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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.

MEMORANDUM OF LAW
REGARDING POWER OF COURT
TO DISMISS THIS CASE WITH
PREJUDICE

INTRODUCTION

The procedural and factual history of this case is long and complex, spanning more than 6 years, yet for the convenience of the court, the defense presents this introduction emphasizing the issues that most impact the only question before the court at this time: “does the court have the power to dismiss this case with prejudice”. A more detailed statement of the case and fact follows.

On February 18, 2002, Sgt. Todd Sommer collapsed and died virtually in the arms of his wife, the defendant Cynthia Sommer. An extensive autopsy was performed and his death was determined to be of natural causes.

During 2003 and 2004, heavy metals testing was performed on six of his tissue samples. The testing was performed by a lab which had never done testing on biological tissues before and the results were very strange for a variety of reasons. First, lab found deadly arsenic in two of the six tissues and normal amounts in the other four. But the “tissue distribution” didn’t make

sense. Arsenic doesn't discriminate in its attack on the human body - it leaves its deadly imprint on every tissue in the body.

Next, the lab's results regarding the type or "species" of arsenic was unheard of in the world of science. (All prior testing of human tissues where one died of arsenic showed the existence of several different types of arsenic, yet with this lab, they found only ONE type of arsenic and in an amount never before seen.)

Next, a death by arsenic finding didn't jibe with the fact that Todd's lab work, before he died, were normal and all of his tissues examined at autopsy were normal, whereas everyone who has ever died of arsenic poisoning showed completely abnormal lab findings and destroyed and distorted tissues.

Finally, Todd was just too healthy to have died of arsenic poisoning. Whereas arsenic ingestion causes someone to double in excruciating pain and die, usually in less than three hours, Todd lived ten days after his was purportedly poised and was on a roller coaster the night before his death.

Contamination was suspected, and when it was determined that the testing lab had "lost" the evidence 16 times, greater questions arose.

Because of all of these concerns, the DA sought "back up" expertise from five separate arsenic experts. Yet, instead of confirming the first lab conclusion of death by arsenic, each of these experts said that it didn't add up, and they opined that Todd did NOT die of arsenic poisoning.

Yet still, the D.A. went to trial and emphasized the "life style" evidence of the defendant (it has been called "conduct unbecoming a widow"), charged her with murder, and, in January, 2007, was able to convince a jury to convict her of special circumstance murder. She faced life imprisonment without parole.

The case received enormous national and international attention from the media before, during, and after the trial and ultimately the undersigned was brought onto the case and presented

a Motion for New Trial. The Motion was granted on November 30, 2007. A new trial was scheduled to begin in May 2008.

In preparation for the new trial, defense counsel, suspicious of the D.A.'s assertions that no other tissues existed which could be tested, made several demands for discovery regarding the tissues, forcing the hand of the prosecution and causing them to send their investigators to hospital where the autopsy took place, and where, on March 20, 2008, a whole batch (31 separate tissues) of never before tested tissues were found.

Ten of these tissues were tested and the results were staggering. None of the tissues showed the presence of any arsenic whatsoever. It became clear that Todd Sommer had never been poisoned at all, and Cynthia Sommer had been convicted of a crime that had never occurred.

On April 17, 2008, 869 days after she was incarcerated, this young widow and mother of four, was released from custody owning nothing more than the clothes on her back, when the prosecution moved to dismiss the charges.

But instead of dismissing the charges "with prejudice" and putting this tragic matter behind us for all time, the prosecution sought to dismiss the charges "without prejudice" and justified their conduct in the case claiming that they had acted nobly throughout the case and that the "system worked just like it was supposed to".

In their attempt to justify their conduct, the D.A. lied to the court directly on one occasion and mis-represented itself on five other separate occasions.

The defense objected to the dismiss without prejudice, and asked the court to dismiss with prejudice.

The court granted the motion to dismiss without prejudice for the time being, but, at the defenses suggestion, ordered a hearing to determine if the dismissal should be made with prejudice.

The District Attorney following the action, held several press conferences and made a number of news and other public appearances, all claiming that it had done nothing wrong.

Last Friday, (May 16, 2008), when the defense was attempting to enforce a discovery order to learn about a variety of issues, the Deputy D.A. through another attorney, informed the court that it believed that the court did NOT have any further jurisdiction in the case, claiming that the court does not have the power to dismiss the case with prejudice.

The court scheduled a hearing for May 30, 2008 to determine if it has the power to dismiss with prejudice.

This memorandum of law will address that question.

STATEMENT OF THE CASE

In February, 2002, Sgt Todd Sommer died. His death was determined to be by natural causes.

In 2003 and 2004, some of Sgt. Sommer's tissues were sent for testing for arsenic.

On or about November 30, 2005, the defendant was arrested for the murder by poison of her husband, Sgt. Sommer.

In November, 2005, the prosecution was specifically advised that other tissues, preserved in paraffin, remained at the location of the autopsy.

Trial began in January, 2007.

The defendant was found guilty by a jury.

Prior to sentencing, the defense brought a Motion for a New Trial.

In May, 2007, the defense requested that it have access to all tissues taken at autopsy. The prosecution asserted that no such tissues remained.

In August, 2007, Deputy prosecutor Laura Gunn was advised that tissues preserved in paraffin were still in possession of Balboa Hospital. She failed to advise the defense.

On or about November 30, 2007, over objection by the District Attorney, the Honorable Peter Deddeh granted the Motion for a New trial.

