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**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO**

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff

versus

CYNTHIA SOMMER,

Defendant

CASE NO. SCD195202
DA NO.

POINTS AND AUTHORITIES IN
SUPPORT OF REQUEST FOR
DISCOVERY

DATE:
TIME:
DEPT: Superior 39
Judge: Hon. Peter Deddeh

REGARDING REQUESTS 1 - 5:

CHAIN OF CUSTODY DOCUMENTS FROM THE NAVY

When Todd Sommer died in February, 2002, the United States Navy directed that an autopsy be performed and a Board Certified pathologist, Dr. Robinson conducted the autopsy. His report that took two sets of tissue samples - one set which he "preserved" and fixed in a formaldehyde type solution and one "fresh" set which he indicated that he had frozen and stored.

Those tissue samples are the core of the prosecution's case against the defendant, and the defense has never received, and now requests, that it be provided all Chain of Custody documents

1 regarding those two tissue sample sets. The Chain of Custody documents will reveal if the tissues
2 were, in fact, properly stored, if they were properly preserved and in what solution, if they were
3 properly frozen and maintained.

4 The names and addresses of the persons who undertook the above preservation process will
5 be able to provide the answers to the above questions.

6 In March, 2002, some of the “fresh” tissues were supposed to be transferred to AFIP-
7 Environmental for Arsenic testing.

8 It is not known if the Navy still has any samples in this case, but if it does, the defense wants
9 to have access to those samples in order to have them evaluated and microscopically examined. If
10 the Navy does not have any of these tissues, the defense wants the documentation to show why not
11 and what happened to them.

12 **DNA TESTING**

13 The findings of AFIP-Environmental as to the liver and kidney tissues were so extreme and
14 so unusual for a wide variety of reasons (1. the total arsenic was extraordinarily high; 2. the
15 speciation results were unheard of and inconsistent with all known speciation testing; 3. the arsenical
16 tissue distribution was a complete anomaly, 4. the results were in contradiction to the pathological
17 evaluation of Todd’s tissues, etc.) that the defense experts opine that it’s entirely possible that (a) the
18 tissues were DID NOT even belong to Todd OR (b) that the tissues were contaminated by a
19 cacodylic preserving agent, which is often used with formaldehyde.

20 For this reason, the defense wants access to the tissues still in possession of the Navy to
21 conduct an evaluation and it wants access to the tissues in AFIP-Environmental’s possession so it
22 can conduct a DNA analysis of the liver and kidney and compare it to the “known” sample made by
23 the Navy at the time of Todd’s enlistment.

24 If the Navy has destroyed any samples, either the preserved samples taken by Dr. Robinson or
25 the DNA “known” sample, the defense wants the documentation establishing when, by whom, and
26 why the tissues were destroyed.

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1 For reasons beyond the understanding the undersigned, the prosecution refuses to agree to the
2 DNA testing of the tissues. The idea that the prosecution can be comfortable with sending a person
3 to prison for the rest of her life for the murder of her husband based on the finding that a liver and
4 kidney tissue had arsenic in them, when it has not been confirmed that the liver and kidney tissue
5 come from her husband is astounding.

6 However, be that as it may, the defense requests that the tissues be released so that we all can
7 assured that the Navy's mis-handling of the tissues and breaks in chain of custody didn't also cause
8 them to test the wrong liver and kidney tissues.

9 If the Navy has destroyed the known sample of Todd's, the defense wants to conduct a DNA
10 test on the liver and kidney and compare the DNA to the brain, blood, urine, bile, and muscle tissues
11 collected to see if they come from the same DNA.

12 **REGARDING REQUESTING 6**

13 **AFIP-Environmental DATA STILL NOT PROVIDED**

14 AFIP-Environmental has purportedly provided all of their data regarding the testing that they
15 conducted of Todd's tissues, but the defense experts have noted several different places where they
16 indicate that data is still missing.

17 Request #6 requests that they provide any data they have not already provided.

18 **REGARDING REQUEST 7-8**

19 **AFIP-Environmental ACCREDITATION INFORMATION**

20 AFIP-Environmental had never before done testing on human tissues for the presence of
21 arsenic. For some reason, the testing was sent to AFIP-Environmental instead of AFIP-Forensic.
22 The two doctors who worked on the testing in this case for AFIP-Environmental testified that they
23 had never done this testing before.

24 The defense does not even know if AFIP-Environmental was certified to do this type of
25 testing in 2003/2004 when it conducted the testing or if it so certified at this point.

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1 Therefore, the defense made requests 7 and 8 in order to obtain all documentation regarding
2 any lab certification of AFIP-Environmental’s ability to do such testing. This is foundational to a
3 claim under *Daubert v. Merrell Dow Pharmaceuticals* (509 U.S. 579, 1993), the U.S. Supreme Court
4 case which introduced a new standard for the admissibility of scientific evidence. From that point
5 forward, it was established that the scientific testimony must be shown to stand on a dependable
6 foundation.

7 *Daubert* made it clear that in determining the reliability of the proffered expert testimony, the
8 focus is on the principles and methodology, not the conclusions they generate. “Each step, from
9 initial premise to ultimate conclusion” must show ‘valid scientific methodology’.

10 The court in *Daubert* established five factors that could be considered by the trial court in
11 determining whether the proffered expert testimony was sufficiently reliable to be put before a jury.

12 The factors listed include:

- 13 (1) whether a technique can be tested;
- 14 (2) whether the technique has been subject to peer review and publication;
- 15 (3) whether a particular scientific technique has a known or potential rate of error;
- 16 (4) whether standards controlling the techniques operation exist and are maintained; and
- 17 (5) whether the technique is generally accepted in the relevant scientific community.

18 The accreditation, or lack thereof of AFIP-Environmental, as it relates to their ability to test
19 for arsenic in human tissues, goes to factors (3) and (4), which could cause this court to determine
20 that the AFIP-Environmental results should not have even been admitted to the jury.

21 The accreditation information also goes to the question of the “weight” to which any of their
22 results should be given.

23 DATED: May 15, 2007

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Allen Bloom

Attorney for Defendant

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