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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.

NOTICE AND MOTION FOR
NEW TRIAL

DATE: May 31, 2007
TIME: 8:30 a.m.
DEPT: Superior 39
Judge: Hon. Peter Deddeh

PLEASE TAKE NOTICE that at the above date and time (or the date to which this matter will be continued - see the attached Motion to Continue) the defendant above named will move this court for a new trial under the authority of Penal Code §1181, subsections (2), (3), (5), (6), (7), and (8).

This Motion will be based on this Notice, the attached Points and Authorities, the attached Declarations, evidence to be presented at the hearing as necessary, the Notice and Motion and Points of Authorities and supporting declarations filed by co-counsel Robert Udell on or about April 17, 2007 in this case, said motion which is hereby incorporated herein by reference, matters addended to this motion hereafter but prior to the hearing, and other matters as deemed necessary.

DATED: May 9, 2007

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Allen Bloom
Attorney for Defendant

1 Pathologist, Dr. Stephen Robinson, of the Naval Medical Center, who had conducted over
2 500 autopsies in his career, evaluated Todd's body. The autopsy and review was complete and
3 thorough. Dr. Robinson did a gross evaluation of the chest, stomach, head, central nervous
4 system, neck, cardiovascular system, coronary arteries, conduction system, aorta, respiratory
5 system, liver, biliary system, alimentary system, the tongue, esophagus, the bowel, genitourinary
6 system, the spleen, the thyroid, adrenal glands, and musculoskeletal system.

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

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

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

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

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

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

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

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

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

28 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>

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

3 The in-depth and microscopic evaluation of the tissues in the autopsy will prove to have
4 significant importance to this motion.

5 After Ms. Sommer’s specifically agreed to the preservation of tissues and organs of Todd,
6 his body was cremated and Ms. Sommer set about attempting to live her life in the emotional
7 wake of her young husband’s death and the need to leave military housing and raise their four
8 children. She received the standard \$250,000 military-issued life insurance policy and monthly
9 care benefits for the children. Despite an uncertain future and the loss of considerable housing
10 and other benefits and Todd’s monthly income, she put over half of the funds in an irrevocable

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

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

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

1 trust for her children and paid off the considerable consumer debt that the young family had
2 jointly incurred during their marriage.

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

4 When Dr. Robinson collected the tissues of Todd, he collected two sets. *What was*
5 *supposed to happen* - though NO documentation of any kind has ever been provided to confirm
6 that it did happen - was that one set of tissues was supposed to be “fixed” in formaldehyde and
7 another “fresh” set was to be frozen.

8 For thirteen months - between February, 2002 and March, 2003, Todd’s tissues were
9 maintained in an undetermined and undocumented fashion and in March, 2003, it was decided to
10 test Todd’s tissues for heavy metals.

11 Again, *what was supposed to happen*, was that the set which was supposed to have been
12 frozen, was sent to the military’s lab - AFIP - for testing.

13 But instead of sending the tissues to the “Forensic” division of AFIP - which tests tissues
14 of people, the tissues were, for some still unexplained reason, sent to the “Environmental”
15 division of AFIP - which tests “things” - soil, water, mineral, etc.

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

21 AFIP-Environmental tests showed the toxic presence of arsenic in Todd’s liver and
22 kidney, but upon further review, it was learned that some findings (the overall amount of arsenic
23 in the liver and kidney) was so extreme and so unusual that NONE of the seven separate PhD’s
24 (including the head of AFIP-Environmental himself) who have examined the results had ever

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26 ⁵ Exhibit A, pages 4-5 et seq.

1 seen such findings and the literature showed that such findings had been observed in such a
2 quantity in only one other case.

3 All of the other findings (arsenical distribution in the other tissues, the speciation of the
4 arsenic in the liver, the speciation of arsenic in the kidney, etc.) of AFIP-Environmental were
5 even more extreme. Not only had NONE of the PhD's ever seen such results, these findings *had*
6 *never been seen in the entire history of reported Arsenical testing and exceeded prior testing*
7 *by a magnitude of 1300%.*

8 Because the findings were so astounding, prior to trial four separate Forensic
9 Toxicologists - all of them with PhD's, refused to "sign off" or approve the results when they
10 were approached by the District Attorney, and even the head of AFIP-Environmental himself
11 indicated that the results his lab achieved were so aberrational that he had serious reservations
12 about their validity.

13 Since the verdict in the case, three additional chemists - including the chair of the School
14 of Public Health at UCLA, have reviewed the AFIP-Environmental findings and determined that
15 they were defective in a wide variety of ways such that the results are fundamentally and
16 scientifically unsound.

17 Since the verdict, it has also been determined that even the foundational literature
18 evidence (the ranges of tissue findings in Dr. Labay's "big red book" - *Baselt* - do not support the
19 prosecution's position.)⁶

20 But a lone chemist (Dr. Centeno) *was* willing to "sign off" on the results, and this
21 evidence was presented to the jury when Ms. Sommer was, some four years post-mortem,
22 brought to trial.

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25 ⁶ Extensive assistance in the area of "Arsenical science" was provided to the undersigned by Attorney Michelle
26 Kostun of Dallas, Texas and New York, an attorney who, after viewing much of the defendant's trial proceedings
27 broadcast on "Court TV", volunteered her time to assist the defendant. Her assistance is greatly appreciated.

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1 Based entirely on the findings of Dr. Centeno, Dr. Robinson and several other
2 pathologists, changed their opinion and said Todd’s death was “homicide by arsenic”.

3 At the trial, the defense made only an incomplete presentation of evidence challenging
4 Dr. Centeno’s findings, in part because of a focus otherwise by defense counsel and in part
5 because of the fact that key and critical data from Dr. Centeno was not provided to the defense
6 until the end of the trial - scientifically handcuffing the defense experts.

7 The prosecution buttressed its “scientific” arsenic evidence with unobjected to but
8 nevertheless inadmissible and speculative evidence that sought to point to the defendant as the
9 sole source of the arsenic by (a) inferring that Todd could not have contacted arsenic while on
10 base because Miramar had a “clean bill of health” (b) showing that no one else on the military
11 base had any symptoms similar to Todd’s; (c) attempting to establish that arsenic was easily
12 purchased on the internet; and (d) by claiming that the defendant had ready access to an
13 insecticide which could have easily killed Todd. (The prosecution just happened to ignore the
14 fact that to reach the levels in Todd’s body, the defendant would have had to feed him over
15 **THREE POUNDS of the insecticide, ingested in a matter of minutes.**

16 Finally, the prosecution, in an effort to support a case which was woefully weak on
17 science and completely bereft of any link to the defendant, was, either by court ruling or by the
18 proverbial and purported “opening of the door” by defense witnesses, allowed to present
19 extensive lifestyle evidence regarding the defendant behavior after her husband’s death which
20 included such powerful and character assassination evidence of the defendant’s engagement in
21 wet-t shirt contents, drinking binges, partying, sexual conduct, and even purported claims of
22 planning Todd’s death with knowledge gleaned through the watching of television soap operas.

