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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

CENTRAL DIVISION

IN RE: CYNTHIA SOMMER

POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS WITH PREJUDICE AND TO FINDING OF PROSECUTORIAL MISCONDUCT; OPPOSITION TO EVIDENTIARY HEARING AND MOTION TO QUASH SUBPOENA

Date: September 25, 2009
Time: 9:00 A.M.
Dept: 58
Stipulation to R.T. Yes
Witnesses: 0 - 2
Time Estimate: 1 hour – 1 day

INTRODUCTION

Deputy District Attorney Laura Gunn acted with integrity and professionalism throughout the proceedings in the now-dismissed case of *People v. Cynthia Sommer*. Ms. Sommer's conviction for murder was overturned due to her trial attorney's ineffective assistance of counsel. No allegations of prosecutorial misconduct were made during trial, when they would have been timely. Nor were they made during the motion for new trial, where statutory authority exists for such a claim, and where Ms. Sommer's current defense counsel was

involved. Ms. Sommer now grasps at straws; her only remaining opportunity to obtain a bar to further prosecution requires that she impugn DDA Gunn's integrity and professionalism, and cast spurious allegations upon DDA Gunn in her role as prosecutor.

Ms. Sommer's motion, however, lacks statutory authority and credible factual support for her allegations. The record contains ample evidence that there were no prosecutorial transgressions which support her motion. Nevertheless, if the court so allows, Ms. Sommer and counsel will use this proceeding to cast aspersions on the prosecution and subject DDA Gunn to extensive examination in a fishing expedition for something, anything, that can be spun in Ms. Sommer's favor. But even assuming, inter alia, that the allegations of misconduct are true, the misconduct alleged does not rise to the level of outrageous government misconduct that supports the requested remedy. The ruling on the instant motion is a legal determination, not a factual one, and DDA Gunn's testimony is immaterial to the ultimate decision the court must make. Thus, the motion for an evidentiary hearing and the request for an order to compel her testimony should be denied.

This is not the forum to re-litigate the case, as Ms. Sommer seeks to do. Many of the scientific assertions made by counsel in the instant pleading were never admitted into evidence or litigated in an adversarial proceeding. They are not relevant to the issue at hand: whether the prosecutor committed such egregious conduct that the defendant would be unable to receive a fair trial of a refiled case. Ms. Sommer has failed to make any showing of such circumstances. Nothing submitted by the defense supports the bald assertions of misconduct, there are no affidavits or declarations, and nothing in the record establishes the prima facie showing necessary to order an evidentiary hearing.

These proceedings are unprecedented. Todd Sommer, an apparently healthy 23-year-old, died under suspicious circumstances. Arsenic was found in his tissues. His death certificate still lists arsenic poisoning—murder—as the cause of death. Now the person once convicted of that murder seeks to bar the People from retrying her in the event that further evidence comes to light, such as a confession, or upon advances in science that further demonstrate her guilt. The jury that heard all of the evidence, including the scientific disputes among the experts, convicted Ms. Sommer. This court should not immunize her from further prosecution as an ultimate

consequence of her trial attorney's ineffective assistance of counsel. To do so would be unfair to the People of the State of California, and deviate from the fair and just criminal justice system prescribed by the Legislature and the People under the state and federal Constitutions.

HISTORY OF THE INVESTIGATION

On February 18, 2002, Marine sergeant Todd Sommer died of arsenic poisoning. The next day, a Navy pathologist performed an autopsy and opined that the cause of Sgt. Sommer's death was probable cardiac arrhythmia. Toxicological testing to further determine the cause was ordered. Based on the Navy autopsy, the San Diego County Medical Examiner issued a "pending investigation" California death certificate. Following completion of the initial, unrevealing toxicological testing, the Medical Examiner amended the death certificate to reflect a natural death by probable cardiac arrhythmia of unknown etiology.

Later that year, a senior Naval Criminal Investigative Service [NCIS] agent reviewed the death investigation and ordered testing of fresh frozen and unpreserved tissue samples for the presence of heavy metals. In May, 2003, testing at the Armed Forces Institute of Pathology [AFIP] revealed that Sgt. Sommer died with fatal levels of arsenic in his liver and kidneys. Very low levels of arsenic were found in his blood, urine, bile, and gastric contents. NCIS began an investigation into his death. In May, 2005, NCIS agents submitted the naval autopsy report and the AFIP arsenic findings to Chief Medical Examiner Dr. Glenn Wagner. After reviewing the materials, Dr. Wagner reopened his office's investigation into Sgt. Sommer's death. On December 6, 2005, the Medical Examiner recorded a second amendment to the death certificate, which now reflects that Sgt. Sommer died from "acute arsenic poisoning/intentional administration by another/homicide."

CRIMINAL PROCEEDINGS

The District Attorney charged Sgt. Sommer's wife, Cynthia, with his murder under the special circumstances of poisoning and of murder for financial gain. She was arraigned on March 10, 2006.

In the pretrial discovery provided to the defense in March 2006, was an "itemized

accounting of post-mortem specimens pertaining to [Sgt. Sommer]" held by AFIP and Balboa Naval Hospital. This accounting, on page 1169 of the Bates-stamped discovery included documentation of the existence of fresh, frozen (unpreserved) tissue samples at AFIP and preserved tissues, including a stock jar of formaldehyde preserved specimens and "31 paraffin-embedded tissue blocks" which had also been fixed with formaldehyde at Balboa Naval Hospital. (See, Exhibit One.) Neither party to the case requested chemical testing of the "paraffin-embedded tissue blocks."

During trial, in limine motions were heard on the extent to which evidence of Ms. Sommer's behavior, following the death of her husband could be admitted by the prosecution. The court ruled that some of the evidence could be admitted while some of the evidence was too prejudicial compared with its probative value. The prosecution complied with the court's order. However, during the defendant's case, "the door was opened" and the court allowed the prosecution to admit the previously excluded evidence. At no time did the prosecutor violate any of the court's evidentiary rulings.

On January 30, 2007, after 18 days of trial and extensive testimony by eight experts, five prosecution and three defense, about the laboratory findings of arsenic poisoning, a jury found Cynthia Sommer guilty of murdering her husband.

After trial, Cynthia Sommer retained a new lawyer, Mr. Bloom. Trial counsel, Robert Udell, and Mr. Bloom each filed motions for a new trial, on behalf of Ms. Sommer, claiming (1) the verdict was contrary to law and evidence; (2) juror misconduct, and (3) insufficiency of the evidence. Neither alleged prosecutorial misconduct. Ultimately, the court granted Ms. Sommer a new trial due to ineffective assistance of trial counsel.

In preparing to resolve concerns that were raised about the arsenic findings in both the first trial and during litigation of the motion for a new trial, DDA Gunn ordered chemical testing on the above-described histology tissue samples that had been preserved in the paraffin tissue blocks. This was despite acknowledgements by both DDA Gunn and Mr. Bloom, that testing of the preserved tissues would be problematic due to the possibility of tainted results. (See, emails attached as Exhibit Two.)

On April 16, the Quebec laboratory that performed the additional tests reported to the

prosecutor that the samples prepared for histological examination did not contain evidence of arsenic. This result differed from the findings of arsenic in the fresh frozen (unpreserved) tissue samples previously made by two laboratories: AFIP's Department of Environmental Pathology Laboratory and the National Medical Services, Inc. Laboratory (NMS Labs).

On April 17, a decision was made to request a dismissal of the case pursuant to Penal Code section 1385. To ensure Ms. Sommer's timely release from custody, the People quickly drafted papers in support of their motion. The prosecution erroneously described the "preserved" histology samples that tested negative as "newly discovered evidence."

It is clear from the original trial discovery, however, that all parties to the trial of Cynthia Sommer were informed that the histology tissue samples existed. And following trial, four e-mail chains between Mr. Bloom and DDA Gunn, dated from May 30, 2007 to July 17, 2007, establish that both the prosecution and the defense were well-aware that the fixed (preserved) tissues at Balboa were available for testing and had not been destroyed. Ms. Sommer suffered no prejudice from any misunderstanding about the state of the physical evidence. A new trial was granted, albeit for other reasons, curing any defect caused by the misunderstanding.

At the People's motion to dismiss on April 17, 2008, the court read into the record the facts underlying the motion as stated in the People's pleading, and confirmed that the People were moving for dismissal without prejudice. (Reporter's Transcript of Motion to Dismiss dated April 17, 2008, [RTMD] at pp. 2-5.) Counsel for defendant Sommer began his remarks by asking the court to dismiss the case with prejudice. (RTMD, p. 6.) After lengthy remarks, he asked again that the case be dismissed. Specifically, defense counsel told the court: "I would request that the case—that this case be dismissed." (RTMD, p. 17.) He also added, without citation of authority for his request, that "[a]s to whether or not this case should be dismissed with or without prejudice, I request a hearing to make a determination at the future time for that purpose." (RTMD, p. 18.)

The court then stated that ". . . my decision is going to be to grant the motion to dismiss without prejudice, to deny Mr. Bloom without prejudice his motion to dismiss with prejudice, to set a hearing on a motion to dismiss with prejudice, and to order that Miss Sommer be released forthwith." (RTMD, p. 18.) The court later reiterated that "I said I was denying the defendant—

Mr. Bloom's request for a dismissal with prejudice . . . ¶ . . . I've denied that without prejudice because I'm going to set a hearing on that motion in this courtroom at a time convenient for the two of you . . . . ¶ . . . The minute order will reflect that the case has been dismissed without prejudice under Penal Code section 1385." (RTMD, p. 20.)

Counsel is mistaken in his statement that the prosecution asserted that a crime never had occurred. (See, Motion to Dismiss with Prejudice, p. 17, l. 14.) Chief Medical Examiner Glenn Wagner has been informed of the results of the chemical analysis of the histology samples. He stands by the amended death certificate of December 6, 2006, which lists Sgt. Sommer's death as a homicide by intentional arsenic poisoning by another person. To date, the death certificate has not been changed.