Trial was scheduled for May, 2008.

On February 18, 2008, the defense made a discovery demand for all documents regarding all tissues in possession of the Balboa Naval Hospital. Ms. Gunn was away from her office for a period of two weeks at that time.

On March 20, 2008, prosecution investigators went to the Naval Hospital and found tissues preserved in paraffin - exactly where they had been when they observed them in 2005. The prosecution sent these tissues for testing.

All the tissues were found to be free of ALL arsenic.

On April 17, 2008, before this court, the District Attorney moved this court to dismiss the case against the defendant “without prejudice”.

The defense joined in the request to dismiss the case, but objected to the dismissal without prejudice and requested that the court grant a hearing to dismiss the case “with prejudice”, asserting that the evidence was overwhelming that not only was the defendant NOT guilty of the crime - there was NO crime whatsoever.

The defense asserted that the prosecution had lied and mis-represented facts to the court in its Motions to Dismiss Without Prejudice.

This court dismissed the case against the defendant and set a hearing regarding the defense request that the court dismiss with prejudice. That hearing is currently scheduled for July 16, 2008.

STATEMENT OF FACTS

In February, 2002, Cynthia Sommer called 911 because her husband, Todd, was desperately ill, lying on the floor in an upstairs bedroom in their house. Todd, though having felt “fluish” occasionally over the past ten days, had “felt better” and had, that very morning, returned from a vacation of several days with Cindy and their children where they had ridden the roller-coaster and ate the cotton-candy of Knotts Berry Farm amusement park in Anaheim, California.

That night he collapsed and never awoke. All the efforts of Cindy, the responding Military Police (Todd was a United States Marine and the family lived in military housing), the paramedics, and emergency physicians were to no avail. He died.

None of the responding personnel noticed anything unusual at the Sommer's home. An autopsy was performed to determine the cause of death.

Pathologist, Dr. Stephen Robinson, of the Naval Medical Center, who had conducted over 500 autopsies in his career, evaluated Todd's body. The autopsy and review was complete and thorough. Dr. Robinson did a gross evaluation of the chest, stomach, head, central nervous system, neck, cardiovascular system, coronary arteries, conduction system, aorta, respiratory system, liver, biliary system, alimentary system, the tongue, esophagus, the bowel, genitourinary system, the spleen, the thyroid, adrenal glands, and musculoskeletal system.

He did a microscopic examination of the heart's left anterior descending artery, the heart's interventricular septum, left ventricular anterior and posterior walls, the heart's left ventricular lateral wall and right ventricle, the lungs, liver, kidneys, spleen, thyroid, colon, and intestines, and fourteen separate sections of the brain.

He collected blood, bile, vitreous, and gastric contents for toxicological evaluation, which ultimately came back normal. In fact, all the results were normal.

After consulting with the department's brain pathologist and heart pathologist, Dr. Robinson concluded:

“Gross, microscopic and toxicological examination, *including in-depth* (emphasis added) examination of the heart and brain failed to identify a definitive anatomic cause of this Marine's demise. However, the lack of morphologic alterations does not preclude a cardiac death due to long QT syndrome¹, Brugada syndrome² (1) or

¹Long QT syndrome (LQTS) is a disorder of the heart's electrical system. The condition leaves you vulnerable to fast, chaotic heartbeats that may lead to fainting — and in some cases, cardiac arrest and possibly sudden death.

You can be born with a genetic predisposition for long QT syndrome. In addition, more than 50 medications, many of them common, as well as other medical conditions, may cause long QT syndrome.

Treatment for long QT syndrome may involve limiting your physical activity, avoiding certain medications or taking medications to prevent the development of a chaotic heart rhythm. Some people with long QT syndrome also need an implantable device to control the heart's rhythm and prevent against sudden death.

<http://www.mayoclinic.com/health/long-qt-syndrome/DS00434>

coronary spasm.³ . . . The manner of death, in my opinion is NATURAL.”
(Exhibit E)⁴

After Ms. Sommer specifically agreed to the preservation of tissues and organs of Todd, his body was cremated and Ms. Sommer set about attempting to live her life in the emotional wake of her young husband’s death and the need to leave military housing and raise their four children. She received the standard \$250,000 military-issued life insurance policy and monthly care benefits for the children. Despite an uncertain future and the loss of considerable housing and other benefits and Todd’s monthly income, she put over half of the funds in an irrevocable trust for her children and paid off the considerable consumer debt that the young family had jointly incurred during their marriage.

She, very soon, went back to her job at a local Subway sandwich store to work.

²Brugada syndrome is an abnormality in the heart's electrical system that causes life-threatening heart rhythm disturbances (arrhythmias).Brugada syndrome occurs most often in young adults. The cause isn't clear, but it appears to be inherited in some cases.

Each beat of your heart is triggered by an electrical impulse from special cells in the right upper chamber of your heart. Tiny pores, called channels, on each of these cells direct this electrical activity. In Brugada syndrome, a defect in these channels causes episodes of abnormal electrical function.During these episodes, the pumping function of the heart is impaired. This decreases blood flow to the brain, causing fainting. It may also lead to chaotic, uncoordinated electrical activity (ventricular fibrillation), which causes the heart to quiver and stop pumping blood. Sudden death usually follows — unless the heart receives an immediate electrical shock from a device called a defibrillator.