23 With the “evidence” in this state, the jury heard the case and found the defendant guilty.

24 Some members of that same jury violated the court’s directions and discussed and
25 evaluated the evidence **prior** to having the case submitted to it and, in one instance, relied on
26 completely inadmissible but prejudicial information gleaned from news articles.

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1 This motion, in concert, with the motion filed by co-counsel and conjoined herein, seeks
2 to right those wrongs and to give Cindy Sommer the fair trial that she deserves when facing a life
3 of imprisonment in state prison.

4 In furtherance of that effort, this Motion will be organized as follows:

5 Initially, a statement of the law regarding a Motion for New Trial will be presented.

6 ARSENIC: Next, a full review of the ARSENIC evidence will be presented by
7 explaining the extremely suspicious and clouded findings of AFIP-Environmental results of (a)
8 Arsenical Tissue Distribution and (b) Speciation. The review will include an analysis of (c) the
9 huge gaps in the Chain of Custody (hereinafter COC), (d) the absence of AFIP-Environmental's
10 arsenical testing experience, (e) the absence of a Standard Operation Procedure (hereinafter
11 SOP), the inconsistencies it had with (f) the Pathology of the decedent and (g) his medical
12 history.⁷

13 A showing will be made that the findings of AFIP-Environmental do not meet the
14 minimal admissibility requirements of *Daubert* and *Kumho Tire* and should not have been
15 admitted, and that the failure of counsel to raise such an objection was inadequate.

16 The "prejudice" of the admission of this evidence will be shown as the "explanation" for
17 how such errors in testing could come about (Contamination, Junk Science, and Conversion).

18 It will then be established that even if the evidence could have been admitted, the defense
19 was denied the opportunity to fully attack such evidence because critical pieces of data were
20 denied to the defense, either as a result of inadvertence or inadequacy on the part of the defense
21 or as a result of inadvertence or neglect on the part of the prosecution and its agents, resulting in
22 a denial of the defendant's due process right to full cross examination.

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25 ⁷ Because the undersigned is restricted by the common ailment inflicting many attorneys - a monstrous inability
26 to comprehend anything scientific, this document will, with the permission of the court, attempt to discuss the scientific
evidence slowly with an effort to put the issue in simple and understandable terms.

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1 Finally, regarding the subject of Arsenic, the defense will expose the errors of the
2 prosecution and defense counsel, in allowing many areas of evidence presented by the
3 prosecution to show that the defendant was the “only possible” source for the arsenic.

4 **JURY MISCONDUCT** - next it will be shown that on several occasions some jurors
5 evaluated the evidence and deliberated about the case prior to it being submitted to them and
6 outside the presence of some jurors. It will also be shown that, in one instance, one juror
7 considered evidence which was not presented to the court - namely that the defendant fought
8 extradition prior to the start of this trial and yielded an opinion of the juror that “if she was really
9 innocent” she never would have tried to avoid coming to court in California.

10 **IMPROPER LIFESTYLE EVIDENCE** - finally, it will be shown that there were a
11 number of instances where the court improperly allowed certain evidence and/or the defense
12 inadequately failed to object to certain evidence which did little else than assassinate the
13 defendant’s character.

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1 **STATEMENT OF THE CASE**

2 On or about November 30, 2005, the defendant was charged with the murder of her
3 husband, Todd Sommer. Special Circumstances, though not the death penalty, were alleged.

4 On or about July 10, 2006, a preliminary hearing was held wherein the defendant was
5 bound over for trial.

6 On January 2, 2007, trial commenced in the case.

7 On January 30, 2007, the jury returned a verdict of guilty on the charges and found the
8 special circumstance to be true.

9 On or about April 17, 2007, co-counsel filed an initial Motion for New Trial which is
10 incorporated herein by reference.

11 The Motion for New Trial is scheduled for May 31, 2007 (but see accompanying Motion
12 to Continue).

13 This Motion is timely made pursuant to California Penal Code §1181.

14 **STATEMENT OF FACTS**

15 At 0134 hours on February 18, 2002, Cindy Sommer, called "911" to report the collapse
16 of her husband, Todd.

17 At 0139 hours (as established by computerized log information presented at trial), the
18 first of the several Military Police officers arrived at the Sommer house. They parked their cars
19 out of the way of the driveway in anticipation of the need for an ambulance to have access to
20 Todd. They immediately went upstairs and took over treatment of Todd from Cindy.

21 At 0143 hours (again established by computerized phone records), Cindy called her local
22 friend, Susan Beach, urgently asking her to come over and watch Cindy's children. Ms. Beach
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1 called back at 0145 and arrived at the Sommer home shortly thereafter.⁸ The paramedics and the
2 ambulance didn't arrive until approximately 0200 hours.

3 They rendered emergency treatment, brought Todd to the hospital, but he never
4 recovered.

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

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

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20 ⁸ Ms. Beach testified that when she arrived she did not see any emergency vehicles outside the house and didn't
21 see any emergency personnel in the downstairs area of the house. She acknowledged that the M.P.'s might have been
22 upstairs with Todd and that she didn't notice them and that their cars might have been away from the immediate entrance
23 of the house.

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

3 Further facts will be presented in the Points and Authorities.
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6 POINTS AND AUTHORITIES

7 I

8 THE COURT HAS THE AUTHORITY TO ORDER A NEW 9 TRIAL IN ORDER TO INSURE THE DEFENDANT A FAIR 10 TRIAL

11 In order to insure a fair trial and pursuant to the statutory authority of Penal Code §1181,
12 subsections (2 - the jury's receipt of improper evidence), (3 - the jury's improper deliberation), (5
13 - the court's error of a question of law), (6 and 7 - the verdict being contrary to evidence), and (8
14 - the presence of newly discovered evidence) and pursuant to the non-statutory power of the court
15 to insure that the defendant's Due Process rights to a fair trial, including the right to adequate
16 counsel (*People v. Fosselman* [1983] 33 C3d 572, 582), this court has the authority to order a
17 new trial.

18 A Motion for New Trial may be supported by affidavits and the court has the discretion to
19 allow oral testimony. *People v. Tucker* (1897) 117 C. 229; *People v. Ferguson* 91932) 124 CA
20 221, 229.

21 When reviewing the Motion for New Trial the court is NOT acting as a "thirteenth juror",
22 where he "deliberates with" the jury.

23 Nor is the trial judge bound by the restriction facing an appellate judge, who must review
24 the jury's verdict in a manner as to resolve all conflicts in the evidence in favor of the verdict.

25 Rather, the trial court judge has the discretion, in fact the mandate, to make an
26 "independent determination" of his own (*People v. Robarge* [1953] 41 C.2d 628, 634).

27 The trial judge is obligated to weigh the evidence himself and exercise an independent
28 judgment, as if there were no jury at all. (See also *People v. Knutte* [1896] 111 C. 453, 455).

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II
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.⁹

⁹ Baselt, page 82 (Exhibit F.)

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

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

7 The court is urged to fully review Exhibits A, B, and C - the sworn declarations of Dr.
8 Laura Labay, Dr. Ela Bokowska, and Forensic Toxicologist Greg Zavatsky. Their supporting
9 documents need only be reviewed as a reference, but the reports generated by these experts
10 themselves is foundational to the defendant’s case.

