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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

INTRODUCTION

Cynthia Sommer has lost everything she ever owned, been forced to spend almost two and half years in jail, had her children ripped from her, and her family has been bankrupted. In short, every aspect of her life has been utterly disrupted as a result of a prosecution of her for killing her husband - when her husband died of natural causes.

If the court is serious about getting to the bottom of the question of whether the prosecution misrepresented and lied to the jury and to the court and improperly caused those disruptions to Ms. Sommer’s life, then the court should grant this motion for discovery.

Only through the order of this discovery will the court ever be in a position to determine if the District Attorney hid evidence from the defense, mis-represented evidence it knew was tainted, and, in general, acted in a manner which was governmentally outrageous, conduct which

would justify the court exercising its discretion under Penal Code §1385 to dismiss, once and for all, the charge against Ms. Sommer**.**

At our last hearing, where the parties were focusing on whether the court should dismiss pursuant to PC§1385 based upon the facts of the case - the court opined that it appeared that "Ms. Sommer has a right without a remedy". The court reached its decision because it felt that case law limited its evaluation of the facts to those presented at the trial.

The question NOW before the court, however, is something very different: whether the government's conduct in this case was so improper as to justify the court's dismissal with prejudice. This is a decision which is NOT beyond the court's purview. This is a task which the court can complete. This is a "right ***WITH*** a remedy", but only if the court get's to the bottom of this issue by an order directing the prosecution provide information which focus on whether or not the prosecution's conduct was improper.

The prosecution will, undoubtedly, object to this request. Rather than allow a beacon of forthrightness and honesty to shine on this case, the prosecution has taken every step possible to hide and delay, and the defense expects they will attempt to do so again.

They will likely present their classic "Bart Simpson"[1] argument: "The court does not have the authority to grant discovery. If the court has authority, the defense has not made a sufficient showing to get the discovery. If the defense has made a sufficient showing, the defense request is too broad."

But the truth is that the court does have the right to determine if the prosecution did or did not manifest "flagrant and shocking"conduct and the first step in that process is to grant this order for discovery.

STATEMENT OF THE CASE

[1] The iconic animated miscreant when accused of stealing the cookies responded: "I didn't do it. Nobody saw me do it. Can't prove a thing."

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 for a dismissal with prejudice. That hearing is currently scheduled for May 4, 2009.

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 syndrome[2], Brugada syndrome[3] (1) or coronary spasm.[4] . . . The manner of death, in my opinion is NATURAL." (Exhibit E)[5]

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[2]Long 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

[3]Brugada 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

[4]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

After Ms. Sommer's 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.

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*

(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

[5] 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.*

standardized. The testing process was broken by some 16 separate breaks in the Chain of Custody[6].

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%.)

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.

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[6] Exhibit A, pages 4-5 et seq.

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 twelve 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 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 HOMICIDE IN THIS CASE IS 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.[7]

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.[8]

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.

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[7] Baselt, page 82 (Exhibit F.)

[8] 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 finding 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.

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 it's 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 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, <u>but prosecution experts. EVERY SINGLE DEFENSE EXPERT PRESENTED AT TRIAL WAS FIRST CONTACTED AND HIRED BY THE PROSECUTION TO BE THEIR WITNESS</u>[9]

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[9]One 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

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 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.

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, Poklus, 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.

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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. "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.

This Motion for Discovery will confirm that.

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 establishes that the prosecution knew of the paraffin preserved tissues as early as November, 2005 AND of the memorandum 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.

   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.

THE DEFENSE ASSERTS THAT THE DISCOVERY CONTAINED HEREIN WILL REFUTE ANY CLAIM THAT THE CANADIAN LAB APPROVED AFIP'S FINDINGS.

POINTS AND AUTHORITIES

I
A PROSECUTOR HAS AN OBLIGATION TO ACT VIGOROUSLY and ETHICALLY

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.)