<http://www.mayoclinic.com/health/brugada-syndrome/AN00551>

³ A coronary artery spasm is a brief, temporary tightening (contraction) of the muscles in the artery's walls. This can narrow and even briefly close the coronary arteries, reducing or interrupting blood flow to part of the heart muscle (myocardium). If the spasm lasts long enough, it can lead to chest pain (angina) and possibly a heart attack (myocardial infarction). Doctors often refer to such spasms as Prinzmetal's angina or variant angina. Unlike typical angina, which usually occurs with exertion, Prinzmetal's angina often occurs at rest.

<http://www.mayoclinic.com/health/coronary-artery-spasm/AN01371>

⁴ For ease of evaluation, this Motion, which incorporates the Motion filed by Attorney Udell and incorporates the Exhibits A, B, C, and D attached thereto, begins the labeling of Exhibits attached hereto as Exhibit E *ad seriatim*.

In March, 2003, it was decided to test Sgt. Sommer's tissues for heavy metals.

Six tissues were sent to the "Environmental" division of AFIP - which tests "things" - soil, water, mineral, etc.

AFIP-Environmental undertook to test the tissues. The tests were done by a chemist who *had never before conducted such tests, using a machine which was brand new to the division were done without a Standard Operating Procedure in place to insure that the proper methods and safeguards were standardized. The testing process was broken by some 16 separate breaks in the Chain of Custody*⁵.

AFIP-Environmental tests showed the toxic presence of arsenic in Todd's liver and kidney, whereas the other four tissues were healthy. Experts consulted by the prosecution advised the prosecution that these findings were suspect. They stated that arsenic, when it courses through the body, leaves its deadly imprint on ALL the tissues it touches, not a select few.

Because these findings were suspect, and even the person who did the testing felt that they might be a product of contamination, the prosecution asked AFIP to do further testing to determine the "type" or "species" of arsenic in the tissues. It was felt that this testing might resolve the concern that the experts had.

Speciation testing was subsequently done by AFIP, but the results multiplied the concerns rather than relieve them, in that the lab found the presence of one of the nine types of arsenic (DMA) in the amount of approximately 98%. In the history of human arsenical testing, DMA had never been the ONLY species found in tissues and had NEVER been found any where near the amount of 98% (it was usually found in the amount of approximately 7 to 9%.)

⁵ Exhibit A, pages 4-5 et seq.

These findings concerned the prosecution further, so they sought out a wide variety of experts with the hopes that they would confirm the conclusion of death by arsenic.

Instead of supporting this finding, the experts - and every one of them - stated that for several reasons they did not believe that Sgt. Sommer died of arsenic poisoning:

1. **TISSUE DISTRIBUTION** - arsenic had NEVER been found to limit itself to two tissues leaving other tissues healthy;
2. **SPECIATION FINDINGS** - the presence of ONLY DMA and at the level of 98% had NEVER been found in any human in the history of the world who had died from arsenic poisoning;
3. **INCONGRUOUS LAB WORK** - arsenic creates such havoc in the body's tissues that lab tests, such as blood, urine, and other analysis always showed unusual results, yet Sgt. Sommer's lab work was perfectly normal;
4. **INCONGRUOUS BEHAVIOR** - no one who has ever ingested arsenic in levels found by AFIP has ever lived longer than three days (and that was only ONE person, everyone else died in a matter of hours), yet Sgt. Sommer purportedly lived ten days after ingestion;
5. **INCONGRUOUS PHYSICAL WELL BEING** - arsenic is known to make a human being very sick, very quickly, but Sgt. Sommer was extremely active over the course of the days after his purported ingestion, even going on a roller coaster ride the night before he died;
6. **INCONSISTENT AUTOPSY FINDINGS** - arsenic leaves tissues in an obvious state of distress manifested in a number of ways, yet all of Sgt. Sommer's tissues evaluated at autopsy were normal.

Despite the fact that ONLY the AFIP chemist was willing to testify that Sgt. Sommer died by arsenic poisoning, the prosecution went further with their case.

The prosecution had another problem - they couldn't establish in even the slightest way that the defendant had ever purchased or had any contact with arsenic. Yet despite this, they

attempted to say that she had access to arsenic through the purchase of an ant bait, neglecting to reveal to the jury that to reach the level of arsenic found by AFIP would have required him to have ingested a loaf of ant bait in excess of **THREE POUNDS.**

Still, the prosecution went forward with the case.

In a case astoundingly weak of evidence, the prosecution sought, and was ultimately able to present lifestyle evidence regarding the defendant behavior after her husband's death which smeared her reputation arguing that she was "celebrating" not "grieving".

With the "evidence" in this state, the jury heard the case and found the defendant guilty.

A
**THE FINDING OF CRIMINAL HOMICIDE IN THIS CASE
WAS DEPENDENT EXCLUSIVELY AND SOLELY ON
THE ARSENIC FINDINGS OF AFIP-ENVIRONMENTAL
(DR. CENTENO)**

When Todd's death was initially evaluated it was determined to be a death by natural causes. The initial autopsy was precise and thorough. It involved extensive gross, microscopic, and toxicological evaluation. It was rendered by qualified and very experienced pathologists, neuropathologists, and cardiac pathologists. Thereafter it was reviewed by entire boards of pathologists as well as the coroner's office and several pathologists in San Diego County. *Every single pathologist who reviewed the record of his death* reached the conclusion that Todd died by natural causes. Both the Navy and the County of San Diego so stated when they filled out their reports and completed their death certificates.