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

25 The AFIP-Environmental “unheard of” findings could reasonably be the product of (a)
26 contamination, (b) junk science/poor testing, or (c) bacterial conversion.

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1 For reasons yet to be explained, the tissues in this case made their way to AFIP-
2 Environmental for testing. The results they attained were highly suspicious for a number of
3 different reasons.

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1 **A. OVERALL ARSENICAL QUANTITY** - AFIP-Environmental testing yielded the

2 following results:

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

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

11 Those findings were, however extraordinarily high - just on the quantity itself. The
12 results were so high, in fact, that Dr. Poklis, Dr. Labay, Dr. Bakowska, Forensic Toxicologist
13 Greg Zavatsky, Dr. Fitzgerald and even Dr. Centeno himself had never seen such high results
14 before.

15 Even the “range” literature which came into evidence showed that these findings were the
16 third highest ever reported for these tissues.¹¹ A review of Exhibit G establishes that of the 49
17 cases cited only two others have ever shown an overall arsenic in the Liver as high AFIP-
18 Environmental’s results in this case. **Even this statistic is misleading however, as a review of**
19 **this “range” shows that though there were two cases showing a range as high as Todd’s**
20 **found by AFIP-Environmental, the fourth highest case was 60 and a full 80% of all the**
21 **findings were less than 20.**

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23 ¹¹ The “range evidence” in this case, came in the form of a table from Baselt (Dr. Labay’s big red book) which
24 is attached as Exhibit F. The Baselt findings themselves, is a compilation of the data presented C. J. Rehling which is
25 attached as Exhibit G. The Rehling findings are listed as milligram percent, which must be multiplied by 10 to obtain
26 PPM.

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1 **B. ARSENIC TISSUE DISTRIBUTION FINDINGS**

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

9 *When the two cases to which Dr. Poklis referred and the Banrandame case (Exhibit H)*
10 *are considered - **the result is the same: THERE HAS NEVER BEEN, IN THE HISTORY OF***
11 ***REPORTED ARSENICAL TISSUE DISTRIBUTION - A DISTRIBUTION FOUND BY***
12 *AFIP-Environmental.*

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

16 **C. SPECIATION FINDINGS**

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

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

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1 The AFIP-Environmental findings were also in direct contradiction to ALL of the testing
2 that had ever been done regarding speciation in the past.

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

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

13 In fact, the average amount of DMA which is present is usually (see chart on bottom of
14 page 303 of Exhibit H, as an example) 4% (MMA is usually at the 6% level).

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

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

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

19 However, Dr. Centeno did testify that he felt that it was "possible" that all AsIII could be
20 metabolized into DMA because it is an "endpoint" metabolite, and if the ingestion occurred nine
21 days before, then that would have given the body long enough to metabolize all AsIII into DMA.

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

3 **E. OXIDATION AND SPECIATION**

4 Dr. Hillary Godwin is the chair of the School of Public Health at U.C.L.A. She has a
5 PhD in chemistry and is widely experienced in the presence and testing of heavy metals in
6 people. Because of the publicity of this case, the television news program "20/20" showed her
7 materials from the defendant's case and thereafter she contacted the undersigned.

8 Additional materials were presented to her, including AFIP-Environmental findings and
9 the findings of Dr. Labay's NMS Laboratory, and Dr. Godwin concluded that not only has she
10 never seen such speciation findings before, they also fly in the face of another conversion of
11 AsIII which occurs in the body.

12 Besides the "enzymatic" conversion of AsIII to MMA and DMA, an oxidation takes place
13 in the body - *in every single circumstance that AsIII is ingested* - wherein some of the AsIII is
14 converted to AsV (please note this is also reflected at page 303 of Exhibit H).

15 As Dr. Godwin's declaration (Exhibit J) establishes, assuming that somehow Todd's
16 body's enzymes created an enzymatic reaction never before seen in the history of speciation, such
17 that all of the metabolized AsIII was converted to DMA, there would still be some AsIII which
18 had "oxidized" into AsV. This AsV would be present and therefore, if we are to believe AFIP-
19 Environmental findings, somehow Todd's body must have metabolized AsIII ONLY into DMA
20 AND must have washed out all the AsV which would have to be there as well.

21 **F. CHAIN OF CUSTODY**

22 Maintaining the chain of custody (COC) of any piece of evidence is important. In the
23 testing of body tissues for poisons it is critical. If a tissue is not properly maintained and is, say,
24 left on a lab bench for three days unaccounted for, bacteria could impact on subsequent testing or
25 cross contamination from other surrounding testing could result.

26 In this case, Todd's tissues experienced monstrously large holes in the COC.

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1 **First**, the COC before it got to AFIP-Environmental has never been documented. Dr.
2 Robinson told us what was *supposed* to happen, but there has never been presented even a single
3 piece of paper confirming that for the thirteen month time period of 2/02 through 3/03, when the
4 tissues were sent to AFIP-Environmental, the COC was proper. Who stored the tissues
5 originally? How were they labeled? Did anyone remove them? If so, when were they returned?
6 Were the “preserved samples” fixed with the common combined fixative agent of formaldehyde
7 and cacodylic acid (*which is pure DMA*)?¹²

8 Dr. Robinson told us that he takes two tissue samples - fixes one in a fixative agent - and
9 freezes the other sample. There is no COC tracing the history of either of these samples, so it is
10 impossible to know if they were maintained properly.

11 **Secondly, the COC within** AFIP-Environmental *itself is riddled with holes*. Exhibit A,
12 at page 4 - 5 shows that there were 16 separate chain of custody gaps, some lasting several hours,
13 some lasting 24 hours, some lasting several days, and one lasting almost three weeks.

14 In short, the holes in the care and custody of AFIP-Environmental is woeful.

15 **G. AFIP-Environmental IS NOT A FORENSIC LAB**

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

19 For reasons still completely unknown, the work was never done by the highly respected
20 AFIP-Forensic, which did the initial testing on Todd’s fluids.

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22 ¹² See www.abdn.ac.uk/emunit/tem.htm (information and buffer recipes from the Electron Microscope Unit at
23 the University of Aberdeen, Institute of Medical Science.)

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1 Why this highly sophisticated testing went to AFIP-Environmental is unknown, but what
2 is not unknown, is that AFIP-Environmental was doing this work for the very first time.

3 **H. NO STANDARD OPERATING PROCEDURE**

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

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

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

13 **I. INCONSISTENT WITH PATHOLOGY**

14 As was presented in the trial, if someone would ingest Arsenic to the point that they
15 would have the enormously high levels reported by AFIP-Environmental, it would be expected
16 that the body's tissues would be seriously compromised. The heart, liver, lung, blood, kidney,
17 and even brain tissues would be observably impacted. Upon either gross or microscopic
18 evaluation, grave deterioration of tissues would be noted.

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

23 As noted, for Todd, his pathologist, Dr. Robinson, Board Certified Pathologist, performed
24 a thorough autopsy and found none of those pathological symptoms. He did a gross evaluation
25 of the chest, stomach, head, central nervous system, neck, cardiovascular system, coronary
26 arteries, conduction system, aorta, respiratory system, liver, biliary system, alimentary system,

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1 the tongue, esophagus, the bowel, genitourinary system, the spleen, the thyroid, adrenal glands,
2 and musculoskeletal system.