ARGUMENT

I

THE COURT LACKS JURISDICTION TO HEAR MS. SOMMER'S MOTION TO DISMISS WITH PREJUDICE

The Court has already heard and ruled upon the People's position that the Court lacks jurisdiction to hear the instant motion. The People, nevertheless continue to object to any further action on the instant proceedings on the basis that the court either lacks jurisdiction or is acting in excess of its jurisdiction. In that regard, the People hereby incorporate by reference the Memorandum of Law regarding the Court's Jurisdiction to Act filed on or about May 23, 2008 and the Reply Memorandum of Law regarding the Court's Jurisdiction to Act, filed on or about May 28, 2008.

Briefly, the court ordered the case against Cynthia Sommer dismissed without prejudice and set a date for a hearing on the defendant's motion to dismiss with prejudice. However, because the case was dismissed and Ms. Sommer released from custody, there is no action or case pending to establish the court's jurisdiction to act in the matter and the defense has not provided the court with any authority, statutory or otherwise, to do so.

A dismissal under section 1385 "cut[s] off action or a part of an action against the defendant." (*People v. Hernandez* (2000) 22 Cal.4th 512, 524.) Any assumption by the court that it would retain jurisdiction over the action after dismissing it under section 1385 was

mistaken: "where no actual fraud has been perpetrated upon the court, a criminal court has no authority to vacate a dismissal entered deliberately but upon an erroneous factual basis." (*Smith v. Superior Court [People]* (1981) 115 Cal.App.3d 285, at pp. 287-288.)

In *People v. Carrillo* (2001) 87 Cal.App.4th 1416, the defense claimed, without citation of authority, that section 1385 authorizes a sentencing court to "conditionally dismiss" a "strike" allegation pending review of his application for treatment at the California Rehabilitation Center. The Court of Appeal stated "[t]he procedure envisioned by defendant is more akin to a stay," and that power to stay an action is not to be found in section 1385. In its analysis, *Carrillo* applied the rule set out by the California Supreme Court in *Hernandez*, *supra*, that section 1385 dismissal "cuts off" an action. (*Id.* at p. 1421.)

Assuming, arguendo, that the court now has jurisdiction to dismiss the case with prejudice, it should not do so, for the reasons set forth in these pleadings.

II.

DEFENDANT'S MOTION IS UNTIMELY

The defense first made allegations of prosecutorial misconduct against DDA Gunn only after a new trial motion was granted and after the case was dismissed at the request of the People. Throughout the entire trial, there were no allegations of misconduct, no objections, and no requests for jury admonishment.

It is, of course, the general rule that a defendant cannot complain on appeal of misconduct by a prosecutor at trial unless in a timely fashion he made an assignment of misconduct *and* requested that the jury be admonished to disregard the impropriety." (*People v. Benson* (1990) 52 Cal.3d 754, 794, italics added; see also *People v. Fierro* (1991) 1 Cal.4th 173, 207; *People v. Gionis* (1995) 9 Cal. 4th 1196, 1215.) There is a futility exception to this general rule, but it is limited to cases of severe and repeated prosecutorial misconduct. (*People v. Arias* (1996) 13 Cal.4th 92, 159-160.) In such cases of severe and repeated misconduct, the necessity of either a timely objection and/or a request for admonition is only excused if either would be futile, if an admonition would not have cured the harm caused by the misconduct, or if the court immediately overrules an objection to alleged prosecutorial misconduct such that the defendant has no opportunity to make such a request. (See: *People v. Hill*, 17 Cal.4th 800, 821.)

In the instant case, there was no misconduct, much less severe and repeated misconduct. Nor were there any objections based on misconduct or a showing that such objections would be futile. In fact, not only did the defendant forego any allegations of misconduct during the trial, but the defendant failed to bring allegations of prosecutorial misconduct at the time of the new trial motion, a time when such a claim is statutorily authorized and when Ms. Sommer was represented by current counsel.

Penal Code section 1181, authorizes a new trial on several different bases. One of those bases is ". . . when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury." (Cal. Pen. Code, §1181, subd. (5).) Yet while in the instant case the defense litigated a new trial motion on various bases, including the insufficiency of the evidence and, at trial court's urging, the ineffective assistance of counsel, they never once raised the claim of prosecutorial misconduct. To the contrary, throughout the motion for a new trial, Mr. Bloom concurred for the most part with the court's assessment that DDA Gunn acted professionally. For example, in his argument regarding the adequacy of Ms. Sommer's representation, Mr. Bloom stated, "I think you had competent, effective representation on the part of the prosecution, and representation which was spotty, at best, on the part of the defense. (Exhibit 3A, MNT p. 208.)

With respect to the comments on the chain of custody documents, there was the following colloquy, possibly amounting to a factual finding by the court:

THE COURT: MY EXPERIENCE IN THIS CASE WAS THAT MS. GUNN WAS COMPLETELY COOPERATIVE WITH MR. UDELL AND SHE WENT TO GREAT LENGTH TO GIVE HIM WHAT HE ASKED FOR AND WHAT HE WANTED, AND SHE CONDUCTED HERSELF IN A VERY PROFESSIONAL AND COLLEGIAL WAY WITH HIM.

MR. BLOOM: HE NEVER ASKED FOR IT, THOUGH.

THE COURT: AND HE WITH HER.

MR. BLOOM: HE NEVER ASKED FOR IT, THOUGH. AND SO, THEREFORE, SHE NEVER ASKED CENTENO TO GET IT UNTIL YOU HEARD THE

REVELATION ON THE WITNESS STAND ABOUT THIS. AND I ASSUME -- I ASSUME THAT'S THE FIRST TIME MS. GUNN HEARD ABOUT THESE MISSING 85 PAGES, AS WELL, IS WHEN CENTENO HAD IT. I ASSUME MS. GUNN WAS NOT SITTING ON THIS IN ANY WAY.

THE COURT: NO. OF COURSE NOT.

MR. BLOOM: BECAUSE SHE WOULD HAVE BATES STAMPED IT AND GIVEN IT OUT.

THE COURT: SHE WOULD HAVE.AND THAT'S THE WAY SHE CONDUCTED HERSELF DURING THIS CASE THE ENTIRE TIME, IS IF THERE WAS SOMETHING MISSING, SHE WOULD GIVE IT OVER TO THE DEFENSE GLADLY. AND SO I DON'T THINK THERE'S ANY QUESTION THAT MS. GUNN DID ANYTHING INAPPROPRIATE, THERE'S ANY QUESTION OF MISCONDUCT HERE, BECAUSE SHE WAS NOTHING BUT COOPERATIVE DURING THE TRIAL."

MR. BLOOM: I SAW THAT THROUGH EVERY PART OF THIS TRIAL THAT I LOOKED AT, AND I AGREE WITH THE COURT'S ASSESSMENT.

(Exhibit 3 B, MNT, pp. 230-231.)

With respect to the behavior of Ms. Sommer after her husband's death:

MR. BLOOM: . . . AND WHEN MS. GUNN TALKED ABOUT IT IN CLOSING, SHE SAID THIS ISN'T BEING OFFERED TO ATTACK FOR AN IMPROPER PURPOSE. THE PEOPLE DID NOT WAIVE A RED FLAG IN FRONT OF THE JURY AND DO IT.

THE COURT: NO. SHE HANDLED IT APPROPRIATELY AND PROPERLY.

MR. BLOOM:: YES. BUT THAT DOESN'T MEAN IT WAS HANDLED APPROPRIATELY AND PROPERLY BY THE DEFENSE.

(Exhibit 3C, MNT, pp. 259-260.)

And, with respect to the testing of the tissues, there was the following discussion:

THE COURT: BUT I THINK, FRANKLY, MS. GUNN'S BEEN VERY COOPERATIVE IN TERMS OF RETESTING THOSE TISSUES. BECAUSE TYPICALLY THAT WOULD BE SOMETHING THAT WOULD BE DONE WAY

DOWN THE ROAD AFTER A HABEAS. AND TO HER CREDIT, THE D.A.'S OFFICE SAID WE'RE GOING TO RESOLVE THIS ISSUE UP FRONT. AND THEY DID.

MR. BLOOM: AND I DON'T CRITICIZE THEM FOR THAT. I'M NOT CRITICIZING THEM IN ANY WAY.

(Exhibit 3D, MNT p. 308.)

The failure of the defense to raise claims of misconduct at trial or at the motion for new trial, and the comments made by the court and Mr. Bloom at the motion for new trial are circumstantial evidence of the lack of credibility attached to the allegations of prosecutorial misconduct brought at this point in time. Again, the reason that such claims were not previously brought is that no such valid claim exists. Even so, any objection based on prosecutorial misconduct would be waived on appeal and no remedy for misconduct would exist on habeas. Here, in this unprecedented motion for dismissal with prejudice following the granting of a new trial motion, the objection should also be deemed waived.

Thus, notwithstanding the fact that there was not any misconduct, let alone severe and repeated misconduct, the defense's motion to dismiss based upon prosecutorial misconduct is untimely and should be denied.

III

THE DEFENSE HAS FAILED TO ESTABLISH THAT THERE WAS ANY MISCONDUCT BY THE PROSECUTOR

A. The Defendant Cannot Establish That The Prosecutor Was Aware of Evidence That Could Exonerate The Defendant And That She Told The Defense That It Did Not Exist.

1. The existence of the preserved tissue samples was known to the defense both during trial and prior to the motion for new trial.

In support of the motion to dismiss with prejudice, Mr. Bloom claims that DDA Gunn was advised in November 2005, that tissues that were preserved in paraffin remained at the location of the autopsy, and intimated that she never advised the defense of the existence of those tissues.

Page 1169 of the Bates-stamped discovery, disclosed to the defense in March 2006, long before trial, however, lists all of the tissues taken at the time of the autopsy in addition to the location at which they were stored. This list includes preserved tissue, including "31 paraffin embedded tissue blocks" at Balboa Naval Hospital. (See, Exhibit One.)

