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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

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.

1 Trial began in January, 2007.

2 The defendant was found guilty by a jury.

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

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

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

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

10 Trial was scheduled for May, 2008.

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

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

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

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

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

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

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

3 On May 8, 2008, the defense requested that all of the items requested herein be provided by
4 the prosecution. They have not responded to this request.

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STATEMENT OF FACTS

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

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

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

17 Pathologist, Dr. Stephen Robinson, of the Naval Medical Center, who had conducted over
18 500 autopsies in his career, evaluated Todd’s body. The autopsy and review was complete and
19 thorough. Dr. Robinson did a gross evaluation of the chest, stomach, head, central nervous system,
20 neck, cardiovascular system, coronary arteries, conduction system, aorta, respiratory system, liver,
21 biliary system, alimentary system, the tongue, esophagus, the bowel, genitourinary system, the
22 spleen, the thyroid, adrenal glands, and musculoskeletal system.

23 He did a microscopic examination of the heart’s left anterior descending artery, the heart’s
24 interventricular septum, left ventricular anterior and posterior walls, the heart’s left ventricular lateral

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1 wall and right ventricle, the lungs, liver, kidneys, spleen, thyroid, colon, and intestines, and fourteen
2 separate sections of the brain.

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

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

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

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

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

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

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

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

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

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

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

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3 After Ms. Sommer’s specifically agreed to the preservation of tissues and organs of Todd, his
4 body was cremated and Ms. Sommer set about attempting to live her life in the emotional wake of
5 her young husband’s death and the need to leave military housing and raise their four children. She

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7 ³A coronary artery spasm is a brief, temporary tightening (contraction) of the muscles in the artery's walls. This
8 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
9 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.

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

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

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1 received the standard \$250,000 military-issued life insurance policy and monthly care benefits for the
2 children. Despite an uncertain future and the loss of considerable housing and other benefits and
3 Todd's monthly income, she put over half of the funds in an irrevocable trust for her children and
4 paid off the considerable consumer debt that the young family had jointly incurred during their
5 marriage.

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

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

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

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

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

19 Because these findings were suspect, and even the person who did the testing felt that they
20 might be a product of contamination, the prosecution asked AFIP to do further testing to determine

21 ⁵ Exhibit A, pages 4-5 et seq.
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1 the “type” or “species” of arsenic in the tissues. It was felt that this testing might resolve the concern
2 that the experts had.

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

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

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

- 12 1. TISSUE DISTRIBUTION - arsenic had NEVER been found to limit itself to two tissues
13 leaving other tissues healthy;
- 14 2. SPECIATION FINDINGS - the presence of ONLY DMA and at the level of 98% had
15 NEVER been found in any human in the history of the world who had died from arsenic
16 poisoning;
- 17 3. INCONGRUOUS LAB WORK - arsenic creates such havoc in the body’s tissues that lab
18 tests, such as blood, urine, and other analysis always showed unusual results, yet Sgt.
19 Sommer’s lab work was perfectly normal;
- 20 4. INCONGRUOUS BEHAVIOR - no one who has ever ingested arsenic in levels found by
21 AFIP has ever lived longer than three days (and that was only ONE person, everyone else
22 died in a matter of hours), yet Sgt. Sommer purportedly lived twelve days after ingestion;
- 23 5. INCONGRUOUS PHYSICAL WELL BEING - arsenic is known to make a human being
24 very sick, very quickly, but Sgt. Sommer was extremely active over the course of the days
25 after his purported ingestion, even going on a roller coaster ride the night before he died;

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1 6. INCONSISTENT AUTOPSY FINDINGS - arsenic leaves tissues in an obvious state of
2 distress manifested in a number of ways, yet all of Sgt. Sommer's tissues evaluated at
3 autopsy were normal.

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

6 The prosecution had another problem - they couldn't establish in even the slightest way that
7 the defendant had ever purchased or had any contact with arsenic. Yet despite this, they attempted to
8 say that she had access to arsenic through the purchase of an ant bait, neglecting to reveal to the jury
9 that to reach the level of arsenic found by AFIP would have required him to have ingested a loaf of
10 ant bait in excess of **THREE POUNDS.**

11 Still, the prosecution went forward with the case.

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

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

16 A

17 **THE FINDING OF HOMICIDE IN THIS CASE IS DEPENDENT EXCLUSIVELY AND**
18 **SOLELY ON THE ARSENIC FINDINGS OF AFIP-ENVIRONMENTAL**
19 **(DR. CENTENO)**