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

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

9 Though the District Attorney sought to "tap dance" around this conclusion, and refer Dr.
10 Eisenga only to the issue of Todd's medical symptoms, and despite the fact that defense counsel
11 never confronted Dr. Eisenga with these pathological findings in precise terms, the evidence still
12 holds that AFIP-Environmental findings, if believed, would have resulted in a wide range of
13 pathological findings - none of which existed.

14 **J. INCONSISTENT WITH TODD'S MEDICAL FINDINGS**

15 Todd did exhibit gastro-intestinal symptoms which were consistent with arsenical
16 poisoning (of course, they're also consistent with the common flu and a hundred other diseases).
17 But the prosecution effectively brought out that his medical findings were consistent with their
18 theory of the case.

19 However, Todd's medical conditions were NOT consistent with the *timing* of the
20 prosecutor's theory of the case.

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

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

3 **Of course, this did NOT happen.**

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

9 Why this point was not properly raised with both Dr. Eisenga and Dr. Centeno by trial
10 counsel is unknown, and why the D.A. was allowed to disingenuously argue that on the one hand
11 the AFIP-Environmental are reliable because it took Todd ten days to metabolize all the AsIII
12 and turn it into DMA and on the other hand completely ignore the fact that the if the AFIP-
13 Environmental results were believed, Todd would have been dead 24 hours after ingestion is
14 unknown.

15 But the facts of the case are just that.

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IV
**THE AFIP-Environmental ERRORS RESULTED IN FALSE
POSITIVE FINDINGS OF THE PRESENCE OF
POISONOUS ARSENIC IN TODD’S BODY.**

Unlike errors in some cases, where the mistakes present just “theoretical” possibilities of mistakes, in this case, the AFIP-Environmental errors likely created results in the most blatant form - false positives of elevated levels of arsenic in two tissue samples, causing a 180 degree change in the findings of the case and a finding homicide by arsenic some three years after Todd’s death.

Contamination - the findings of AFIP-Environmental are so out of step with known science, the pathological findings, and Todd’s medical condition, one has to look at them and ask, “well, if they are wrong, how did they get that way?”

In this case, there are two very plausible explanations for the “false positives” of AFIP-Environmental.

First is contamination. These findings are such that it just seems that two of the tissues - the liver and kidney - are completely out of step with the other tissues of Todd’s body. Dr. Robinson talked about how two samples were taken and one was supposedly preserved in an DMA laced preservative and the other frozen. Without a chain of custody it is impossible to confirm, but the results are highly suggestive that somehow the liver and kidney tissues which were sent to AFIP-Environmental were in fact the “fixed” tissue as opposed to the frozen “fresh” sample.

Dr. Centeno even had this concern, and he made the inquiry. Without getting any documentation confirming the proper COC, Dr. Centeno was told that it shouldn’t have been that way - that he *should* have received the fresh tissue. He never went any further.

Concurrent with the filing of this motion, the defense has made the request for the production of those records, if they exist, with the hopes to address that question.

1 Under the state of the evidence at this point, however, the possibility cannot be ruled out
2 that the reason why AFIP-Environmental findings for Todd's liver and kidney are "through the
3 roof" is because they were contaminated at some point prior to testing.

4 It can't help but be commented on, that NONE of the inability to confirm if
5 contamination occurred can be laid at the feet of the defense. In this case, it was not by any
6 omission of trial counsel that the testing was not done.

7 It was entirely the fault of the prosecution and/or their agents, because despite the fact
8 that in May, 2003, it became known that arsenical death was being investigated in this case, ALL
9 OF THE OTHER TISSUES NOT SENT TO AFIP-Environmental WERE DESTROYED IN
10 February, 2006 - without consultation or agreement from the defense.

11 In essence, the navy, first contaminated, then tested, and then destroyed control samples -
12 forever barring the defendant from having her own experts evaluate the tissues and perform their
13 own tests.

14 The prosecution's delay in filing this case, caused critical and viable evidence, which
15 could have destroyed the validity of AFIP-Environmental's findings, to be destroyed.

16 (See Exhibit L.)

17 **Conversion** - With grave concerns regarding the COC pre-AFIP-Environmental and post-
18 AFIP-Environmental, it is also possible that the liver and kidney were not properly maintained.
19 This would have allowed the tissues to be subject to bacteria which can have an amazing impact
20 on human tissue.

21 Studies have shown that when bacteria is introduced to tissues (Dr. Labay testified about
22 one such example) arsenic can be converted to a degree that when the tissue is tested it results in
23 a finding of dangerous DMA, when it started as non dangerous, dietary/organic arsenic.

24 In the attached Exhibit L, an experiment showed that when the benign and ever-present
25 bacteria, AsB, from a simple "mussel" was infected with several common bacteria, the AsB was
26 converted to DMA.

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1 Sometimes the conversion took 28 days; in some cases 14 days, depending on the
2 bacteria. In some cases it took as little as 60 minutes, and in one circumstance it took less than
3 30 minutes for ALL of the AsB to convert to DMA. (Exhibit M, page 148).

4 Simply put, this means that it's very possible that had Todd's liver or kidney tissue, being
5 left out on a lab bench during one of the 14 months prior to AFIP-Environmental's receipt of it,
6 or during one of the 16 COC gaps during the time it had the tissues, became thawed and was
7 subjected by bacteria which - long after the tissue left Todd's body - caused the AsB arsenic in it,
8 to convert to DMA.

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AFIP-Environmental FINDINGS DO NOT COMPORT WITH DAUBERT AND SHOULD THEREFORE NEVER HAVE BEEN ADMITTED

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13 During the past decade, scores of people (this past weekend it was announced that the
14 number is now "200") who were convicted of serious crimes - including dozens who had been
15 sentenced to death - have been exonerated by DNA analyses of crime scene evidence that had not
16 been tested at the time of their trials.

17 As reported in Science Magazine¹³ (Exhibit K), "it was not surprising to learn that
18 erroneous convictions sometimes occur and that new science and technology can help detect and
19 correct those mistakes. Nor was it surprising to learn . . . that erroneous eyewitness
20 identifications are the most common contributing factor to wrongful convictions. ***What was***
21 ***unexpected is that erroneous forensic science expert testimony is the second most common***
22 ***contributing factor to wrongful convictions, found in 63% of those cases.***"¹⁴

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24 ¹³ 5 August 2005, volume 309, *The Coming Paradigm Shift in Forensic Identification Science*, by Saks and
Koehler. Exhibit K

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26 ¹⁴ It was also properly commented that these data likely understate the relative contribution of forensic science
27 expert testimony to erroneous convictions. Whereas lawyers, police, and lay witnesses participate in virtually every
criminal case, forensic science experts participate in a smaller subset of cases - about 10 to 20% of criminal cases during
the era when these DNA exonerations were originally tried.

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1 An outgrowth of this phenomena, as well as other factors has caused a considerable
2 change of the law regarding the introduction of scientific evidence. In the 19th century, courts
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4 were impressed by “qualifications” and success in the marketplace. If the market valued an
5 asserted expertise or expert, courts generally did, too.