Mr. Bloom then claims that in May 2007, after trial, the defense requested access to all tissues taken at the autopsy but was told that no such tissues remained. What he fails to tell the court is that on May 30, 2007, at 10:05 a.m., long before the motion for new trial, DDA Gunn sent an e-mail to Mr. Bloom informing him that the Balboa Naval Hospital had the preserved tissues and that they had not been destroyed. She sent another e-mail in the afternoon, following Mr. Bloom's response about what testing they should do with the tissues. In the follow-up e-mail, DDA Gunn alluded to another e-mail that she had sent him the night before and, concerned that he might not have received it, advised Mr. Bloom of the fresh tissues that were in existence at AFIP, that tissues at Balboa Naval Hospital had not been destroyed, and that Dr. Wagner had gone back and viewed tissue slides (which clearly demonstrated their continued existence) for microscopic anatomic evaluation. (See, Exhibit Two.)

Further communication was sent by DDA Gunn questioning the need to test the histological tissue samples further, it having already been determined that the microscopic anatomic evaluations were normal.

On June 6, 2007, DDA Gunn sent Mr. Bloom an itemized list of all of the fresh frozen (unpreserved) tissue samples that remained at AFIP that Dr. Jose Centeno had e-mailed to her on May 29.

In July 2007, Mr. Bloom acknowledged the existence of both the preserved and the fixed tissues, communicating the need to test samples of both but acknowledging that the tissues fixed with preservative are problematic.

Finally, Mr. Bloom contends that in August 2007, DDA Gunn was advised that the paraffin embedded tissues were still in possession of Balboa Hospital but failed to advise the defense.

Clearly, however, Mr. Bloom was aware all along that the preserved tissue samples were still in existence. As demonstrated by page 1169 of the pretrial discovery, such preserved

samples included stock jars of tissue fixed in formaldehyde and paraffin tissue blocks.

The misunderstanding by counsel is incredible in light of the documented communications between DDA Gunn and Mr. Bloom. The People are at a loss as to why Mr. Bloom would make such claims and can only surmise that he was not aware that the preserved tissue samples included both those fixed in formaldehyde and those embedded in paraffin.

2. The materiality of the preserved tissue samples remains unknown.

Following trial, the People voluntarily submitted the paraffin embedded tissue samples to a Quebec laboratory for testing. The results of the paraffin embedded tissue samples that had never been tested before were negative for the presence of arsenic. As this information was not obtained until after trial, there has not been an opportunity to examine the experts as to the effect, if any, of the fixation process of the paraffin embedded tissue samples. Common sense indicates that repeated submersion in increasing concentrations of formaldehyde may result in the leaching of arsenic from the tissues. Mr. Bloom alludes to the possibility that the process may create false positives. Without litigation of the science involved through the opinions of experts in the field, it is impossible to say that the negative results exonerate the defendant, especially where here, the cause of death is still listed as arsenic poisoning – homicide despite the knowledge by the medical examiner of the paraffin embedded tissue sample results.

3. The defense has failed to demonstrate prejudice as a result of any short term belief that tissues were destroyed following the trial in the instant case.

The misrepresentations alleged to have been made by DDA Gunn in May 2007 would have had no effect on Ms. Sommer's trial as they would have occurred long after the trial had concluded. Nor would they have had any effect on Ms. Sommer's ability to have a fair trial in the future, as any miscommunication that may have occurred was cleared up in a matter of weeks, long before the motion for new trial.

In any event, a motion for new trial was granted, essentially curing any defect that had occurred up to that point. Then, the case was dismissed, thus curing any defects that may have occurred either during the first trial or since. Clearly, the defense has failed to establish any misconduct with respect to information about the tissues, let alone a basis for an evidentiary

hearing on the matter.

B. The Prosecutor Properly Went Forward With The Prosecution.

1. The prosecution has the discretion to prosecute Ms. Sommer.

> "In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute. *United States v. Goodwin,* 457 U.S. 368, 380, n. 11 (1982); accord, *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 248 (1980). '[So] long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.' *Bordenkircher v. Hayes,* 434 U.S. 357, 364 (1978).

(*Wayte v. U.S.* (1985) 470 U.S. 598, 607 ["*Wayte*"].

a. The record establishes not only that there was probable cause to believe that defendant committed the crime, but that there was sufficient evidence to support the verdict.

In the present case, as in all felony cases, the People were required to present evidence at a preliminary hearing to establish probable cause that Ms. Sommer murdered her husband. The court, finding such probable cause to exist, bound the case over for trial.

Thereafter, following the presentation of the People's case, the trial court twice denied 1118 motions to dismiss for insufficiency of the evidence. A jury found Ms. Sommer guilty beyond a reasonable doubt. Thereafter, the trial court considered and rejected insufficiency of the evidence as the basis for a new trial, finding instead that Ms. Sommer had ineffective assistance of counsel. Clearly, in light of the trial court's findings, it was proper for the prosecution to pursue the charges. Regardless, without a prima facie showing of a constitutionally prohibited prosecution, an evidentiary hearing is improper for the reasons set forth in these pleadings.

b. Numerous experts opined that Todd Sommer's death was consistent with acute arsenic poisoning.

Experts Dr. Centeno (AFIP) and Dr. Wagner (San Diego Chief Medical Examiner), along with Dr. Bernard Eisenga, and Dr. Jerry Spencer testified on behalf of the prosecution. All of them testified that Todd Sommer's death was consistent with acute arsenic poisoning despite

some unusual findings.

Counsel intimates that the prosecutor ignored the experts with whom she first consulted and set forth to find experts that would further her prosecution. This is untrue. Drs. Centeno and Wagner concluded that the death of Todd Sommer was due to acute arsenic poisoning after an analysis of the fresh frozen and unpreserved tissue came back with high concentrations of arsenic in his liver and kidneys, and low but elevated levels in his brain and blood.

2. The prosecutor did not violate any evidentiary ruling regarding the admissibility of evidence.

DDA Gunn acted with integrity and professionalism throughout the pendency of the prosecution of Ms. Sommer. She violated no evidentiary rulings, and only admitted evidence of Ms. Sommer's behavior with prior authorization of the court; evidence that was determined to be probative on the issue of guilt and to which trial counsel opened the door. For counsel to attack DDA Gunn for pursuing the truth is improper, especially where here, the court ruled the evidence admissible in light of the defense having opened the door.

C. Statements Made By The People In The Motion To Dismiss Were Not Designed To Mislead The Court, Nor Is It Likely That They Did So.

1. While The Motion To Dismiss Was Inarticulately Drafted, The Prosecution Did Nothing In An Attempt To Mislead The Court.

In response to the prosecution statement that the defense, through their experts, raised questions regarding the arsenic evidence, counsel accuses the prosecution of attempting to mislead the court emphasizing that every single defense expert presented at trial was first contacted and hired by the prosecution. He admits, however, in a footnote that in actuality not all of them were first consulted by the prosecution. This inherently disingenuous assertion fails to recognize that DDA Gunn performed her prosecutorial obligation as expected. She disclosed favorable and material evidence, in the form of vague expert statements, to the defense, who then presented much more detailed information from the expert witnesses at trial. Additionally, it is not true that the experts were first hired by the prosecution, or that the People had full advance notice of the defense evidence.

While it is true that Dr. Poklis consulted with NCIS investigators in October 2003, before

the case was even submitted to the prosecution, he did not write a report. The NCIS report summarizing the interview stated that "Dr. Poklis reviewed portions of the military medical history of V/SOMMER and the autopsy report. Dr. Poklis opined that these documents presented to him had inadequate value to indicate arsenic poisoning" but suggested a number of avenues for NCIS to pursue. When the prosecutor contacted Dr. Poklis prior to trial, Dr. Poklis referred the prosecutor to the NCIS report and declined to speak with the prosecution.

As state above, NMS was actually selected by the defense for purposes of retesting. The prosecution agreed. Thus, neither Dr. Labay, nor Dr. Bakowska were prosecution experts. Because the NMS lab results were substantially similar to AFIP's, the prosecution intended to call Dr. Labay for the purpose of testifying about the results of the testing done at NMS. The prosecution had not intended to ask Dr. Labay to *interpret* the results, because her resume did not reflect that she was qualified to do so. After Dr. Labay expressed concerns about the results, the prosecution contacted the defense about Dr. Labay and told Dr. Labay that she should talk to the defense about testifying. Dr. Labay did not write a report until after the trial.

Two weeks into the trial, during the Martin Luther King Jr. Day weekend, the defense faxed the prosecutor a resume for Dr. Ela Bakowska. The prosecution had never heard of this witness, who also worked at NMS Labs. Dr. Bakowska was clearly more qualified to discuss the interpretation of the arsenic results than Laura Labay. However, she never wrote a report or provided any statements to the prosecution before testifying.

Counsel also claims that the prosecution attempted to perpetrate a fraud on the court when it stated that the defense trial experts, together with new experts, for the first time provided detailed reports regarding the quality of the arsenic evidence during post-trial litigation.

While the substance of their opinions became known at trial, reports by Dr. Labay and Dr. Bakowska, were not created until after trial. Dr. Zavatsky, though waiting in the hall to testify during the trial, was released by the defense without having testified. It was not until after trial that he wrote a report about breaks in the chain of evidence. (See Exhibit Four.)

Unless and until defense counsel can demonstrate that detailed reports were received by the prosecution prior to trial, he should refrain from such caustic accusations. After all, he too is bound by a duty of candor to the court. (Bus. & Prof. Code, § 6068(d); Rules Prof. Conduct,

rule 5-200.)

2. There Was No Prejudice To The Defense Requiring Dismissal.

While there is never any excuse for intentionally misleading the court, which the prosecution did not do in the present case, the defense has failed to demonstrate how Ms. Sommer has been prejudiced by statements made in the People's motion to dismiss. To the contrary, Ms. Sommer's case has been dismissed. Unless she can show that she is unable to receive a fair trial in light of the reasons set forth for the dismissal, the court should not dismiss the charges with prejudice. Notwithstanding the lack of relevance, the People are compelled to respond to the unfounded allegations made by counsel.