Fifteen months later, one finding - and one finding only - was presented and changed their mind: the arsenical findings of AFIP-Environmental.

B

ARSENIC

Arsenic is the twentieth most abundant element in the earth's crust and is present in all living organisms. In certain areas of the United States and Canada, fresh water supplies contain up to 1.4 mg/L substantially in excess of the acceptable limit of 0.01 mg/L. Seafood can contain from 2 mg/kg for freshwater fish up to 22 mg/kg for lobsters, most of which is organically bound.⁶

Arsenic, which has been used as a poison since antiquity, has ten major types or "species", each with different levels of toxicity. Arsenic Trioxide (AsIII), the species found in ant poison, is one of its deadliest species. Two species (AsB and AsC) are referred to as "dietary" or "organic" arsenic and are readily found in seafood and are both quite common and not dangerous and, in fact, because of they way they "bond" differently to human tissues, have never been shown to have any short term toxic or long term toxic effects.⁷

Arsenic Trioxide (AsIII) is easily soluble. In this form it is colorless and tasteless and extremely toxic to human tissues when ingested. Testimony at trial, as presented by several witnesses including Drs. Poklis, Centeno and others, explained that AsIII acts on every body tissue it touches. It greatly damages the cells of the kidney, the fibers of the heart, the blood vessels, the bone marrow, etc. It destroys the integrity of the blood vessels themselves, rupturing them, such that the arsenic tainted blood will seep through the vessels and pool throughout the body. In very small doses (reported by several sources at the trial) as small as 100 mg (100 thousandths of a gram) it can be fatal, causing severe gastric symptoms in minutes, immobilizing symptoms within several hours, and even death within four hours if untreated.

⁶ Baselt, page 82 (Exhibit F.)

⁷ Dr. Centeno, during his testimony, referred to the presentation he made regarding Arsenic entitled "Chronic Arsenic Toxicity". A portion of that presentation is the source of this information and is attached hereto as Exhibit I.

The body's reaction to the ingestion of AsIII would be dramatic. Blood function would be mobilized such that red and white blood cells would be greatly affected. The body would attempt to wash the substance through the kidney and liver and enzymatic effects would occur on the AsIII, wherein a small amount of the substance (usually 4-6%) would be converted to first a monomethylate (MMA) and then to a dimethylate (DMA).

C

THE ARSENICAL FINDINGS OF AFIP-Environmental WERE HIGHLY SUSPICIOUS

The "cause of death" evidence in this case revolves exclusively around the findings of AFIP-Environmental. Put in other words, the ONLY difference between the several original and independent pathological conclusion that Todd's death was natural and their trial conclusion that Todd's death was "homicide by arsenic" was the testing results of AFIP-Environmental.

Yet, it is without doubt that AFIP-Environmental's findings are extremely controversial and have a wide number of extremely suspicious characteristics about them.

Their overall findings are controversial because (1) the Overall Arsenical Quantity is almost "off the chart", (2) the tissue distribution found is virtually unheard of, (3) the speciation findings go against every speciation evaluation and study ever performed and have never been seen before, (3) there are huge holes in the Chain of Custody (COC) of Todd's tissues such that it is unknown if the tissues were properly maintained or could have been susceptible to bacteria which causes chemical changes in a manner so as produce a "false positives" for arsenic, (4) AFIP-Environmental and Dr. Centeno and his chemist, Dr. Todorov, have no experience testing for arsenic in human tissues and have never used the machine they used for such a purpose, (5) AFIP-Environmental had no Standard Operating Procedure (SOP) in place to standardize their testing process, (6) the findings, which indicate a poisoned tissue 1000+ times the normal levels, are in direct contradiction to the pathology findings of Todd's tissues which show them to be normal, (7) the findings, which would reflect a dosage of enormous size, which would indicate a

person experiencing deathly symptoms are in direct contradiction to the “slightly under the weather” medical condition of Todd.

OVERALL ARSENICAL QUANTITY - AFIP-Environmental testing yielded the following results:

Liver	92.4 ppm (parts per million)
Kidney	16.1 ppm
Urine	20 ppb (parts per billion)
Blood	79 ppb
Brain	12.1 ppb
Muscle	10.1 ppb

Because of arsenic’s ubiquitous nature, it is normal to find trace (or parts per billion) elements of arsenic in virtually every tissue in the body, in fact in virtually every substance on earth. For this reason, the only significant findings of AFIP-Environmental were their findings in the liver and kidney (parts per million).

ARSENIC TISSUE DISTRIBUTION FINDINGS

Even more suspicious than the overall tissue quantity is the manner in which the AFIP-Environmental findings showed how the arsenic was distributed amongst the tissues. In direct contradiction to what the evidence established is the way the body would distribute arsenic throughout its organs and tissues, AFIP-Environmental’s findings showed only “trace” or background amounts in urine, blood, brain, and muscle tissue with enormously high amounts in the liver and kidney. This *has never been reported in any such case*.

If we are to believe AFIP-Environmental results, Todd’s body is the first and only body ever to have metabolized arsenic in a manner such that there are deadly amounts in the liver and kidney, but only trace amounts in the rest of the body.