6 In the seminal case of *Frye v. U.S.* (293 F. 1013 D.C. Cir. 1923), the court confronted the
7 question of admissibility of an expertise that no life in any commercial marketplace and solved
8 the problem by substituting an intellectual marketplace.

9 For 60 years, the foundation for the introduction of an expert was whether the expertise
10 had “gained general acceptance in the particular field in which it belongs.”

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23 This means that forensic science errors accounted for 63% of all exonerations, though they only participated in
24 10-20% of the cases.

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1 In 1993, the law dramatically changed. In *Daubert v. Merrell Dow Pharmaceuticals* (509
2 U.S. 579, 1993), the U.S. Supreme Court introduced a new standard for the admissibility of
3 scientific evidence. From that point forward, it was established that the scientific testimony must
4 be shown to stand on a dependable foundation.¹⁵

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

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

11 The factors listed include:

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

17 The application of those standards to this case would yield a conclusion that the findings
18 of AFIP-Environmental are inadmissible.

19 AFIP-Environmental’s conclusion *both* as to arsenical quantity AND, more egregiously
20 as to speciation, should not have been presented to the jury. Because AFIP-Environmental had
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22 ¹⁵ In a subsequent case, *Kumho Tire v. Carmichael* (526 U.S. 137, 1999), the Supreme Court confirmed that the
23 *Daubert* standard applied to all “expert” testimony, whether scientific or otherwise.

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1 never done this testing it could not cite any error rates. It couldn't be known whether AFIP-
2 Environmental findings could be repeated and to what degree of accuracy.

3 AFIP-Environmental did not have an SOP in place when it did its initial testing and
4 therefore element four of *Daubert* requiring such a procedure is not met.

5 With regards to speciation, there were the additional hurdles that the technique of
6 speciation, particularly the way that AFIP-Environmental conducted the test, has ever been
7 subjected to peer review or been generally accepted in the relevant scientific community.

8 Dr. Centeno himself testified that speciation is subject to considerable controversy in the
9 scientific community.

10 In all, the findings of AFIP-Environmental should have been challenged prior to its
11 introduction. The failure to do so by trial counsel was inadequate. In large part, that inadequacy
12 was the product of the very late receipt of the data which supported the conclusion that AFIP-
13 Environmental was monumentally "over its head" in doing forensic arsenical testing. But
14 whether the inadequacy was due to the prosecution's failure to provide data in a timely fashion,
15 or the defense's failure to follow up on its earlier request for all data is immaterial. What *is*
16 material is that Cindy Sommer is now sitting in jail awaiting a sentence of life imprisonment
17 based on scientific testimony which is not admissible under the standards of the United States
18 Constitution, as interpreted by the United States Supreme Court.

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VI

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**EVEN IF THE AFIP-Environmental FINDINGS WERE
ADMISSIBLE, THE DEFENSE WAS DENIED THE
OPPORTUNITY TO FULLY CHALLENGE THE
FINDINGS.**

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As more fully presented in the Motion for New Trial filed by co-counsel on April 17,
2007, extensive data from AFIP-Environmental was not received until the very end of the trial.

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1 This should never had happened. Whether it was error for the defense not to push more fully for
2 the information OR whether it was incumbent on the prosecution to be more diligent in insisting
3 its agent (AFIP-Environmental) comply with an earlier court order mandating that all data be
4 provided OR whether it was error for the defense to not request a continuance of the case until all
5 the data could be obtained is of little moment.

6 What is important is that Ms. Sommer, facing a life imprisonment, didn't have the
7 opportunity to have her experts fully evaluate the absolute center of the prosecution's case
8 against her *until after the trial was actually over*. She was denied her fundamental right to
9 present a defense and to meaningfully challenge the evidence presented against her.

10 As can be seen from Dr. Labay's and Dr. Bakowska's declaration, it was ONLY AFTER
11 THE TRIAL was over were the huge gaps in AFIP-Environmental's COC noted. Only after the
12 trial was over were the huge gaps in the data observed.

13 Even now, it appears that AFIP-Environmental has NOT provided all the information
14 about its findings to the defense.

15 The defendant should not have a verdict stand, where she did not have the opportunity to
16 present her attack on the prosecution's key witness.

17 All of the information presented herein should have been used to (a) stop AFIP-
18 Environmental from being allowed to present its findings at all OR (b) to attack those findings
19 with the exact information contained in Exhibits A, B, and C and all of the information contained
20 in this Motion for New Trial.

21 A trial is not meant to be an exercise in gamesmanship, but rather should be an effort to
22 allow both parties - including the defense - the opportunity to fully flesh out all of the details of
23 the case, to shine the bright light of adversarial representation on the evidence, to allow the jury
24 to view all sides of the case and then render their verdict.

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1 Only one side in this case - the prosecution - had such an opportunity and Ms. Sommer
2 faces a lifetime in prison having had little more than a shell of a defense as it relates to some of
3 the most critical evidence against her.

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VII
THE PROSECUTION’S EFFORT TO ESTABLISH THAT
MS. SOMMER IS THE ONLY OR LOGICAL SOURCE OF
ARSENIC IS MONUMENTALLY FLAWED.

With little direct evidence linking Ms. Sommer to arsenic, the prosecution sought to present a variety of circumstances to “narrow” the field such that it would appear that Ms. Sommer and Ms. Sommer alone administered the poison that it argued killed Todd.

Clean bill of health for Miramar was completely hearsay: Towards that end, the prosecution began by attempting to show that Todd did not suffer arsenic poisoning by an environmental contact. They sought to prove this point in two ways. First, they called NCIS Officer Terwilliger to establish if Miramar had any dangerous substances in the area or had any arsenic in the hanger area.

Now, if Terwilliger had himself gone to the base and done an investigation using devices to detect arsenic after he was properly trained in the administration of those devices, such an inquiry would have been perfectly proper. But he didn’t.

He conducted no physical search himself, but rather reviewed records of the base and then was allowed to give his hearsay findings that he could find no record indicating that dangerous substances were kept in Miramar or that arsenic was kept in the hanger area.

The D.A. had every right to ask this question, and the defense could have stopped it completely by the mere objection: “hearsay”. Terwilliger should not have been allowed to testify to the out of court statements or contents of out-of-court records regarding the hazardous waste condition of Miramar. He was not the custodian of record of any such records and he should not have been allowed to provide the jury with their content.

Had defense counsel entered a simple objection, Terwilliger could not give his testimony and his interpretation of the records, and if the records really do exist and if they really do say what the prosecution asserts them to say, then the prosecution could have sought to introduce those records.

1 through one of the marines who went to El Centro to look for such waste - the D.A. objected and
2 the court properly stopped the defense from presenting the evidence in that manner.

3 The court said to the defense, that it was not stopping it from presenting such evidence,
4 only that it couldn't do so through this person. That the defense would have to present its own
5 independent witnesses to establish that El Centro had arsenical waste and that Todd may have
6 come in contact with it while in that county.

7 All the defense would have had to do was enter the same objection regarding Miramar
8 and the prosecution would have been required to attempt to prove this point in a proper way, if it
9 could do so at all.