D. The Delay In Disclosure of Chain of Custody Documentation Was Not Misconduct.

During the testimony of Dr. Jose Centeno, it was revealed that chain of custody documents were not among the discovery provided by AFIP. Following his testimony, Dr. Centeno returned to his lab in Washington and retrieved those documents.

Mr. Udell recognized that there had been a misunderstanding as to his request for "raw data" which he took to include the chain of custody documents. He declined to object on the basis of prosecutorial misconduct. Even Mr. Bloom agreed that DDA Gunn had cooperated with obtaining all of the documents that the defendant requested throughout the trial. He too declined the opportunity to make an objection.

Notwithstanding, the late disclosure of those documents did not rise to the level of a constitutional violation. In *People v. Salazar* (2005) 35 Cal.4th 1031, 1042, the court set out the elements for *Brady* error.

> "In *Brady,* the United States Supreme Court held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' (*Brady , supra,* 373 U.S. at p. 87.) The high court has since held that the duty to disclose such evidence exists even though there has been no request by the accused (*United States v. Agurs* (1976) 427 U.S. 97, 107), that the duty encompasses impeachment evidence as well as exculpatory evidence (*United States v. Bagley* (1985) 473 U.S. 667, 676), and that the duty extends even to evidence known only to police investigators and not to the prosecutor (*Kyles v. Whitley* (1995) 514 U.S. 419, 438). Such evidence is material ' "if there is a reasonable probability that, had the

> evidence been disclosed to the defense, the result of the proceeding would have been different." ' (*Id.* at p. 433.) In order to comply with *Brady,* therefore, 'the individual 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, supra,* 514 U.S. at p. 437; accord, *In re Brown* (1998) 17 Cal.4th 873, 879.)[¶] "

(*People v. Salazar, supra,* at pp. 1042-1043; emphasis added.)

It is well established that *Brady* and its progeny require that the timing of disclosure is in time to make effective use of the information at trial. In *People v. Wright* (1985) 39 Cal.3d 576, the prosecution failed to disclose a report containing prior statements that could have been used to impeach the witnesses until after the jury went to deliberate. The trial court allowed the defense to reopen and present the material. In ruling on an alleged *Brady* violation, the California Supreme Court stated, "We agree with the trial court that the circumstances presented here did not warrant the sanctions of dismissal or mistrial. The situation is distinguishable from most cases of suppression by the prosecution in which the existence of the suppressed evidence is not discovered by the defendant until after the trial is over and a verdict reached. (See, e.g., *People v. Ruthford, supra,* 14 Cal.3d 399, 121 Cal.Rptr. 261, 534 P.2d 1341; *People v. Shaparnis* (1983) 147 Cal.App.3d 190, 196, 195 Cal.Rptr. 39; *People v. Partlow* (1978) 84 Cal.App.3d 540, 556, 148 Cal.Rptr. 744.) In the case at bar, defendant discovered the additional evidence before a verdict had been reached, indeed before the jury's deliberations had begun. The court was therefore able to allow defendant to present the additional evidence to the jury in a timely manner, so that it could be considered in their deliberations. (*People v. Wright, supra,* at p. 1115.)

Here, disclosure was made during trial when there was still an opportunity to cross-examine the witness and inquire about breaks in the chain of custody. In fact, the absence of chain of custody documents was more detrimental to the People than any breaks in the chain of custody contained within the documents. Finally, the defense had an expert prepared to take the stand on the lapses in the chain of custody. That they decided not to call their expert was in no way due to the prosecution but is an issue related to the strategy decisions made by the defense. Additionally, the court could have required a curative instruction regarding late disclosure making impeachment even more effective than had the disclosure been prior to trial.

Thus, there is no suppression required for a true *Brady* violation.

Notwithstanding, because the case was dismissed after the conviction, there was no prejudice to the defense, a required element of a *Brady* violation

IV

THE PROSECUTION SHOULD NOT BE REQUIRED TO TESTIFY

A. There Is No Right To An Evidentiary Hearing

California law affords numerous examples of a trial court's authority, in ruling upon motions, to resolve evidentiary disputes without resorting to live testimony. (See, e.g., § 1050, subd. (b) [affidavits or declarations sufficient to support motion for continuance]; *People v. Cox* (1991) 53 Cal.3d 618, 697 [whether to conduct live hearing on new trial motion alleging juror misconduct is within court's discretion]; *Garcia v. Superior Court* (1984) 156 Cal.App.3d 670, 681-682 [evidentiary hearing on motion to disqualify trial judge not required]; *People v. Eastman* (1944) 67 Cal.App.2d 357, 359 [implying court properly could rule on motion to vacate judgment of conviction on affidavits only].)

In *People v. Hedgecock* (1990) 51 Cal.3d 395, 419, the court stated in evaluating allegations of juror misconduct: "Defendant is not [] entitled to an evidentiary hearing as a matter of right. Such a hearing should be held only when the court concludes an evidentiary hearing is "necessary to resolve material, disputed issues of fact." (*Id.* at p. 415.) "The hearing should not be used as a 'fishing expedition' to search for possible misconduct, but should be held only when the defense has come forward with *evidence* demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing." (*Id.* at p. 419; see also *People v. Schmeck* (2005) 37 Cal. 4th 240, 295.)

B. The Court Should Quash The Subpoena For DDA Laura Gunn And Deny The Motion To Compel Her Testimony.

Although there is no statutory authority for the quashing of a subpoena, the court has inherent power to issue an order quashing a subpoena. A court may quash a subpoena "where the witness would not have contributed material evidence. [Citations.]" (*People v. Superior*

Court (Long) (1976) 56 Cal.App.3d 374, 378, 126 Cal.Rptr. 465, citing *In re Finn* (1960) 54 Cal.2d 807, 813, 8 Cal.Rptr. 741, 356 P.2d 685; *People v. Singletary* (1969) 276 Cal.App.2d 601, 604, 81 Cal.Rptr. 79; and *People v. Rhone* (1968) 267 Cal.App.2d 652, 657, 73 Cal.Rptr. 463.)

In the present motion to dismiss, the Court should quash the subpoena and deny the motion to compel the testimony of Deputy District Attorney Laura Gunn. As is apparent in the People's Response to Ms. Sommer's Motion To Dismiss, counsel is merely attempting to put DDA Gunn on the stand to engage in a fishing expedition in the hope that he may reveal some impropriety that will inure to his client's benefit. This is improper.

The California Evidence Code defines "relevant evidence" as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Cal. Evid. Code, § 210.)

Because the remedy the defense seeks is not supported by the allegations that he makes, even if the allegations were true, which they are not, the disputed facts are of no consequence to the determination of the action. In other words, as a legal matter, the allegations of misconduct made by counsel do not rise to the level required to support a dismissal with a bar to prosecution of a refiled case. For that reason, the testimony of Deputy District Attorney Laura Gunn is irrelevant and she should not be compelled to take the stand.

Additionally, Evidence Code section 664 states, "It is presumed that official duty has been regularly performed." Because DDA Gunn's duty is an official one, it is presumed that her duty has been regularly performed. Counsel should not be allowed to call DDA Gunn to the stand without some independent proof of misconduct on her part.

C. Judicial Inquiry Into Prosecutorial Discretion Is Disfavored

Throughout their pleadings, counsel attacks the pursuit of criminal charges against Ms. Sommer.

"The exercise of discretion in enforcing the criminal law is a core element of the constitutional authority of the Executive Branch, and judicial inquiry into such prosecutorial decisionmaking "entails systemic costs of particular concern." (*Wayte, supra*, 470 U.S. at pp.

607-608.) In *McCleskey v. Kemp* (1987) 481 U.S. 279, 296-297 & n. 18 the United States Supreme Court stated that the policy considerations behind a prosecutor's traditionally 'wide discretion' suggest the general "impropriety of our requiring prosecutors to defend their decisions."

"Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy . . . . Those concerns "make the courts properly hesitant to examine the decision whether to prosecute." (*Wayte*, *supra*, 470 U.S. at p. 608.)

Thus in claims which challenge the discretion of the prosecutor, such as claims of selective prosecution, vindictive prosecution, and motions to recuse, the defense must present sufficient credible evidence to establish a prima facie showing of an improper motivation. (See e.g., *Murgia v. Municipal Court* (1975) 15 Cal.3d 286 [discriminatory prosecution]; *U.S. v. Armstrong* (1996) 517 US 456 [discriminatory prosecution]; *People v. Farrow* (1982) 133 Cal.App.3d 147 [pretrial claim of vindictive prosecution]; *In re Bower* (1985) 38 Cal.3d 865, 876; *People v. Superior Court (Baez)* (2000) 79 Cal.App.4th 1177 [mere plausible justification no longer sufficient.]; Penal Code section 1424 [standard to obtain recusal.]

D. The Core Work Product Of The Prosecutor Is Privileged.

Should the court require DDA Gunn's testimony, the People request that the court limit her testimony to that which is relevant to the allegations made by the defense. The People also would ask the court to honor her statutory claim of privilege as to any matters which fall within her core work product.

The work product privilege under Civil Code section 2018.030 is applicable in criminal as well as civil proceedings. (See: Pen. Code, § 1054.6; *People v. Avila* (2006) 38 Cal.4th 491, 604; *People v. Coddington* (2000) 23 Cal.4th 529; but see *Garcia v. The Superior Court of Orange County* (2007) 42 Cal.4th 63, and *People v. Zamudio* (2007) 43 Cal.4th 327.) This privilege encompasses counsel's impressions and conclusions regarding witnesses who would be favorable and those who would not be so. (*People v. Coddington* , *supra*, 23 Cal.4th at p. 606.) The purpose is to preserve the rights of attorney in the preparation of their cases and to

prevent attorneys from taking advantage of the industry and creativity of opposing counsel. The attorney is the holder of the privilege. The privilege applies to District Attorneys. (See, *People v. Boehm* (1969) 270 Cal.App.2d 13.)

V

THE DEFENDANT HAS FAILED TO DEMONSTRATE MISCONDUCT UNDER STATE AND FEDERAL STANDARDS

Well-established federal standards for assessing claims of prosecutorial misconduct were set forth by our Supreme Court in *People v. Samayoa* (1997) 15 Cal.4th 795, 841: "A prosecutor's ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."