II
THE COURT HAS THE POWER TO DISMISS UNDER PENAL CODE SECTION 1385 DUE TO FLAGRANT PROSECUTORIAL CONDUCT

The power of a court to dismiss a criminal case for outrageous conduct arises from the due process clause of the United States Constitution. (*Rochin v. California* (1952) 342 U.S. 165, 168; *People v. McIntire* (1979) 23 Cal. 3d 742, 748, fn. 1; *People v. Wesley* (1990) 224 Cal. App. 3d 1130, 1141-1142.) "When conduct on the part of authorities is so outrageous as to interfere with an accused's right of due process of law, proceedings against the accused are thereby rendered improper. [Citations.]" (*Boulas v. Superior Court*, 188 Cal. App. 3d at p. 429.) “Dismissal is, on occasion, used by courts to discourage flagrant and shocking misconduct by overzealous governmental officials in subsequent cases.” [Citations.] Id.

“Where it appears that the state has engaged in misconduct, the burden falls upon the People to prove, by a preponderance of the evidence, that sanctions are not warranted because the defendant was not prejudiced by the misconduct. [Citations.]” (*People v. Zapien* (1993) 4 Cal.4th 929, 967 [17 Cal. Rptr. 2d 122, 846 P.2d 704].)

In *Boulas*, the prosecutor interfered with the defendant’s constitutional right to have a counsel of his choice. The defendant brought a motion to dismiss under section 1385, which the trial court treated as an invitation to exercise its discretionary power of dismissal. After conducting an evidentiary hearing, the court declined to dismiss. The Court of Appeal held that the case should have been dismissed under section 1385.

In *People v. Moore* (1976) 57 Cal. App. 3d 437, the court held that the case against the defendant should be dismissed because of outrageous government conduct where the D.A. actively interfered with the attorney-client relationship, by establishing a relationship with the defendant behind his attorney’s back.

III
THE COURT’S POWER TO ORDER DISCOVERY

The law requires a prosecutor to disclose exculpatory (*Brady*) material, along with other discovery obligations. But if in doubt about whether an item must be disclosed, prosecutors are

encouraged to disclose out of an abundance of caution. (*Kyles v. Whitley* (1995) 514 U.S. 419, 439-440.)

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

"Absent some governmental requirement that information be kept confidential… the state has no interest in denying the accused access to *all evidence* that can throw light on issues in the case…" (*People v. Riser* (1956) 47 Cal.2d 566, 586, orig. emphasis; 5 Witkin and Epstein, California Criminal Law, (3d ed. 2000) § 27, pp. 73-74.)

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

1. General principles of defense discovery:

Defense discovery begins with Penal Code section 1054.1: **"The prosecuting attorney shall disclose to the [defense] all of the following materials and information, if it is in the possession of the prosecuting attorney or if [he] knows it to be in the possession of the investigating agencies: (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial. (b) Statements of all defendants. (c) All relevant real evidence seized or obtained as part of the investigation of the offenses charged. (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial. (e) Any exculpatory evidence. (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in... the**

case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial."

Discovery constitutionally compelled must be provided whether specified in the statutes or not. **"The... duties of disclosure under the due process clause are *wholly independent* of any statutory scheme ... [and t]he due process requirements are self-executing and need no statutory support to be effective."** (*Izazaga, supra*, 54 Cal.3d at 378; orig. emphasis.) **"The savings provision of P.C. 1054(e)... recognizes the right to discovery compelled under federal due process and other federal constitutional principles… regardless of whether it is recognized by California statute."** (5 Witkin and Epstein, California Criminal Law, (3d ed. 2000), § 32(4), p. 78.)

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

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

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

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

Exculpatory material must be disclosed even after a conviction, or an appeal is over. (*Imbler v. Pachtman, supra*, 424 U.S. 409, 427, fn. 25; *People v. Kasim, supra*, 56 Cal.App.4th

1360, 1377; *People v. Garcia, supra*, 17 Cal.App.4th 1169; rule 5-220, Rules of Prof. Cond., State Bar of California.)

DATED: January 20, 2009____________________________

____Allen Bloom
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