10 **Melrose Place Soap Opera** - another improper way the D.A. sought to establish Cindy's
11 "evil intent" was to say that she watched a television nighttime soap opera - Melrose Place - and
12 from there learned how to poison her husband.

13 The theory was so silly and so speculative that when NCIS Rendon testified the
14 prosecution only slightly alluded to the matter. For whatever absurd and unjustifiable reason,
15 defense counsel brought this prosecution theory to the jury's attention. By asking certain follow-
16 up questions, the defense allowed the prosecution *on re-direct* to establish that the investigator
17 had gone to London to talk to Cindy's ex-husband and asked him if she ever watched such crime
18 shows as CSI, etc. The husband said "no", that Cindy usually watched the nighttime "soaps"
19 including Party of Five, Friends, Beverly Hills 90210 and Melrose Place.

20 The door now wide open, Rendon testified that when he returned he contacted the
21 producers of Melrose Place and learned that during the time period of Todd's death, there were
22 six episodes in which one of the characters poisoned her husband.

23 None of this should have been allowed to be presented to the jury. Such speculation has
24 virtually no probative value yet severely prejudices Ms. Sommer.

25 **"Arsenic is easy to get online"** - The prosecution also sought to establish that the
26 defendant could easily buy Cacodylic Acid (DMA) online with little difficulty and without
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1 identification. To establish this point, they presented NCIS Terwilliger who testified that he
2 contacted a company, SPI, ordered Cacodylic Acid and had them send it to his work.

3 The presentation of this evidence was replete with hearsay, as he related that he was told
4 by the representatives at the business that they didn't care if he had any identification or not, that
5 they didn't care why he was using the product or if he had some official or governmental
6 position.

7 All of this was entirely hearsay and should have been objected to, but was not. Again,
8 when questioned, trial counsel offered no excuse or claim or tactic, but simply indicated that he
9 "wished someone had been there at his side" to remind of this omission.

10 In fact, this error was even more egregious because not only did trial counsel not object to
11 the damning hearsay evidence, he well knew that the position of the company was exactly the
12 opposite to that which Terwilliger testified. As can be seen from exhibit O, counsel's
13 investigator had spoken to representatives of the company and had confirmed that the company
14 policy was that NONE of the substance was to be sold except where its purpose was confirmed
15 as legitimate, such as a Naval forces representative.

16 Both the company representative and president were available for the defense but were
17 not called to testify.

18 **Grant's Kills Ants Stakes** - Perhaps the most dramatic way that the prosecution sought
19 to put the arsenical "smoking gun" in the defendant's hand was through testimony that an ant
20 poison, readily available to the defendant on the Miramar base was lethal enough, in very small
21 doses, to kill Todd.

22 The prosecution not only presented this in evidence, but made repeated references to the
23 product: ***Grants Kills Ants Stakes:***

24 "How did it (arsenic) get there? There are no admissions. No
25 receipts in the People's case which link the Defendant to the
26 poison in Todd's body. But what do we know about arsenic? You
27 can get it. People can get it . . . on the internet . . . lab supply store . . .

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1 Frugal . . . Ebay. Then Rick Rendon went looking for **Grant's**
2 **Kills Ants stakes at the local marine Corps exchange**
3 **garden supply store. And there it was . . . and by the**
4 **way, those Grant's Ants Stakes, it would take 2 ½**
5 **traps, the bait from 2 ½ traps to kill. 2 ½ Grants Ants**
6 **Stakes, that's all it would take. That's all it would**
7 **take. So, it's gettable."**

8 In all, between argument and testimony there were some fourteen separate references to
9 Grant's Kills Ants Stakes.

10 The prosecution failed to mention, and the defense never sought to present, the fact that
11 it would have taken an amount so large as to have choked a horse to reach the levels found in
12 Todd.

13 Oh, the D.A.'s assertion that it would only take 2 ½ stakes to kill someone is correct¹⁶ but
14 that completely begs the questions and only presents half a story. The real issue - and the issue
15 that the defense should have raised in a 402 hearing AND in evidence AND in argument is that
16 what is important is **HOW MANY STAKES WOULD IT TAKE TO REACH A DOSAGE**
17 **OF THE MEASURE THAT WAS FOUND IN TODD?**

18 The answer to that question presents a very different picture.

19 Depending on whether you use the statistics from the Baselt summary OR from the
20 Benramdame case, if we assume that 2.5 stakes yielded an average of 2 ppm of AsIII in the Liver,

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22 _____
23 ¹⁶ The poisonous gel in each bait weighs 1/3 of an ounce or 9.24 grams. The solution contains .45% Arsenic
24 Trioxide as metallic in water soluble form, which means that each bait has approximately 41 mg of Arsenic Trioxide
(AsIII) in it. It was testified to that as little as 100mg of AsIII can be fatal, therefore 2 ½ stakes could be fatal. See
25 Exhibit P.
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1 then it would have taken approximately 118 stakes to reach Todd’s liver dosage AND, by similar
2 calculation, an additional 28 stakes to reach Todd’s kidney dosage for a total of some 146 stakes.

3 As each stakes weighs 9.24 grams, Todd would have had to consume some 1,349 grams
4 of Grant’s Kills Ant’s bait OR, put in more understandable numbers, a **LOAF OF OVER**
5 **THREE POUNDS OF PURE ANT BAIT GEL** to reach his dosage numbers. And this is
6 doing the calculation MOST favorable to the prosecution, because if we use the figures obtained
7 by Poklis, it would have taken over NINE POUNDS.

8 The thought of Cindy buying 150 ant stakes, opening each of them, scraping the poison
9 out, molding it into a great big “cookie of bait” and feeding Todd a THREE POUND giant
10 CANDY bar of Bait Gel and saying “here honey, I’ve got your evening snack, be sure to munch
11 it all down” is utterly and totally ridiculous.

12 And if you think it’s possible to hide such a huge amount, we should consider that, if she
13 tried to hide the ant bait at a rate of an ounce for every glass, a fairly high number considering the
14 smell and sweetness of the ant bait (the arsenic may be tasteless and colorless, but the bait is
15 treated with a sweetener to make the ants like it) it would have **REQUIRED TODD TO**
16 **CONSUME OVER 5 GALLONS OF SUCH A SOLUTION to reach his levels.**

17 And it has to be remembered, that, as there were no signs of chronic arsenical use, all five
18 gallons would have had to be consumed at a single setting and quickly, because after just a glass
19 or two, Todd would have started to feel the symptoms to the point that he would have crawled up
20 in a fetal ball and been struck by overwhelming gastro-intestinal problems.

21 Simply put, the whole idea that the prosecution got to put in the juror’s mind of how easy
22 it would be for this product to be used is absurd, and the failure of the defense to take steps to
23 respond to it was inadequate.

24 VIII

25 HOW DID TODD DIE IF NOT FROM ARSENIC?

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1 As the burden is on the prosecution to prove their case, it is not the obligation to establish
2 Todd's cause of death, but faced with this task, there are several of possibilities.

3 **Ephedra** - Todd had recently used Ephedra and Ephedra tablets had in fact been taken
4 from their house following his death. Ephedra has, since 2002, been removed from the market
5 because it is believed to caused over 150 deaths in this country alone.