Under state law, conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct only if it involves 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Gionis,* (1995) 9 Cal.4th 1196, 1214-1216; *People v. Roldan* (2005) 35 Cal.4th 646, 719, *People v. Adanandus* (2007) 157 Cal.App.4th 496, 514-515.)

Even where a defendant shows prosecutorial misconduct occurred, reversal is not required unless the defendant can show he suffered prejudice. (*People v. Arias* (1996) 13 Cal.4th 92.)

In the present case, Ms. Sommer has failed to demonstrate the DDA Gunn committed misconduct, let alone a "pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process" or "the use of reprehensible methods to attempt to persuade either the court or the jury." Nor, has Ms. Sommer shown that she has suffered prejudice as a result of DDA Gunn's conduct. To the contrary, the case was dismissed and the defendant released from custody. Even assuming all of the allegations made by Ms. Sommer are true, the relief requested is not appropriate.

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///

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VI

DEFENDANT'S ALLEGATIONS OF PROSECUTORIAL MISCONDUCT DO NOT SUPPORT THE RELIEF REQUESTED

In *People v. Kasim* (1997) 56 Cal.App.4th 1360, the court stated:

> "[D]ismissal of charges is an extraordinary remedy, which is reserved for the few cases where conduct by the prosecution has completely eliminated the possibility of a fair retrial. (See, e.g., *Barber v. Municipal Court* (1979) 24 Cal.3d 742, 157 Cal.Rptr. 658, 598 P.2d 818.) Certainly, the actions here cannot be condoned-and we have indicated that we do not in any manner condone them. However, as serious as the prosecutorial misconduct was in this case, it was not sufficiently egregious to warrant a dismissal of the charges and a bar to reprosecution. The misconduct did not make a fair retrial for Kasim impossible. Nor can we say that Kasim "has effectively been acquitted of the offense in question." (*In re Martin* (1987) 44 Cal.3d 1, 53, 241 Cal.Rptr. 263, 744 P.2d 374 [even on habeas corpus when judgment determined to be void, petitioner generally subject to retrial]

(*Id.* at pp. 1387-1388.)

In the present case, there is absolutely no indication that any of the allegations of misconduct, let alone the actual conduct of the prosecutor, has eliminated the possibility of a fair retrial. Thus, the relief requested in inappropriate.

For all of the reasons set forth in these pleadings, the People respectfully request that the court quash the subpoena, deny the motion to compel the testimony of DDA Gunn, deny the request for an evidentiary hearing and deny motion to dismiss with prejudice on the basis of prosecutorial misconduct.

Dated: September 8, 2009

Respectfully submitted:

BONNIE M. DUMANIS
District Attorney

By: LAURA E. TANNEY
Deputy District Attorney

Attorneys for Plaintiff

EXHIBIT 1

U.S. NAVAL CRIMINAL INVESTIGATIVE SERVICE

INVESTIGATIVE ACTION 14DEC05

CONTROL: 18FEB02-SDPE-0065-7HMA

V/SOMMER, TODD MITCHELL/SGT USMC
M/W/MMES/S/263-99-5109/01JAN79/ROCKFORD, IL

V/SOMMER POST-MORTEM SPECIMENS RETAINED BY AFIP & BALBOA NAVAL HOSPITAL

1. On 14Dec05, Reporting Agent (RA) contacted the Armed Forces Institute of Pathology (Jose CENTENO, Ph.D.) and the San Diego Naval Medical Center Armed Forces Regional Decedent Affairs Officer (Barb CALLAHAN) in support of the above captioned investigation.

2. The aforementioned personnel provided RA with the following itemized accounting of post-mortem specimens pertaining to V/SOMMER currently located within their inventory:

AFIP:

Brain - 5g
Muscle - 5g
Urine - 1ml
Blood - 5ml
Liver - 4g
Kidney - 4g
Gastric contents - 50ml
Bile - 0.5ml
Kirby Operation Manual
Levofloxin - empty bottle
Loperamide - empty bottle
Acetaminophen - half full bottle
Loperamide - 6 pills
Promethazine - 5 pills

Balboa Naval Hospital:

One box containing the A02-13 materials consisting of three heat-sealed plastic pouches. The first pouch has the bottom half of a cardboard box in which there are 31 paraffin-embedded tissue blocks. The blocks appear to be labeled A02-13-1 through A02-13-31. The second pouch contains many pieces of various types of tissue in formalin, along with a piece of gauze. The third pouch contains sections of brain and a blue surgical towel.

REPORTED BY: ROB D. THERMILLIGER
OFFICE: NCISRA MIRAMAR SAN DIEGO, CA

001169

CASE CONTROL ____ MAIL ____
TRANSMIT 1/2/06 FAX ____

EXHIBIT (62)

EXHIBIT 2

Gunn, Laurie

From: Gunn, Laurie
Sent: Wednesday, May 30, 2007 5:04 PM
To: 'allen bloom'
Subject: RE: Sommer discovery

Hi Allen,

I sent kind of a long email last night re the microscopic analysis, did you not get it?

Here is the situation as of right now:

1. Frozen, *unpreserved* tissue is at AFIP. Here is what they have:

Liver~2grams; Kidney~2grams; Brain~20grams; Muscle~20grams; Stomach contents~50grams; Bile~2grams; Blood~8mL; Urine~0.1mL

2. *Preserved* tissue is apparently still at Balboa Naval Hospital and was not destroyed. I guess in theory you could do your microscopic analysis, but again, I'm not really understanding what a "microscopic anatomic evaluation" really nets the defense. Here's what I sent you last night:

My question about the release of tissues for pathology findings is this: The state of the evidence at trial was unequivocally that there were no microscopic findings. Udell's expert stated emphatically that the absense of findings was inconsistent with the arsenic findings. My expert (Glenn Wagner) said he went back and looked at the slides and did not see any microscopic findings either, but that based on his literature review, you would not necessarily see microscopic findings. I don't remember what everyone said about it, but that testimony definitely happened.

Given that everyone is already agreed that there are no findings, what does having your expert look at the slides really get you? Yes, you would have yet another person saying "no microscopic findings," but is that really necessary? Am I missing something?

3. In order to obtain a "punch" or copy of Todd Sommer's DNA from the national Dept of Defense DNA database, they will need a written request from his legal next of kin -- which, ironically, is your client. The legal dept at the DoD is going to send me their guidelines regarding the written request. You would get the request in writing, signed by the defendant, which would then go to Washington. They would process your request. Meanwhile, we would write up and ask Judge Deddeh to sign a court order to release the balance of the tissues for DNA testing. His order will go through DoD's legal department and the tissues would most likely go to the lab of our choosing, together with a copy of the DNA "card." They have expressed a preference that we select the California DOJ lab in Richmond, California, which does all of the CODIS work for the state.

Laurie (not michelle)

-----Original Message-----
From: allen bloom [mailto:allenbloom@sbcglobal.net]
Sent: Wednesday, May 30, 2007 3:28 PM
To: Gunn, Laurie
Subject: Re: Sommer discovery

hi michelle,
so now, what do we want done with these tissue. i think we need someone to try to determine if the liver

and kidney are fresh or preserved & then to do the microscopic anatomic evaluation.
thoughts?
arb

----- Original Message -----
From: Gunn, Laurie
To: allen bloom
Sent: Wednesday, May 30, 2007 10:06 AM
Subject: Sommer discovery

Allen,
This morning I got an email from Agent Rendon that says:

OK...here we go:

1. I received the Naval Medical Center San Diego (NMCSD) file from their surgical pathology section.
2. NMCSD confirmed they do have V/SOMMER's tissues on hand. Dr. Robinson's formaldehyde samples are what they have on hand. AFIP was sent the frozen samples.

So, apparently the formaldehyde samples were not destroyed. But they still are presumably full of formaldehyde.

Laurie

Gunn, Laurie

From: allen bloom [allenbloom@sbcglobal.net]
Sent: Wednesday, May 30, 2007 3:28 PM
To: Gunn, Laurie
Subject: Re: Sommer discovery

hi michelle,
so now, what do we want done with these tissue. i think we need someone to try to determine if the liver and kidney are fresh or preserved & then to do the microscopic anatomic evaluation.
thoughts?
arb

> ----- Original Message -----
> **From:** Gunn, Laurie
> **To:** allen bloom
> **Sent:** Wednesday, May 30, 2007 10:06 AM
> **Subject:** Sommer discovery
>
> Allen,
> This morning I got an email from Agent Rendon that says:
>
> OK...here we go:
>
> 1. I received the Naval Medical Center San Diego (NMCSD) file from their surgical pathology section.
> 2. NMCSD confirmed they do have V/SOMMER's tissues on hand. Dr. Robinson's formaldehyde samples are what they have on hand. AFIP was sent the frozen samples.
>
> So, apparently the formaldehyde samples were not destroyed. But they still are presumably full of formaldehyde.
>
> Laurie

Gunn, Laurie

From: allen bloom [allenbloom@sbcglobal.net]
Sent: Wednesday, June 06, 2007 9:34 PM
To: Gunn, Laurie
Subject: Re: Todd Sommer's tissues

Hi Laurie,
what are you doing working so late. (and what am I doing working later. jeez, let's get a life.)

anyway, how 'bout i give you a call friday to discuss where we are. i have a court appearance up until about 11, then i'm free all day. tell me when's a good time to call.

hope that works.

best
allen
CONFIDENTIALITY NOTICE
This message constitutes a privileged and confidential attorney-client communication. Pursuant to California Evidence Code Section 952 and California Code of Civil Procedure Section 2018, this information may not be disclosed, or otherwise distributed.
If you have received this message in error, please help us correct the mistake by letting us know. Thank you.
----- Original Message -----
From: "Gunn, Laurie" <laurie.gunn@sdcda.org>
To: <Allenbloom@sbcglobal.net>
Sent: Wednesday, June 06, 2007 8:15 PM
Subject: FW: Todd Sommer's tissues

Allen, here is what's left of the frozen tissues at AFIP in case I haven't sent this to you yet. Laurie

-----Original Message-----
From: Centeno, Jose A. Ph.D.
Sent: Tuesday, May 29, 2007 9:25 AM
To: Gunn, Laurie
Subject: RE: Todd Sommer's tissues

Laurie:

As of 05/29/2007, we have the following (Sommer, Todd) samples (with the approximate weight/volume) in our laboratory:

Liver~2grams
Kidney~2grams
Brain~20grams
Muscle~20grams
Stomach contents~50grams
Bile~2grams
Blood~8mL
Urine~0.1mL

Kirbi operation manual
Levoflacin-empty bottle
Loperamide-empty bottle
Loperamide-6 pills
Acetaminophen-half full botle
Promethazine-5 pills

Let me know if there if we can be of any additional assistance.

