has declined to admit into evidence, and there is no legal basis to remove that matter from her declaration.

CONCLUSION

The Commission should overrule Sheriff Mirkarimi's objections to Ms. Lemon's expert declaration. The testimony and the attached exhibits are proper and should be admitted in full.

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