6 The military thought this was an area worthy of pursuing, but when they determined that
7 Todd's lab results were negative post-mortem, they dropped the issue. In fact, a number of the
8 deaths from Ephedra occurred when there was NO ephedra in the system. (Exhibit Q). The
9 failure of the defense to pursue this theory was inadequate.

10 **Levaquin** - One of the products that was prescribed for Todd for his diarrhea was
11 Levaquin. Levaquin® (generic name - levofloxacin) is an antibacterial available by prescription
12 which belongs to a class of medicines called quinolones. A number of adverse side effects have
13 been found from the use of Levaquin, "some reactions have been accompanied by cardiovascular
14 collapse."¹⁷ Use of antibacterial agents such as Levaquin may result in pseudomembranous
15 colitis¹⁸, which "may range in severity from mild to life-threatening".

16 Levaquin, as with other quinolones, has "been associated with prolongation of the QT
17 interval on the electrocardiogram and infrequent cases of arrhythmia. Rare cases of torsades de
18 pointes have been spontaneously reported . . . and [use of Levaquin] should be avoided in
19 patients with known **prolongation of the QT interval**" among others. (Emphasis added).

20 If the court recalls, the pre-AFIP-Environmental autopsy by Dr. Robinson indicated that
21 one of the potential causes of death of Todd was "long QT interval" (see Introduction, this
22 document, above.)

23 ¹⁷FDA approved label June 2006 p. 18. Drug contraindications and adverse reactions discussed pp. 17-29.
24

25 ¹⁸See generally, <http://www.mayoclinic.com/health/pseudomembranous-colitis/DS00797> ("Pseudomembranous
26 colitis is an inflammatory condition of the colon (large intestine) that occurs in some people who have used antibiotics. It
27 develops when antibiotics disrupt the normal balance between "good" and "bad" bacteria in your colon, causing the
28 proliferation and spread of harmful microorganisms.").

1 The use of non-steroidal anti-inflammatory drugs with Levaquin “may increase the risk of
2 CNS stimulation and convulsive seizures.”

3 In a small per cent of clinical trials, some of the following adverse reactions were present:
4 cardiac failure, hypertension, hypertension aggravated, hypotension, postural hypotension,
5 arrhythmia, arrhythmia ventricular, atrial fibrillation, bradycardia, cardiac arrest, ventricular
6 fibrillation, heart block, palpitation, supraventricular tachycardia, ventricular tachycardia and
7 tachycardia.¹⁹

8 The failure of the defense to pursue this alternative theory was also inadequate.

9

10 Hank Gathers was leading the country in scoring and rebounding for Loyola Marymount
11 University when, in the middle of game, he dropped to the ground and died before he could be
12 removed from the basketball court.

13 Jim Fixx, the marathoner and author, who wrote the “Complete Book of Running” is
14 credited with almost single handedly started the “jogging” craze in this country, died of a heart
15 attack after a long run at the age of 52.

16 People die of heart failure all the time. Young people; healthy young people.

17 The presentation of this evidence to the jury, and a more careful presentation of the
18 conclusions reached by Dr. Robinson in the original autopsy in this case should have been
19 presented to the jury and the failure to do so was inadequate.

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22 ¹⁹*Id.* 27.

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1 **IX**

2 **JURY MISCONDUCT**

3 The areas of jury misconduct have been raised in the Motion for New Trial filed by co-
4 counsel and are incorporated herein. A more detailed declaration from former alternate juror
5 Lori Cosio Azar has been included herein and labeled "Exhibit D-1".

6 It provides some important additional information.

7 It is clear that at least two jurors, in direct violation of the court's order, discussed their
8 view of the evidence with other jurors prior to the completion of the case and outside of the
9 presence of the entire jury.

10 On one occasion the jurors discussed the defendant's testimony as to how she got the
11 "black eye" that she had at one point in the trial, saying that they thought "her testimony was a
12 lie" and that they believed that "she probably got it in a brawl in jail".

13 On another occasion, one juror commented that she didn't believe Cindy's testimony
14 regarding her tatoo.

15 On another occasion, one juror commented that she didn't believe Cindy's testimony as
16 to whether she was "forced" to get married to Todd because she was pregnant or whether their
17 child was one month early.

18 And on another occasion, one juror commented on the testimony of Cindy's felony
19 conviction, opining that " she must have done something pretty bad to be convicted of a felony
20 child abuse."

21 None of these comments on the evidence or discussion of the trial testimony was proper.
22 As noted in *People v. Hutchins*, (1993) 6 Cal4th 97 at 117:

23 "The Penal Code provides that jurors must not "converse among
24 themselves or with anyone else on any subject connected with the
25 trial, or to form or express any opinion thereon until the cause is
26 finally submitted to them.' (§1122). Petitioner's jury was so

1 instructed. **Violation of this duty is serious misconduct.** (People
2 v. Pierce [1979] 24 Cal3d 199, 207) . . . This conduct also raises a
3 presumption of prejudice.

4 Also see *Mattox v. United States* (1892) 146 U.S. 40, 43 and reapplied in *Remmer v.*
5 *United States* (1954) 347 U.S. 227, 229

6 Further egregious misconduct was committed by Juror Bill Campbell, a retired police
7 officer of the San Diego Police Department. Immediately after the verdict - but at a point in time
8 where he could not have made the comments based on something he learned after his jury service
9 was complete - Juror Campbell informed Alternate Cosio-Azar that (1) he's seen many cases
10 where the police botched the investigation and too many criminals go free and that he made sure
11 that didn't happen in this case and (2) that he knew that the defendant had fought extradition
12 before she came to California, which added another four months in jail, and "if she really wanted
13 to tell the world she was innocent she would have come here on her own."

14 "If you were innocent, would you fight extradition?" He asked.

15 Both of these remarks reflect juror misconduct. The first reflects the exercise of certain
16 expertise in violation of *In re Malone* (1996) 12 Cal4t5h 935, 963, in that Juror Campbell seems
17 to be drawing on his own expertise as a long time police officer in concluding that he knows this
18 case was botched, but that he's not going to let the defendant get away with it.

19 Even more compelling, and directly on point with the case law mandating a reversal, is
20 Juror Campbell's reliance on information about the case from outside sources and the
21 consideration of information which was not evidence from the case, is in violation of the
22 obligation of jurors as delineated in *People v. Holloway* (1990) 50 Cal3d 1098, as well as *Gibson*
23 v. *Clanon*, (9th cir. 198) 633 F.2d 851, 853.

24 The aforementioned jury misconduct was in violation of state law as well as the U.S.
25 Constitutional guarantees of the Fifth, Sixth, and Fourteenth Amendment rights to due process
26 and to confrontation, a unanimous, unbiased jury.

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1 A juror’s exposure to extraneous materials raises a *presumption of prejudice* (*People v.*
2 *Karis* [1988] 46 Cal33d 612, 642; *People v. Hogan* [1982] 31 Cal3d 815, 846), which can only
3 be rebutted by proof that no prejudice actually resulted. *People v. Honeycutt* (1977) 20 Cal3d
4 150, 156.