Jose

Gunn, Laurie

From: allen bloom [allenbloom@sbcglobal.net]
Sent: Monday, July 16, 2007 3:04 PM
To: Gunn, Laurie
Subject: Re: DNA Release Consent Form and instructions

Hi Laura,
just left you a voice mail. will back it up with this email.

How about www.fsalab.com - ed blake's Forensic Science Associates lab. I worked with Blake several decades ago. His reputation is excellent. He is very experienced in this area. He's consulted with you guys many, many times. Woodie Clark knows him very, very well.

His price is $200 per hour and on a sample which is easily done, it would be about $500 per tissue.

Problematic samples, like ones which have been fixed in formaldehyde for a long time are more difficult and more time consuming.

I'm ok testing the liver, kidney, blood, brain, and muscle, but we have to try to test the exact sample tissue source that was used to come up with the arsenical testing. I also think that we need to test both the "fixed" and the "frozen" tissues from each sample.

So, timeline, it looks like we can't move forward until you return from vacation and until i return from vacation. your not here now, and i'm leaving in the a.m. until the 25th.

i will check email the entire time i'm gone and i will make myself available to communicate with you via email during that time period (ok, so i'm diving with my son and i don't think cozumel has underwater email, so i'll wait until i get on dry land)

let me know your thoughts.

thanks
allen

p.s. i had the stipulation from cindy delivered to your office on the 13th, i hope you have it by now.

----- Original Message -----
From: "Gunn, Laurie" <laurie.gunn@sdcda.org>
To: "allen bloom" <allenbloom@sbcglobal.net>
Sent: Friday, July 13, 2007 1:24 AM
Subject: RE: DNA Release Consent Form and instructions

> This has taken so long that there is no way that we can do the work
> within
> the agreed-on time anyway. Cellmark was the other one we were discussing;
> they're in Texas. Is Cellmark okay with you?
>
> I assume you still have Cathy With's contact info re where to send the
> forms? Though I guess until we agree on a lab there's no way for you to
> finish filling them out. Let me know if Cellmark's okay.

Gunn, Laurie

From: ALLENBLOOM@sbcglobal.net
Sent: Tuesday, July 17, 2007 1:18 AM
To: Gunn, Laurie
Subject: RE: DNA Release Consent Form and instructions

Laura,
Thanks for the reply. My initial thoughts are: 1) If any of the tissues in the case are found NOT to be the DNA of Todd, then the reliability of the entire tissue preservation system used would be greatly challenged. (2) One of the explanations for what I believe are extraordinary arsenical results is that the tissues were swapped or contaminated. Fixing solutions can contaminate tissues causing false positives for heavy metal, including arsenic. It's possible that one of the so-called "preserved samples" were in fact swapped with the supposedly "frozen/fresh samples".

Ed Blake is available for you to talk to you. He explained the need for focused testing clearly to me. I might have botched its explanation to you. Please feel free to call him to discuss the matter with him. I told him that this would be a joint request for testing, but you might want to mention me to remind him of our discussion and the issues he raised.

this whole discussion relates to DNA testing.

As for the vacation - thanks - i hope your good karma works on caribean weather patterns.

best,
allen
--- Original Message ---
From: "Gunn, Laurie" <laurie.gunn@sdcda.org>
To: "allen bloom" <allenbloom@sbcglobal.net>
Subject: RE: DNA Release Consent Form and instructions

>Allen,
>I will check into Blake's lab. Since no testing has ever been done on
>tissues fixed in preservative in this case, and our case in no way
>relied on the "fixed" tissues, I don't see the point in testing the
>fixed tissues. Can you help me understand why you think this would be
>useful?
>Laurie
>
>PS have a nice vacation.
>
>-----Original Message-----
>From: allen bloom [mailto:allenbloom@sbcglobal.net]
=20
>Sent: Monday, July 16, 2007 3:04 PM
>To: Gunn, Laurie
>Subject: Re: DNA Release Consent Form and instructions
>
>
>Hi Laura,

>just left you a voice mail. will back it up with
this email.
>
>How about www.fsalab.com - ed blake's Forensic
Science Associates lab.
>I=20
>worked with Blake several decades ago. His
reputation is excellent. He
>is=20
>very experienced in this area. He's consulted with
you guys many, many=20
>times. Woodie Clark knows him very, very well.
>
>His price is $200 per hour and on a sample which is
easily done, it
>would be=20
>about $500 per tissue.
>
>Problematic samples, like ones which have been fixed
in formaldehyde for
>a=20
>long time are more difficult and more time consuming.
>
>I'm ok testing the liver, kidney, blood, brain, and
muscle, but we have
>to=20
>try to test the exact sample tissue source that was
used to come up with
>the=20
>arsenical testing. I also think that we need to
test both the "fixed"
>and=20
>the "frozen" tissues from each sample.
>
>So, timeline, it looks like we can't move forward
until you return from=20
>vacation and until i return from vacation. your not
here now, and i'm=20
>leaving in the a.m. until the 25th.
>
>i will check email the entire time i'm gone and i
will make myself
>available=20
>to communicate with you via email during that time
period (ok, so i'm
>diving=20
>with my son and i don't think cozumel has underwater
email, so i'll wait
>
>until i get on dry land)
>
>let me know your thoughts.
>
>thanks
>allen
>
>p.s. i had the stipulation from cindy delivered to
your office on the
>13th,=20
>i hope you have it by now.
>CONFIDENTIALITY NOTICE
>This message constitutes a privileged and
confidential attorney-client=20
>communication. Pursuant to California Evidence Code
Section 952 and=20
>California Code of Civil Procedure Section 2018,
this information may

EXHIBIT 3-A

GOING ON.

SO WHEN YOU DO THE BALANCE OF THIS, I THINK WHAT YOU HAVE TO TAKE A LOOK AT IS THREE MAJOR AREAS I BELIEVE THAT EXIST IN THIS CASE WHICH ARE THE FOCUS OF THE PROBLEMS. THEY GO INTO THE SCIENCE. THEY GO INTO THE JUROR BEHAVIOR. AND THEN THEY GO INTO THE ISSUE OF LIFESTYLE EVIDENCE THAT CAME IN.

AND PARTS OF EACH OF THESE CASES HAVE TO DO WITH THE LAWYERING THAT OCCURRED IN THIS CASE. I THINK YOU HAD COMPETENT, EFFECTIVE REPRESENTATION ON THE PART OF THE PROSECUTION, AND REPRESENTATION WHICH WAS SPOTTY, AT BEST, ON THE PART OF THE DEFENSE.

THIS IS NOT A MOTION FOR NEW TRIAL ASKING THE COURT TO MAKE SURE NOT TO SENTENCE MS. SOMMER TO SIX MONTHS IN COUNTY JAIL. THE WEIGHT OF THIS COURT'S DECISION IS ENORMOUS. AND SO WHEN YOU BALANCE ALL OF THOSE THINGS, I ASK THE COURT'S INDULGENCE IN ALLOWING ME TO GO THROUGH THE EVIDENCE OR THE MATERIALS THAT I'VE RAISED IN EACH OF THOSE THREE AREAS.

THE COURT: THIS IS YOUR MOTION, MR. BLOOM. SO YOU HANDLE IT THE WAY YOU THINK IT'S NECESSARY TO PROPERLY REPRESENT YOUR CLIENT.

MR. BLOOM: I WILL.

NOW, THE FIRST AREA THAT I THINK WE HAVE TO FOCUS ON HAS TO DO WITH THE EVIDENCE OF THE SCIENCE. AND THIS WILL BE THE MOST INVOLVED OR DETAILED PRESENTATION I'M GOING TO MAKE BECAUSE I AM ENCUMBERED, MONSTROUSLY ENCUMBERED BY THAT AFFLICTION THAT I'VE SEEN ALMOST EVERY

EXHIBIT 3-B

PROBLEMS THAT THEY HAD WITH IT. THEY DIDN'T FOCUS ON THIS PARTICULAR ASPECT OF IT. THEY DIDN'T CALL IN OTHER EXPERTS TO TALK ABOUT HOW THIS PARTICULAR ASPECT IS UNKNOWN OR UNDECIDED OR FUZZY IN THE COMMUNITY. AND THAT'S ONE OF THE MAJOR THINGS HE DIDN'T DO IN THIS CASE WHICH HE SHOULD HAVE DONE.

AND WHY -- AND THE INADEQUACIES STEM FROM, YOU KNOW, FINDS AT VARIOUS WAYPOINTS ALONG THE PATH LEADING THERE, LEADING TO THAT RESULT. NOT GETTING DISCOVERY, NOT BEING SUFFICIENTLY AWARE OF THE ISSUE, AND ACCEPTING THE FINDINGS -- ACCEPTING NOTIFICATION THAT THIS IS ALL THAT WE HAVE, LAURA, ET CETERA, AND THINGS LIKE THAT. ALL OF THAT IS THE FOUNDATION THAT LED TO THE CONCLUSION. AND AS I SAY, I THINK IN PART IT WAS HIS INADEQUACIES IN NOT DOING IT.

I THINK THE PEOPLE HAVE A BURDEN, THOUGH, ALSO, IN THIS REGARD BECAUSE I THINK THEY HAVE AN OBLIGATION TO MAKE THIS PRESENTATION.