20 When Todd's death was initially evaluated it was determined to be a death by natural causes
21 The initial autopsy was precise and thorough. It involved extensive gross, microscopic, and
22 toxicological evaluation. It was rendered by qualified and very experienced pathologists,
23 neuropathologists, and cardiac pathologists. Thereafter it was reviewed by entire boards of
24 pathologists as well as the coroner's office and several pathologists in San Diego County. *Every*
25 *single pathologist who reviewed the record of his death* reached the conclusion that Todd died by

1 natural causes. Both the Navy and the County of San Diego so stated when they filled out their
2 reports and completed their death certificates.

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

5 **B**

6 **ARSENIC**

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

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

18 Arsenic Trioxide (AsIII) is easily soluble. In this form it is colorless and tasteless and
19 extremely toxic to human tissues when ingested. Testimony at trial, as presented by several
20 witnesses including Drs. Poklis, Centeno and others, explained that AsIII acts on every body
21 tissue it touches. It greatly damages the cells of the kidney, the fibers of the heart, the blood

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23 ⁶ Baselt, page 82 (Exhibit F.)

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

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1 vessels, the bone marrow, etc. It destroys the integrity of the blood vessels themselves, rupturing
2 them, such that the arsenic tainted blood will seep through the vessels and pool throughout the
3 body. In very small doses (reported by several sources at the trial) as small as 100 mg (100
4 thousandths of a gram) it can be fatal, causing severe gastric symptoms in minutes, immobilizing
5 symptoms within several hours, and even death within four hours if untreated.

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

11 **C**

12 **THE ARSENICAL FINDINGS OF AFIP-
13 Environmental WERE HIGHLY SUSPICIOUS**

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

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

20 Their overall findings are controversial because (1) the Overall Arsenical Quantity is
21 almost "off the chart", (2) the tissue distribution found is virtually unheard of, (3) the speciation
22 findings go against every speciation evaluation and study ever performed and have never been
23 seen before, (3) there are huge holes in the Chain of Custody (COC) of Todd's tissues such that it
24 is unknown if the tissues were properly maintained or could have been susceptible to bacteria
25 which causes chemical changes in a manner so as produce a "false positives" for arsenic, (4)

1 AFIP-Environmental and Dr. Centeno and his chemist, Dr. Todorov, have no experience testing
2 for arsenic in human tissues and have never used the machine they used for such a purpose, (5)
3 AFIP-Environmental had no Standard Operating Procedure (SOP) in place to standardize their
4 testing process, (6) the findings, which indicate a poisoned tissue 1000+ times the normal levels,
5 are in direct contradiction to the pathology findings of Todd's tissues which show them to be
6 normal, (7) the findings, which would reflect a dosage of enormous size, which would indicate a
7 person experiencing deathly symptoms are in direct contradiction to the "slightly under the
8 weather" medical condition of Todd.

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

11	Liver	92.4 ppm (parts per million)
12	Kidney	16.1 ppm
13	Urine	20 ppb (parts per billion)
14	Blood	79 ppb
15	Brain	12.1 ppb
16	Muscle	10.1 ppb

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

21 **ARSENIC TISSUE DISTRIBUTION FINDINGS**

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

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

4 **SPECIATION FINDINGS**

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

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

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

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

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

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

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

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

5 Not only has this never been seen before, but it would also be directly contradictory to the
6 known bodily impact of arsenic. Todd's dosage of arsenic was so large (if you believe AFIP-
7 Environmental) that he would have been dead within four *hours* not nine days after ingestion
8 (See testimony of Dr. Spencer). If this was the case, then the arsenic would have had only four
9 hours to metabolize in the body and, even according to Dr. Centeno, could never have reached a
10 level consistent with AFIP-Environmental results.

11 **CHAIN OF CUSTODY**

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

16 In this case, Todd's tissues experienced monstrously large holes in the COC. There were
17 16 separate chain of custody gaps, some lasting several hours, some lasting 24 hours, some
18 lasting several days, and one lasting almost three weeks.

19 **AFIP-Environmental IS NOT A FORENSIC LAB**

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

23 **NO STANDARD OPERATING PROCEDURE**

24 A Standard Operating Procedure (SOP) is a requirement of any laboratory doing testing.
25 It is a requirement of the lab, the lab's accrediting agency, and the courts. Obviously because

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1 AFIP-Environmental had never before done arsenical testing on human tissues it had no SOP in
2 place when it conducted its testing of Todd's tissues.