SPECIATION FINDINGS

As stated, Arsenic has a number of different types or “species”. The “speciation” of arsenic from body tissues in a forensic setting is important, because different species have different toxicity, and, for example of a tissue contained high amounts of AsB or AsC - it could mean that the person just ate a big lobster, but if the Arsenic was AsIII, well, that would mean that the person’s previous meal was, in fact, his last meal - he’d be dead.

In an effort to determine the type of arsenic found in Todd’s tissues, AFIP-Environmental sought to “speciate” the findings and, as they had done with the tissue distribution findings, ***CAME UP WITH FINDINGS WHICH HAD NEVER BEEN REPORTED IN THE HISTORY OF ARSENIC SPECIATION.***

AFIP-Environmental found that all of the arsenic that they found in Todd’s body was DMA (they found it to be present in an amount greater than 98%). A brief explanation of DMA is in order. When the body ingests arsenic trioxide, it realizes its poisonous quality and attempts to eliminate it. One of the ways it does so is by activating the enzymatic response of the body to change AsIII into what’s called a metabolite, first “monomethylate” (MMA) and then “dimethylate” (DMA).

Therefore, it is very common to find that when someone ingests AsIII on autopsy, it is found that a percentage of it has been metabolized into MMA and DMA. **BUT NEVER IN THE HISTORY OF SPECIATION HAS THERE EVER BEFORE BEEN A FINDING THAT ALL OF THE ARSENIC METABOLIZES INTO DMA!!**

In fact, the average amount of DMA which is present is usually 4% (MMA is usually at the 6% level).

To find DMA at the level of 98% is absolutely unheard of.

To find ONLY DMA to the exclusion of all other species of arsenic is also unheard of.

It should be noted, that even Dr. Centeno himself, has never seen such speciation findings before!

Not only has this never been seen before, but it would also be directly contradictory to the known bodily impact of arsenic. Todd’s dosage of arsenic was so large (if you believe AFIP-

Environmental) that he would have been dead within four *hours* not nine days after ingestion (See testimony of Dr. Spencer). If this was the case, then the arsenic would have had only four hours to metabolize in the body and, even according to Dr. Centeno, could never have reached a level consistent with AFIP-Environmental results.

CHAIN OF CUSTODY

Maintaining the chain of custody (COC) of any piece of evidence is absolutely critical to the accuracy of scientific testing. If a tissue is not properly maintained and is, say, left on a lab bench for three days unaccounted for, bacteria could impact on subsequent testing or cross contamination from other surrounding testing could result.

In this case, Todd's tissues experienced monstrously large holes in the COC. There were 16 separate chain of custody gaps, some lasting several hours, some lasting 24 hours, some lasting several days, and one lasting almost three weeks.

AFIP-Environmental IS NOT A FORENSIC LAB

The evidence is without dispute that Dr. Todorov who did the testing in this case and Dr. Centeno who supervised the work had NEVER before done any testing for arsenic on human beings. The machine they used was new to their lab. Their testing was new to their experience.

NO STANDARD OPERATING PROCEDURE

A Standard Operating Procedure (SOP) is a requirement of any laboratory doing testing. It is a requirement of the lab, the lab's accrediting agency, and the courts. Obviously because AFIP-Environmental had never before done arsenical testing on human tissues it had no SOP in place when it conducted its testing of Todd's tissues.

An SOP is important because it allows a lab's results to be standardized, reviewed, and repeatable.

The absence of such an SOP leaves anyone reviewing the results without the ability to determine if the findings are supported by the evidence or are a product of contamination or poor technique.

INCONSISTENT WITH PATHOLOGY

If someone ingests Arsenic to the point that they would have the enormously high levels reported by AFIP-Environmental, it would be expected that the body's tissues would be seriously compromised. The heart, liver, lung, blood, kidney, and even brain tissues would be observably impacted. Upon either gross or microscopic evaluation, grave deterioration of tissues would be noted.

Each of the pathologists - even the prosecution's pathologists, including Dr. Eisenga, concluded that arsenical poisoning manifests in dramatic pathological findings - deterioration of the blood vessels, presence of fibrous tissues in the heart, cell deterioration in the liver, kidney, etc.

As noted, for Todd, his pathologist, Dr. Robinson, Board Certified Pathologist, performed a thorough autopsy and found none of those pathological symptoms. He did a gross evaluation of the chest, stomach, head, central nervous system, neck, cardiovascular system, coronary arteries, conduction system, aorta, respiratory system, liver, biliary system, alimentary system, the tongue, esophagus, the bowel, genitourinary system, the spleen, the thyroid, adrenal glands, and musculoskeletal system.

He did a microscopic examination of the heart's left anterior descending artery, the heart's interventricular septum, left ventricular anterior and posterior walls, the heart's left ventricular lateral wall and right ventricle, the lungs, liver, kidneys, spleen, thyroid, colon, and intestines, and fourteen separate sections of the brain.

He collected blood, bile, vitreous, and gastric contents for toxicological evaluation, which ultimately came back normal. In fact, all the results were normal.

INCONSISTENT WITH TODD'S MEDICAL FINDINGS

Sgt. Sommer's medical conditions were NOT consistent with the *timing* of the prosecutor's theory of the case.

As stated earlier, if AFIP-Environmental findings are to be believed, Todd must have ingested arsenic sometime prior to February 8, 2002. Both Dr. Eisenga and Dr. Centeno so

opined. They both concluded that Todd did ingest arsenic on that date. An ingestion on February 8 would comport with the subsequent gastro-intestinal findings of Dr. Eisenga AND the “long enough to metabolize to DMA” findings of Dr. Centeno.