AND THIS IS NOT A QUESTION OF SITTING ON THE INFORMATION AND NOT HAVING IT. BUT THEY HAVE TO MAKE -- THEY HAVE AN OBLIGATION TO A CERTAIN LEVEL TO GET THIS.

THE COURT: MY EXPERIENCE IN THIS CASE WAS THAT MS. GUNN WAS COMPLETELY COOPERATIVE WITH MR. UDELL AND SHE WENT TO GREAT LENGTH TO GIVE HIM WHAT HE ASKED FOR AND WHAT HE WANTED, AND SHE CONDUCTED HERSELF IN A VERY PROFESSIONAL AND COLLEGIAL WAY WITH HIM.

MR. BLOOM: HE NEVER ASKED FOR IT, THOUGH.

THE COURT: AND HE WITH HER.

MR. BLOOM: HE NEVER ASKED FOR IT, THOUGH. AND SO, THEREFORE, SHE NEVER ASKED CENTENO TO GET IT UNTIL YOU HEARD THE REVELATION ON THE WITNESS STAND ABOUT THIS. AND I ASSUME -- I ASSUME THAT'S THE FIRST TIME MS. GUNN HEARD ABOUT THESE MISSING 85 PAGES, AS WELL, IS WHEN CENTENO HAD IT. I ASSUME MS. GUNN WAS NOT SITTING ON THIS IN ANY WAY.

THE COURT: NO. OF COURSE NOT.

MR. BLOOM: BECAUSE SHE WOULD HAVE BATES STAMPED IT AND GIVEN IT OUT.

THE COURT: SHE WOULD HAVE. AND THAT'S THE WAY SHE CONDUCTED HERSELF DURING THIS CASE THE ENTIRE TIME, IS IF THERE WAS SOMETHING MISSING, SHE WOULD GIVE IT OVER TO THE DEFENSE GLADLY. AND SO I DON'T THINK THERE'S ANY QUESTION THAT MS. GUNN DID ANYTHING INAPPROPRIATE, THERE'S ANY QUESTION OF MISCONDUCT HERE, BECAUSE SHE WAS NOTHING BUT COOPERATIVE DURING THE TRIAL.

MR. BLOOM: I SAW THAT THROUGH EVERY PART OF THIS TRIAL THAT I LOOKED AT, AND I AGREE WITH THE COURT'S ASSESSMENT

THE COURT: OKAY.

MR. BLOOM: NOR DO I THINK THAT IT'S REALLY THE COURT'S OBLIGATION TO SAY WELL, TELL ME ABOUT DAUBERT. THE COURT DOES ACT AS A GATEKEEPER AND THE COURT MAKES AN EVALUATION OF WHAT'S PRESENTED THERE, BUT UNLESS A PARTICULAR ISSUE IS BROUGHT TO THE COURT'S ATTENTION --

THE COURT: THE COURT HAS TO TRUST THE COMPETENCE OF THE ATTORNEYS UNTIL IT'S BLATANTLY OBVIOUS THAT THEY'RE

EXHIBIT 3-C

ESTABLISH MS. SOMMER'S BAD CHARACTER, THIS IS NOT BEING OFFERED TO ESTABLISH A LIFESTYLE EVIDENCE, PER SE, BUT, RATHER, TO DEAL WITH -- IT RELATES TO THE QUESTION OF MOTIVE, OF HER BEHAVIOR AS IT RELATES TO THAT. HE DIDN'T DO THAT, AS WELL.

AND, OF COURSE, IF HE HAD REALLY WANTED TO STOP IT FROM COMING OUT, HE DIDN'T MAKE ANY MOTION TO STRIKE THE TESTIMONY. ONCE THE COURT HAD RULED THAT IT WAS GOING TO COME IN, THAT YOU'D OPENED THE DOOR, NOT ONLY HAD HE NOT PRE-EMPTIVELY TO DEAL WITH IT, HE DIDN'T MAKE ANY EFFORT TO SAY OH, JUDGE, IF THAT'S THE CASE, THEN I WANT TO STRIKE THE ENTIRETY OF THAT QUESTION AND I WANT THE COURT TO INSTRUCT THE JURY THEY CAN'T CONSIDER IT AT ALL, IT'S NOT BEFORE THE JURY.

ANY ONE OF THESE WAYS WOULD HAVE BENEFITED MS. SOMMER AND ULTIMATELY CAUSED HER TO AT LEAST GAIN THE ADVANTAGE OF A FAIR TRIAL IN THIS REGARD AT THIS POINT. NONE OF IT HAPPENED. THE COURT CALLED IT THE WORST OF ALL POSSIBLE WAYS, WORST OF ALL POSSIBLE --

THE COURT: WORLDS.

MR. BLOOM: WORLDS. AND THAT'S REALLY WHAT IT WAS.

AND IT WAS A VERY POWERFUL THING. I MEAN YOU DON'T HAVE TO LOOK JUST TO THE PUBLICITY THAT EXISTED IN THIS CASE AS TO WHY THAT EVIDENCE IS HEADLINE EVIDENCE. BUT IT'S A VERY POWERFUL THING. AND WHEN MS. GUNN TALKED ABOUT IT IN CLOSING, SHE SAID THIS ISN'T BEING OFFERED TO ATTACK FOR AN IMPROPER PURPOSE. THE PEOPLE DID NOT WAIVE A

RED FLAG IN FRONT OF THE JURY AND DO IT.

THE COURT: NO. SHE HANDLED IT APPROPRIATELY AND PROPERLY.

MR. BLOOM: YES. BUT THAT DOESN'T MEAN IT WAS HANDLED APPROPRIATELY AND PROPERLY BY THE DEFENSE. BECAUSE IT WASN'T.

THE COURT: NO. I GET YOUR POINT.

MR. BLOOM: AND AS WE KNOW FROM MR. UDELL'S DECLARATION THAT COVERS THIS POINT, AS HE SAID, "I ARGUED THAT THE TESTIMONY DID NOT OPEN THE DOOR, BUT THE COURT RULED IT DID. I WANT TO MAKE IT CLEAR THAT MY PRESENTATION OF MS. SOMMER, MS. LIPPERT, MS. PETERS AND THEIR TESTIMONY WAS NOT MADE BECAUSE OF A TACTICAL EVALUATION THAT I THOUGHT IT WOULD SOMEHOW BE WORTH THE RISK OF ALLOWING THE SEXUAL TESTIMONY INTO EVIDENCE. HAD I BELIEVED THAT THE COURT WOULD RULE THAT IT WOULD OPEN THE DOOR TO THE WITNESSES OF STRONG, REED, BENTON, PETERS AND CHANDRA WELLS, I NEVER WOULD HAVE PUT THESE QUESTIONS TO THE WITNESS OR SOLICITED THE INFORMATION FROM THEM. MY FAILURE TO MAKE THESE REQUESTS -- TO SUMMARIZE, MY FAILURE TO MAKE THESE REQUESTS WERE NOT TACTICAL DECISIONS ON MY PART."

SO I COME BACK FULL CIRCLE. YOU START IN THIS CASE WITH WHAT I THINK EVERYONE HAS TO AGREE IS A CASE WHICH, AT BEST, AT VERY BEST, MOST FAVORABLE TO THE WAY THIS TRIAL CAME OUT TO THE PROSECUTION, BARELY MAKES THE CASE. I DON'T THINK THERE'S ANYONE THAT LOOKS AT THIS CASE AND SAYS THERE'S NO QUESTION, THE EVIDENCE IS OVERWHELMING.

EXHIBIT 3-D

JUST HIS AGENCY. WHY WASN'T THIS PRESENTED TO THE JURY? I MEAN IF IT'S GOING TO COME IN, WHY WASN'T IT PRESENTED TO THE COURT TO STOP IT FROM COMING IN? AND WHY WASN'T THIS PRESENTED TO THE JURY? SO THE FACT THAT HE, CENTENO, KNEW THIS PROJECT, THIS AREA, WAS UNCERTAIN EVEN BEFORE THE TRIAL I DON'T THINK SPEAKS AGAINST THE FACT THAT MS. SOMMER DIDN'T RECEIVE THE ADEQUATE REPRESENTATION THAT SHE SHOULD HAVE GOTTEN FROM BOB UDELL.

AND THE ONLY THING THAT I DO TAKE ISSUE WITH ON A PERSONAL BASIS HAVING TO DO WITH SOMETHING THAT MS. GUNN SAID WAS -- I WANT TO CLARIFY SOMETHING. SHE SAID THE DEFENSE IS BEING A BIT INGENUOUS -- DISINGENUOUS WHEN WE RAISE THESE ARGUMENTS, AS EVIDENCED BY THE FACT THAT WE FLOATED THE IDEA OF TRYING TO SAY THAT DNA PROVED THAT -- YOU CAN'T EVEN PROVE THAT THE TISSUES THAT WERE ACTUALLY TESTED BELONGED TO MR. -- TO TODD SOMMER. AND AS EVIDENCE OF THAT WAS AN INITIAL STATEMENT IN MY PAPERS THAT SHOWED THERE'S NOT EVEN EVIDENCE TO PROVE THAT THEY TESTED THE RIGHT AMOUNT.

WELL, THAT'S TRUE. BUT WHAT'S LEFT OUT THERE OUT OF THAT PRESENTATION IS THAT THE REASON WHY I MADE THAT STATEMENT IN MY PAPERS TO THE EFFECT THAT YOU CAN'T EVEN PROVE IT WAS HIS TISSUES IS BECAUSE MS. GUNN TOLD ME THAT THE TISSUES HAD BEEN DESTROYED AND THERE'S NO WAY TO TEST THEM. SHE TOLD ME THAT THEY DON'T EXIST ANYMORE. SHE WAS SURPRISED AS ME TO FIND OUT THAT THEY, IN FACT, DO EXIST WHEN I SAID WE WANT TO SEE IF THERE'S TESTING TO BE DONE AND COULD BE DONE. IT WASN'T HER MISREPRESENTATION TO ME

INITIALLY. THIS WAS AFTER THE FACT, AND WE ULTIMATELY FIND OUT THEY DO EXIST.