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

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

8 **INCONSISTENT WITH PATHOLOGY**

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

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

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

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

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

5 **INCONSISTENT WITH TODD’S MEDICAL FINDINGS**

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

8 As stated earlier, if AFIP-Environmental findings are to be believed, Todd must have
9 ingested arsenic sometime prior to February 8, 2002. Both Dr. Eisenga and Dr. Centeno so
10 opined. They both concluded that Todd did ingest arsenic on that date. An ingestion on
11 February 8 would comport with the subsequent gastro-intestinal findings of Dr. Eisenga AND the
12 “long enough to metabolize to DMA” findings of Dr. Centeno.

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

15 **This did NOT happen.**

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

21 **D**

22 **EXONERATING TISSUES AND DISMISSAL OF THE CASE**

23 Knowing that AFIP findings “reeked” of contamination, the defense determined that the
24 discovery given to it by the prosecution established that other tissues had been preserved at
25 autopsy and that they were preserved in paraffin. The defense sought access to these tissues.

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1 In May, 2007, *prior to the Motion for New Trial*, the defense sought access to the other
2 tissues taken at time of autopsy through a Motion for Discovery. Deputy District Attorney Laura
3 Gunn stated that no such tissues existed.

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

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

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

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

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

24 The defense called the prosecutor a liar.

25 The prosecution's Motion to Dismiss made the following assertions:
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1. “The prosecution proceeded to trial based on laboratory testing and expert opinion evidence that victim Todd sommer died of arsenic poisong 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

2. “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 discvoery.” (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. This discovery motion will further establish this to be the case.

Emails between Ms. Gunn and these and other experts from months or weeks BEFORE THE TRIAL establish this.

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

4

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

13

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

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

19

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

24

25 **Ms. Gunn well knew, long before trial, of multiple experts who believed**

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1 presented at the trial in January, 2007 CAME from the prosecution. All reports
2 submitted by the defense at the Motion for New Trial in May, 2007 only repeated
3 what these experts told the prosecution directly in verbal communications prior tot
4 they had already been told verbally prior to the trial.

5 This Motion for Discovery will confirm that.

6 The written reports within the defense Motion for a New Trial were
7 filed in May, 2007.

8 If the prosecution truly didn't believe the oral statements made to
9 prosecution by the experts before trial and somehow the prosecution only because
10 truly aware of what they were saying at the trial in January, 2007 or when the
11 Motion for New Trial was filed in May, 2007, then why did they wait until March,
12 2008- 15 months after the trial testimony and 10 months after the Motion for New
13 Trial - to finally go seek the paraffin tissues.

14
15 The prosecution assertion that it was the "newly submitted" reports of
16 the defense presented at the MNT which was the lynchpin for their conduct is a
17 gross and crude effort to manipulate the truth and to perpetrate a fraud on the
18 court.

- 19
20 5. "On march 20,2008 investigators went to . . . Balboa Naval Hospital . . . (T)hey learned
21 *for the first time* that there were several samples of Todd's tissues still there, stored in
22 paraffin cassette blocks." (Page two, line 14-16)

23
24 This statement is in direct contradiction with the fact that discovery page 1169
25 establishes that the prosecution knew of the paraffin preserved tissues as early as
26

1 **THE DEFENSE ASSERTS THAT THE DISCOVERY CONTAINED**
2 **HEREIN WILL REFUTE ANY CLAIM THAT THE CANADIAN LAB**
3 **APPROVED AFIP’S FINDINGS.**

4
5 **POINTS AND AUTHORITIES**

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

11 **“Prosecutors have a special obligation to promote justice and the ascertainment of**
12 **truth. ... ‘The duty of the district attorney is not merely that of an advocate. His duty is not**
13 **to obtain convictions, but to fully and fairly present... the evidence...”** (*People v. Kasim*
14 *(1997) 56 Cal.App.4th 1360, 1378.*)

15 The law requires a prosecutor to disclose exculpatory (*Brady*) material, along with other
16 discovery obligations. But if in doubt about whether an item must be disclosed, prosecutors are
17 encouraged to disclose out of an abundance of caution. (*Kyles v. Whitley (1995) 514 U.S. 419,*
18 *439-440.*)

19 In the words of the California Supreme Court: **“A... defendant’s right to discovery is**
20 **based on the ‘fundamental proposition that [an accused] is entitled to a fair trial and an**
21 **intelligent defense in light of all relevant and reasonably accessible information.’ ”** (*Santa*
22 *Cruz v. Municipal Court (1989) 49 Cal.3d 74, 84.*)

23 **“Absent some governmental requirement that information be kept confidential...**
24 **the state has no interest in denying the accused access to *all evidence* that can throw light**

1 **on issues in the case...**” (*People v. Riser* (1956) 47 Cal.2d 566, 586, orig. emphasis; 5 Witkin
2 and Epstein, California Criminal Law, (3d ed. 2000) § 27, pp. 73-74.)