The problem with this scenario is that Todd would have been **curled up in a fetal position within four hours after ingestion and DEAD by the morning of February 9th**.

This did NOT happen.

If Todd had ingested such a massive lethal dose of arsenic on February 8, 2002, such that the AFIP-Environmental results are believable, he would have never been able to go back to work four of the days following February 8th and NEVER would have been able to take a three day vacation to Knotts Berry Farm, ride on the roller coaster, eat cotton candy, and play with the kids with no physical symptom whatsoever *up until the day of his death - ten days later*.

D

EXONERATING TISSUES AND DISMISSAL OF THE CASE

Knowing that AFIP findings “reeked” of contamination, the defense determined that the discovery given to it by the prosecution established that other tissues had been preserved at autopsy and that they were preserved in paraffin. The defense sought access to these tissues. In May, 2007, *prior to the Motion for New Trial*, the defense sought access to the other tissues taken at time of autopsy through a Motion for Discovery. Deputy District Attorney Laura Gunn stated that no such tissues existed.

In August, 2007, the head of the Balboa Hospital autopsy laboratory created a memo indicating that Deputy DA Gunn was aware of the presence of the paraffin tissues. Ms. Gunn never informed the defense, yet vehemently argued that the Motion for New Trial should be denied and that the scientific evidence was sound.

After the Motion for New Trial was granted (November, 2007), the defense renewed its demand for the tissues and/or all records relating to them in a discovery demand made on February 18, 2008.

Ms. Gunn was out of the office until March 5, 2008, but on March 7, 2008, she responded to the February 18 demand by ignoring the request, yet on March 20, 2008, Ms. Gunn's investigators went to the Balboa Hospital morgue and found the paraffin tissues - exactly where they had been when they saw them in November, 2005. These tissue, which had NEVER been sent to AFIP, were from the same six organs previously tested AND four additional areas, were tested and ALL TEN OF THE TISSUES PROVED TO COMPLETELY FREE OF ARSENIC.

On April 17, 2008, the prosecution filed a Motion to Dismiss the case against the defendant without prejudice.

The prosecution presented a number of facts which they claimed supported their Motion to Dismiss without prejudice. In essence, the Motion asserted that despite the fact that the defendant had spent 869 days in jail for a crime which they now asserted had never occurred, the justice system worked just as it was supposed to and that the prosecution acted appropriately and responsibly at all times throughout the case.

The defense called the prosecutor a liar.

The prosecution's Motion to Dismiss made the following assertions:

1. "The prosecution proceeded to trial based on laboratory testing and expert opinion evidence that victim Todd Sommer died of arsenic poisoning and that the defense, through their experts, raised questions regarding the arsenic evidence." (Page 1, lines 24-26).

This is a direct effort by the prosecution to mis-lead the court and the discovery requested herein will further establish so. It was NOT defense experts who raised questions regarding by the arsenic evidence, but prosecution experts. EVERY SINGLE DEFENSE EXPERT PRESENTED AT TRIAL WAS FIRST CONTACTED AND HIRED BY THE PROSECUTION TO BE THEIR WITNESS⁸

⁸One expert, Dr. Ela Bakowska apparently was NOT contacted by the prosecution first, but all of her findings were known to the prosecution. Dr. Bakowska was an employee of NMS labs, with whom Ms. Gunn consulted. She is a colleague of Dr. Laura Labay who WAS consulted by the prosecution and Dr. Bakowska's opinions were presented to the prosecution by Dr. Labay.

1. “The People had no advance notice of this defense evidence because none of these experts had written reports that could have been provided in pretrial discovery.” (Page 1, lines 26-27).

This is a lie.

The prosecution had FULL advance notice of the defense experts, because they consulted with them first. In fact, they hired them first. E-mails between Ms. Gunn and these and other experts from months or weeks BEFORE THE TRIAL establish this.

1. “Extensive post-trial litigation followed the conviction. The defendant’s trial experts, together with new experts *then for the first time* provided detailed reports regarding the quality of the arsenic evidence that had been presented at trial.” (Page 1; line 28-29)

This statement is direct effort to mis-lead the court and is tantamount to an attempt to perpetrate a fraud on the court. The prosecution KNEW that the quality of the arsenic evidence in the case was highly suspect and challenged LONG before the trial and LONG before the motion for new trial. Why? Because at least four separate experts told them so. Dr.’s Labay, Fitzgerald, Cantrell, Poklis, all told Ms. Gunn that in their opinion Sgt. Sommer did NOT die of arsenic poisoning - and they told her months and days before the trial. Even the D.A.’s own witness suspected contamination in the findings.

1. “On November 30, 2007, the (court) granted the defendant’s motion for a new trial . . . The case was transferred to the Honorable John S. Einhorn and the trial date was set for May 14, 2008.

“In fairness to the defendant and in the course of preparing for the retrial, the People carefully evaluated the newly submitted reports by the defense.”

This statement is a direct effort to mis-lead the court and is tantamount to an attempt to perpetrate a fraud on the court. THERE WAS NO “NEWLY SUBMITTED” REPORT which added ANY information beyond that which the prosecution knew before trial and long before the Motion for New Trial.