THE COURT: RIGHT.

MR. BLOOM: AND THE DNA TEST WAS DONE JUST ON A SMALL POINT. IT WASN'T ANY EFFORT BY THE DEFENSE TO TRY TO SNOWBALL THE COURT OR SOMETHING LIKE THAT.

THE COURT: WELL, I DIDN'T TAKE IT THAT WAY. BUT I THINK, FRANKLY, MS. GUNN'S BEEN VERY COOPERATIVE IN TERMS OF RETESTING THOSE TISSUES. BECAUSE TYPICALLY THAT WOULD BE SOMETHING THAT WOULD BE DONE WAY DOWN THE ROAD AFTER A HABEAS. AND TO HER CREDIT, THE D.A.'S OFFICE SAID WE'RE GOING TO RESOLVE THIS ISSUE UP FRONT. AND THEY DID.

MR. BLOOM: AND I DON'T CRITICIZE THEM FOR THAT. I'M NOT CRITICIZING THEM IN ANY WAY. I AM SAYING, THOUGH, A COMMENT ABOUT HOW -- MS. GUNN MADE MORE AS AN ASIDE, THAT I HAD FLOATED THIS DNA ISSUE BEFORE THE COURT, IS REALLY A FUNCTION OF WHAT WE THOUGHT, WHAT SHE TOLD ME, WHEREAS THE STATE OF THE EVIDENCE AT THE TIME.

THE COURT: OKAY.

MR. BLOOM: BUT I ALSO TAKE CONSIDERABLE ISSUE WITH ONE OTHER POINT THAT WAS RAISED. LANPHEAR, POPE, STRICKLAND ARE ALL CASES -- LANPHEAR AND POPE DEALING SPECIFICALLY WITH CALIFORNIA LAW, STRICKLAND DEALING OUT OF THE UNITED STATES CONSTITUTION AND THE UNITED STATES SUPREME COURT. SHE SAYS MAKES IT CLEAR THAT THERE'S NOT ONE RIGHT WAY TO TRY A CASE. MS. GUNN IS WRONG. THERE IS ONE RIGHT WAY TO TRY A CASE. IT'S A WAY THAT'S BASED UPON EVALUATION OF THE EVIDENCE. IT'S A WAY THAT'S BASED UPON

EXHIBIT 4

Date: Friday, January 12, 2007 3:15 AM

From: Labay, Laura <Laura.Labay@NMSLABS.COM>

To: rnvenus@charter.net

Subject: RE: Sommer Case

That is correct. I have not provided a written report to anyone about this case.
Thank you, Laura.

-----Original Message-----
From: rnvenus@charter.net [rnvenus@charter.net]
Sent: Friday, January 12, 2007 1:13 AM
To: Labay, Laura
Subject: Sommer Case

Hi Dr. Labay, The DA Laura Gunn is asking for any written reports I have resecived from experts. Just varifying for her that you have not given me any.
Venus

remove all

remove all

Date: Friday, January 12, 2007 9:52 AM
From: Bakowska, Ela <Ela.Bakowska@NMSLABS.COM>
To: rnvenus@charter.net, Bakowska, Ela <Ela.Bakowska@NMSLABS.COM>
Subject: No reports

Venus,

I did not send you any reports.

Thank you

Ela Bakowska, Ph.D.
Technical Director
Metals Department
NMS Labs
3701 Welsh Road
Willow Grove, PA 19090
Tel. 800-522-6671
direct 215-366-1371
fax 215-657-2972
e-mail: ela.bakowska@nmslabs.com

-----Original Message-----
From: rnvenus@charter.net [mailto:rnvenus@charter.net]
Sent: Friday, January 12, 2007 9:32 AM
To: Bakowska, Ela
Subject:

Dr Bakowska, The DA Laura Gunn is asking if I have received any reports from experts. Just varifying that I have not received any from you. Venus

remove all

remove all

Date: Tuesday, January 16, 2007 7:39 AM

From: Alphonse Poklis <apoklis@mcvh-vcu.edu>

To: rnvenus@charter.net

Subject: Re: Sommer Case

Venus, I have not prepared any written reports concerning this case. Very busy here, my classes are starting. I'll be at Univ.VA this evening, any question call me tomorrow (Wednesday). Take care, AP

remove all

Gunn, Laurie

From: Alphonse Poklis [apoklis@mcvh-vcu.edu]
Sent: Thursday, January 11, 2007 9:36 AM
To: Gunn, Laurie
Cc: rnvenus@charter.net
Subject: Re: Cynthia Sommer case

Ms. Gunn, sorry for my delay in responding, very busy here. My opinions in the Sommer case are available for your review in my NCIS interview back in October 2003. Al Poklis

U.S. NAVAL CRIMINAL INVESTIGATIVE SERVICE

INVESTIGATIVE ACTION 17OCT03

CONTROL: 18FEB02-SDPE-0065-7HMA

V/SOMMER, TODD MITCHELL/SGT USMC
M/D/MEE5/S/263-99-5109/01JAN79/ROCKFORD, IL

RESULTS OF INTERVIEW WITH DR. ALPHONSE POKLIS, PH.D.

On 17Oct03, Reporting Agent (RA) along with Special Agent (SA) Don HOUSMAN, SA Amanda CARLSON, and Analyst Tracy LEMPKE met with Dr. Alphonse POKLIS, of Virginia Commonwealth University (VCU), School of Medicine, in Richmond, VA. The premise of this meeting was to obtain expert judgment based on information/documents provided with regards to captioned investigation.

Dr. POKLIS reviewed portions of the military medical history of V/SOMMER and the autopsy report. Dr. POKLIS opined that these documents presented to him had inadequate value to indicate arsenic poisoning. Some tests that may have been supportive in the evaluation of arsenic are hematology and bone marrow examinations; however, V/SOMMER's complete medical records did not reflect any such tests. Dr. POKLIS further related that although V/SOMMER was presenting certain symptomatic characteristics of arsenic poisoning (on his last two visits to the hospital), he found it abnormal that V/SOMMER was not suffering from leaky vessels or hypo-tension (low blood pressure). These two conditions are notable symptoms associated with acute arsenic poisoning.

In addition to the review of V/SOMMER's medical records, the Armed Forces Institute of Pathology (AFIP) examination reports were provided to Dr. POKLIS for evaluation. It was the opinion of Dr. POKLIS that the aluminum and cadmium found during the heavy metals screening of V/SOMMER's remains were not significant and weren't necessarily indicative of arsenic poisoning. Dr. POKLIS stated the two above-mentioned metals might be trace contamination from when the specimens were packaged, depending on what type of containers the items were packaged in. The cadmium and aluminum may also have been exposed to the specimens from the environment it was tested in or the handling of the samples. Also, trace contamination could have resulted from the equipment used to draw/remove the specimens. The only finding of interest to Dr. POKLIS other than the level of arsenic was the presence of copper. Dr. POKLIS related the arsenic/copper compound could be found in wood treatment type products, but related certain pesticides or herbicides could not be ruled out as possible sources. Another topic of discussion, based on the AFIP examinations, was the format utilized to test the specimens for arsenic. Dr. POKLIS stated, based on his experience it was not common for specimens to be tested by dry weight as reflected on some of the reports. In addition, it was noted that the staff assigned to AFIP's environmental section conducted the tests. This could account for the dry weight testing method that was performed. Also discussed was the professional experience of the individuals who performed the

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EXHIBIT (56)

U.S. NAVAL CRIMINAL INVESTIGATIVE SERVICE

test, being that they worked for the environmental section and may not be accustomed with other forms of testing procedures for arsenic.

Based on his review of the requested materials, the only findings that Dr. POKLIS viewed as an indicator of arsenic poisoning were the test results from the analyses conducted on V/SOMMER's liver sample. Dr. POKLIS reiterated that the cadmium and aluminum findings have little relevance.

BIOGRAPHICAL DATA
NAME: Alphonse POKLIS, Ph.D.
RANK: Civilian
D&PLOB: 24Aug45, Baltimore, ML
EMPL: Virginia Commonwealth University, School of Medicine

PARTICIPATING AGENT(S)
Don HOUSMAN, Special Agent, NCISHQ
Amanda CARLSON, Special Agent, NCISHQ
Tracy LEMPKE, Analyst, NCISHQ

REPORTED BY: TONY C. NAPUTI
OFFICE: NCISRA MIRAMAR, CA

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CASE CONTROL ____ MAIL ____

TRANSMIT 11/24 ⓔ FAX ____

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO, CENTRAL DIVISION
220 West Broadway, San Diego, CA 92101

IN RE DISMISSED CASE SCD195202,

PEOPLE V. CYNTHIA SOMMER

Defendant.

Case No.

D.A. No.

PROOF OF SERVICE BY MAIL AND FAX
CCP S 1013A AND 2015.5
CA RULES OF COURT 2001-2011

I, the undersigned, declare as follows:

I am employed in the county of San Diego, over eighteen years of age and not a party to the within action. My business address is 330 West Broadway, Suite 860, San Diego, CA 92101.

On September 8, 2009, I served a copy of the within **POINTS & AUTHORITIES IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS WITH PREJUDICE AND TO FINDING OF PROSECUTORIAL MISCONDUCT; OPPOSITION TO EVIDENTIARY HEARING AND MOTION TO QUASH SUBPOENA** to the interested parties in the within action by placing a true copy thereof enclosed in a sealed envelope, with postage fully prepaid, in the United States Mail at 330 West Broadway, San Diego, CA 92101, addressed as follows:

Allen Bloom, Esq.
550 West "C" Street, Suite 1670
San Diego, CA 92101-8557
Tel: (619) 235-0508
Fax: (619) 235-0516
Attorney for Cynthia Sommer

I also FAXED the same document(s) using the fax number (619) 235-0516. The facsimile machine I used complied with Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2005(i), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September 8, 2009 at 330 West Broadway, San Diego, CA 92101.

Kim R. O'Rourke