3 **“We are unaware of any requirement that that a party must cite a specific statute in**
4 **order to receive discovery to which it is entitled. ... Not providing discovery the defense**
5 **specifically requests merely because defense counsel did not cite the right statute would be**
6 **inconsistent with the high court’s holding [in *Wardius v. Oregon* ... 412 U.S. at p. 479.]”**
7 (*People v. Gonzalez* (2006) 38 Cal.4th 932, 958.)

8 ***1. General principles of defense discovery:***

9 Defense discovery begins with Penal Code section 1054.1: **“The prosecuting attorney**
10 **shall disclose to the [defense] all of the following materials and information, if it is in the**
11 **possession of the prosecuting attorney or if [he] knows it to be in the possession of the**
12 **investigating agencies: (a) The names and addresses of persons the prosecutor intends to**
13 **call as witnesses at trial. (b) Statements of all defendants. (c) All relevant real evidence**
14 **seized or obtained as part of the investigation of the offenses charged. (d) The existence of a**
15 **felony conviction of any material witness whose credibility is likely to be critical to the**
16 **outcome of the trial. (e) Any exculpatory evidence. (f) Relevant written or recorded**
17 **statements of witnesses or reports of the statements of witnesses whom the prosecutor**
18 **intends to call at the trial, including any reports or statements of experts made in... the**
19 **case, including the results of physical or mental examinations, scientific tests, experiments,**
20 **or comparisons which the prosecutor intends to offer in evidence at the trial.”**

21 Discovery constitutionally compelled must be provided whether specified in the statutes
22 or not. **“The... duties of disclosure under the due process clause are *wholly independent of***
23 **any statutory scheme ... [and t]he due process requirements are self-executing and need no**
24 **statutory support to be effective.”** (*Izazaga, supra*, 54 Cal.3d at 378; orig. emphasis.) **“The**
25 **savings provision of P.C. 1054(e)... recognizes the right to discovery compelled under**

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1 **federal due process and other federal constitutional principles... regardless of whether it is**
2 **recognized by California statute.”** (5 Witkin and Epstein, California Criminal Law, (3d ed.
3 2000), § 32(4), p. 78.)

4 An affirmative duty arises, however, when the police (or prosecutor) have reason to
5 believe exculpatory evidence exists. “**...a bad faith failure to collect potentially exculpatory**
6 **evidence would violate the due process clause [in] cases in which the police ...by their**
7 **conduct indicate... the evidence could form the basis for exonerating the defendant.”**
8 (*Miller v. Vasquez* (9th Cir. 1989) 868 F.2d 1116, 1120-1121.)

9 The Supreme Court agrees. “[T]he... **prosecutor has a duty to learn of any favorable**
10 **evidence known to the others acting on the government’s behalf in the case, including the**
11 **police.”** (*Kyles v. Whitley, supra*, 514 U.S. 419, 437; see also *Strickler v. Greene* (1999) 527 U.S.
12 263.)

13 Availability is key: “[T]he party seeking relief from the disclosure requirements has
14 **the burden of demonstrating that the information... is unavailable.”** (*In re Littlefield, supra*,
15 5 Cal.4th at 136.)

16 When the prosecution appeals the granting of a new trial motion the case *is* still pending
17 and the trial court can make discovery orders. (*Wisely v. Superior Court* (1985) 175 Cal.App.3d
18 267.)

19 *Exculpatory* material must be disclosed even after a conviction, or an appeal is over.
20 (*Imbler v. Pachtman, supra*, 424 U.S. 409, 427, fn. 25; *People v. Kasim, supra*, 56 Cal.App.4th
21 1360, 1377; *People v. Garcia, supra*, 17 Cal.App.4th 1169; rule 5-220, Rules of Prof. Cond.,
22 State Bar of California.)

23 DATED: May 16, 2008

24 Allen Bloom
25 Attorney for Defendant