Ms. Gunn well knew, long before trial, of multiple experts who believed that Sgt. Sommer did NOT die of arsenic poisoning. All of the defense evidence presented at the trial in January, 2007 CAME from the prosecution. All reports submitted by the defense at the Motion for New Trial in May, 2007 only repeated what these experts told the prosecution directly in verbal communications prior tot they had already been told verbally prior to the trial. The written reports within the defense Motion for a New Trial were filed in May, 2007.

If the prosecution truly didn’t believe the oral statements made to prosecution by the experts before trial and somehow the prosecution only because truly aware of what they were saying at the trial in January, 2007 or when the Motion for New Trial was filed in May, 2007, then why did they wait until March, 2008- 15 months after the trial testimony and 10 months after the Motion for New Trial - to finally go seek the paraffin tissues.

The prosecution assertion that it was the “newly submitted” reports of the defense presented at the MNT which was the lynchpin for their conduct is a gross and crude effort to manipulate the truth and to perpetrate a fraud on the court.

1. “On March 20,2008 investigators went to . . . Balboa Naval Hospital . . . (T)hey learned *for the first time* that there were several samples of Todd’s tissues still there, stored in paraffin cassette blocks.” (Page two, line 14-16)

This statement is in direct contradiction with the fact that discovery page 1169 (attached) establishes that the prosecution knew of the paraffin preserved tissues as early as November, 2005 AND of the memorandum dated 31 August 2007 (attached) attached to the box where the tissues were found indicating that the head of the laboratory had discussed the contents of the box with Ms. Gunn. (Photos of location of box and its contents attached.)

It should be noted, that AFTER District Attorney Dumanis held a press conference and made this exact statement, members of the press determined the existence of discovery page 1169 and the memorandum mentioned above, and confronted Ms. Dumanis with these documents and asked her to respond to this apparent contradiction, at which point, Ms. Dumanis asserted that “she had mis-spoke” and that really her office had known of the tissues but “re-discovered” them in March, 2008.

1. The Canadian experts who examined the paraffin tissues also determined that “the Armed Forces Institute of pathology’s determinations were carried out appropriately and that the results are in all likelihood valid” (Page two, lines 28-29).

This is a direct attempt to mislead the court. It at least infers that the D.A. shared all of the materials regarding AFIP’s findings and the Canadian lab thought their findings were appropriate. THE DEFENSE HAS SINCE LEARNED THAT IN FACT THE PROSECUTION NEVER PRESENTED THE EVIDENCE THAT AFIP HAD 16 SEPARATE BREAKS IN THE CHAIN OF CUSTODY WHILE IN POSSESSION OF THE TISSUES.

POINTS AND AUTHORITIES

I

THE ROLE OF THE PROSECUTION IN A CRIMINAL CASE IS TO INSURE JUSTICE IS PERFORMED AND THE COURT HAS THE AUTHORITY TO DISMISS A CASE, EVEN OVER THE OBJECTION OF THE PROSECUTION

The role of the prosecutor differs significantly from that of the defense lawyer. “**... the prosecutor represents “a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”** (*Berger v. United States* (1935) 295 U.S. 78, 88.)’ ” (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

“Prosecutors have a special obligation to promote justice and the ascertainment of truth. ... “The duty of the district attorney is not merely that of an advocate. His duty is not to obtain convictions, but to fully and fairly present... the evidence...” (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1378.)

However, this special obligation doesn’t change the fact that the Court has the power to dismiss a case.

Dismissal Under Cal. Penal Code § 1385

A court is authorized pursuant to the California Penal Code Section 1385 upon its own motion, and at the request and invitation of the defense, to dismiss criminal charges pending against a defendant in the interest of justice.⁹ The Supreme Court has made it clear that a trial court may do so even over the objections of the prosecution *People v. The Superior Court of Marin County, Howard, Real Party In Interest*, 69 Cal2d 491, 501 (1968):

“The Attorney General urges that section 1385 of the Penal code does not confer power upon the court to order a dismissal of an action over the objection of the prosecution. This contention flies in the face of the very language of the section which provides that the court may 'either of its own motion or upon the application of the prosecuting attorney,' order an action to be dismissed”.

⁹Section 1385 (a) provides: The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading.

Marin, supra, also makes it clear that the court's power to dismiss exists either before the jury was empaneled (see *People v. Sidener*, 58 Cal2d 645, 648-49) or even after a jury verdict of guilt (see *People v. Burke*, 47 Cal2d 45, 49-51; *People v. Benjamin* 154 CA2d 164, 173; *People v. Harris* 146 CA2d 142, 147) and where the evidence is conflicting (see *People v. Alverson*, 760 Cal2d 803, 807):

“It would seem that, if anything, a court should have broader discretion to dismiss in furtherance of justice after the verdict than it should have during trial.”

Marin supra.

In determining whether to dismiss in the interests of justice after a verdict, involves a “balancing of many factors, including the weighing of the evidence indicative of guilt or innocence, the nature of the crime involved, the fact that the defendant has or has not been incarcerated in prison awaiting trial and the length of such incarceration, the possible harassment and burdens imposed upon the defendant by a retrial, and the likelihood, if any that additional evidence will be presented upon a retrial.”:

“When the balance falls clearly in favor of the defendant, a trial court not only may but should exercise the powers granted to him by the Legislature and grant a dismissal in the interests of justice.”

II A COURT HAS THE AUTHORITY TO DISMISS CHARGES WITH PREJUDICE

When a court exercises its discretion to dismiss, it must state its reasons in an order entered upon the minutes (the mere statement that the dismissal is in the interest of justice is insufficient *People v. Borousk*, 24 CalApp. 3rd 147, 156-57; 1972), and the court has the right to amend its minute order to comply with this requirement. However, where the record shows that the court made the dismissal order after viewing the evidence in the light most favorable to the prosecution and thereafter concluded that no reasonable trier of fact could find guilt beyond a reasonable doubt, **the dismissal will be construed as an acquittal** for legal insufficiency. *People v. Hatch*, (2000) 22 Cal 4th 260, 271-73; *Marin County*, *supra*, 69 Cal 2nd at 504-05 (finding trial judge's dismissal “on the stated ground of insufficiency of evidence to establish guilt beyond a reasonable doubt” “a sufficient basis for the dismissal”). Our Supreme Court in *Hatch* clearly states that there are not “rigid limitations on the language trial courts may use to dismiss for legal sufficiency of the evidence pursuant to section 1385” and that “courts need not restate the substantial evidence standard or use certain 'magic words' whenever they determine that the evidence is insufficient as a matter of law.” and that when the order properly establishes that the trial court rules that the evidence in a case is insufficient as a matter of law, then the “ruling **bars retrial**”.

Simply put, when the court indicates that it is intending to dismiss on the grounds of insufficient evidence, the dismissal acts as an acquittal for double jeopardy as defined in both the California and United States Constitution. *Hatch*, *supra*, at 271. (See also *People v. Salgado*, [2001] 88 Cal App 4th 5, 10: “double jeopardy principles permit a retrial when a dismissal is based on the trial court's reweighing of the evidence as a 'thirteenth juror,' but precluded when a dismissal is based on the legal insufficiency of the evidence”).

III THE COURT HAS THE AUTHORITY TO AMEND THE MINUTES OF ITS ORDER IN THE INTEREST OF

JUSTICE OR TO TRANSFER THE CASE TO THE TRIAL JUDGE FOR CONSIDERATION

The Supreme Court has made it clear that a trial court's effort to dismiss a case for all purposes, in the interest of justice, cannot be thwarted by technical defects in the process. "It is within the trial court's power . . . to amend it's . . . order to conform to its actual order." *People v. Borousk, Jr.* (1972) 24 CA3rd 147 citing *People v. Winters*, 171 CA2d Supp. 876, 882.

The court process of amending its technical order to comport with the full intent of the court is perfectly appropriate. *Borousk* makes it completely clear that the trial court has the authority to call a hearing to determine whether a dismissal should be made with or without prejudice: ""the presiding judge called a hearing on his motion. This was proper. Any such court motion should be made under circumstances which will afford respective counsel a chance to be heard. The hearing should be conducted with judicial propriety."

The hearing can rely on declaration or testimony and proper notice should be given to the parties (*Borousk*, id at 158) and the court's ultimate decision must be clearly stated. It is an acceptable procedure for a presiding (or a subsequent judge) to transfer the issue to the trial judge, as the trial judge would have a "feel" for the case and may be in a better position to deal with the intangibles with which a case is so often impressed (*Borousk*, id at 162):

"It is recommended that if a section 1385 hearing before a judge other than the one who conducted the trial poses the likelihood of . . . difficulties . . . the matter be transferred to the trial judge if he is reasonably available."

But whether this court keeps the case or transfers it to Judge Deddeh, *Borousk* makes it very clear that the power of the trial court to dismiss pursuant to section 1385 is "very broad" and technical impediments to the reaching of a conclusion to determine if the "interests of justice" are met by a dismissal should be minimized.

CONCLUSION

The prosecution's conduct in this case has been at the lowest levels of professionalism. It's conduct has cost a young woman her freedom for almost two and half years; has kept four children from their mother for that time; has kept a mother from being with her daughter; has had enormous emotional implications to a young widow; has poisoned the parents of a young marine against his wife who loved him dearly and kept those very same in-laws away from their grandchildren for 869 days and counting.

When it finally became clear that evidence, which had been available to the prosecution throughout the entirety of the case, finally and fully exonerated the defendant, the prosecution, instead of apologizing for their actions, conducted press conferences claiming that the "system worked exactly like it should have" and continues its hubris by refusing to dismiss the case once and for all, when the evidence is absolutely overwhelming, nay incontrovertible, that Sgt. Sommer died of natural causes and that there never was a crime at all.

Now the prosecution makes a claim all but asserting that it is above the law, in arguing that the court has no jurisdiction to dismiss this case with prejudice and for once and all time.

The law clearly says otherwise, but as of the writing of this document, the prosecution has yet to state why the court does not have the power to dismiss with prejudice. Counsel can only speculate as to the absurd length the prosecution will go to avoid a hearing on this matter. Perhaps they will attempt to circumvent the law by making a far fetched claim that the issue should be denied because the defense made the request, where the court alone has the power to dismiss with prejudice.

Perhaps the D.A. will claim that court lost its power because on April 17, 2008, the court uttered the words that it was dismissing without prejudice a micro-second before it stated that it is preserving the entire issue by setting a hearing to determine if the dismissal should be with prejudice.

The way the D.A. has "lip-synced" the truth throughout this case, it's difficult to know what they will suggest at this time. However, nothing they can say, can change the fact, that the court's order on April 17, 2008, to set a hearing to determine if the case should be dismissed with

prejudice is clearly within the power and authority of the court, as protected by the California Supreme Court.

Dated: May 23, 2008

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