5 Unless the presumption of prejudice is rebutted, a defendant is entitled to a new trial,
6 regardless of contentions that a more favorable verdict would not have resulted absent the error.
7 *People v. Pierce* (1979) 24 Cal 199, 206-207. *Hogan*, supra at 846

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X

10 **THE ADMISSION OF MS. SOMMER’S POST-MORTEM**
11 **CONDUCT WAS IMPROPER**

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12 With no evidence linking the defendant to “arsenic” and Todd’s death, and very little
13 evidence establishing a motive for the defendant to kill her husband, the prosecution sought to
14 fill in this huge void and paucity of evidence with “lifestyle” evidence to assassinate her
15 character and show that Cindy was a (a) bad mom, (b) a “loose” woman, and (c) frivolous and
16 “non-grieving” widow.

17 This evidence came in the form of a number of sources. Some of it was presented over
18 objection of counsel and some was presented without objection. All of it put a “scarlet letter” on
19 Ms. Sommer’s back and marked her as a “bad person” in the eyes of the jurors - evidence which
20 is highly and unduly prejudicial and should have been excluded.

21 Some of the evidence came in the prosecution’s case in chief and was mentioned in
22 opening statement and some of it came in when the defendant’s mom testified and purportedly
23 “opened the door” to testimony.

24 This evidence was relentlessly presented by the prosecution. It came in through at least
25 fifteen separate witnesses. The trial turned from an attempt to link Cindy to Todd’s death, to an
26 effort to show her to be an unworthy person. In any form, it should not have been presented.

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1 In order of appearance in the trial, this character assassination evidence was as follows:

2 **Stuart Payne** - Stuart Payne, one of the prosecution's early witnesses in the case, was
3 properly called to the stand to state that he was at the hospital, on behalf of the "command" to
4 meet Cindy when she arrived on the night of Todd's death. He introduced himself to Cindy, told
5 her how sorry he was at her loss, and told her that if there was anything that the Navy "can do for
6 you", just "let me know." At that point, Cindy asked if she would have to pay back Todd's
7 enlistment bonus.

8 Up to this point the introduction of this evidence was fine. The D.A. could present this as
9 an admission as it relates to the defendant's purported financial motive. The jury could then
10 evaluate whether it goes to motive to kill or the fragmented thinking of a woman who not only
11 just lost her husband and father of her children, but also her sole source of financial support,
12 leaving her alone with four kids to support.

13 What *was* improper however, was the D.A.'s follow question of whether he "thought this
14 statement to be unusual" and his answer "Yes", followed up by the D.A.'s question "why" and
15 Payne's answer, "because I did not expect a response like that from someone who had just lost
16 their husband."

17 The opinion of Payne as to whether Cindy's comments from usual or unusual or properly
18 grieving or not properly grieving is completely irrelevant. Counsel should have objected and the
19 court should have stopped this testimony from being presented.

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21 **Thomas Streckfuss** - In opening statement the D.A. was allowed to inform the jury that
22 evidence would show that the post-mortem, there were a number of parties at the defendant's
23 house. This evidence came in the form of Thomas Streckfuss who stated that there were a
24 number of complaints about loud parties from the neighbors (hearsay and objectionable), a
25 circumstance which happened four to five times (hearsay and objectionable), that he went to the

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1 defendant's house on one occasion wherein he saw a large group of between 30 and 40 people at
2 the defendant's house and how he had to break up the party.

3 The Streckfuss appearance at the defendant's house had NOTHING to do with any
4 investigation of the death of Todd, and was offered purely for purpose of establishing that the
5 defendant was not grieving as the D.A. thought was appropriate and was partying after Todd's
6 death.

7 The prejudice is obvious but the relevance is NOT. To somehow correlate post-mortem
8 partying with pre-mortem intent to kill your husband is speculative and should have been
9 suppressed.

10 In this circumstance, the defense entered a timely objection and the court overruled it,
11 saying that the "state of mind of the officer" was relevant. The state of mind of the officer was
12 NOT in question and the evidence should not have been presented.

13

14 **Richard Overfield** - Richard Overfield was called by the prosecution to establish that he
15 was present at a funeral service for Todd in Florida where Cindy spoke. He testified that, at the
16 funeral, Cindy cried and told the group that Todd had done everything he wanted to do; that she
17 had given him everything that he wanted.

18 It's arguable as to whether Cindy's statements are admissible as they do not appear to be
19 an admission or fit within any other exception to the hearsay rule, however, that aside, what is
20 clear is that Overfield's opinion about those statements is irrelevant and should not have been
21 presented.

22 Overfield testified that he didn't believe Cindy, that it hit him "wrong because Todd was
23 23 years old and he didn't get everything he wanted". He was also allowed to testify that at the
24 end of the service two other people came up to him and all of them agreed that "there wasn't a lot
25 of emotion for a grieving widow."

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1 Overfield's opinion is without relevance. If the comments of Cindy are even admissible,
2 how Overfield viewed them is prejudicial and irrelevant, and should have been objected to by
3 defense counsel.

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5 **Suzie Peace** - Suzie Peace, the defendant's ex-mother-in-law was called to the stand by
6 the prosecution to establish that the defendant had "dropped quite a bit of money" on her by
7 taking her out to Mimi's and how excited she was about having purchased and \$100 ring at
8 Tiffany's. She was also allowed to testify how she had talked to Cindy about "her spending" but
9 it didn't seem to have any effect on her. This evidence was borderline admissible. It's *possible*
10 that it established an admission in that it reflected a financial gain motive for Todd's death. It's a
11 stretch, but it's possible.

12 But her subsequent testimony was not admissible. She also testified that after Todd's
13 death, she saw evidence of "loose behavior" by Cindy - men passed out on the floor, lots of beer
14 bottles, alcohol, drugs laying around the house".

15 None of this evidence was objected to and should have been.

16 None of this evidence was relevant.

17 None of this evidence came in through any "opened door" policy as it was presented in
18 the D.A.'s case in chief.

19 It did nothing but label Ms. Sommer's as a "slut", a "bad mom" and a "druggie".

20 NONE of that evidence should have been presented.

21

22 **Robi Peters** - Robi Peters was called by the defense to talk about how, after Todd's
23 death, Cindy sounded confused and disoriented at times.

24 Somehow, the prosecution was allowed to cross examine Ms. Peters about how Cindy's
25 child, Bailey had showed up at school with a bruise on his left eye, temple, and forehead and how
26 Cindy had to go to a counselor.

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1 It is difficult to even imagine a more damning piece of evidence - an assertion that Cindy,
2 while Todd was away, had struck her child multiple times and sent him to school with marks and
3 bruises.

4 How this related to Cindy's charge of murder is virtually unanswerable.

5 It clearly painted Cindy as a bad mom, some months or years prior to Todd's death, but
6 its link to establishing Cindy as Todd's killer is non-existent.

7 Ms. Peters was NOT called as a character witness. She was called to give specific
8 observations about Cindy's confusion after Todd's death. Her testimony did NOT open the door
9 to specific bad acts by Cindy in the past and even if they did, as this case had NOTHING to do
10 with child abuse or child neglect this evidence was entirely irrelevant.

11

12 **The defendant's prior deferred prosecution** - When in Florida, Cindy was charged
13 with having left her children unattended at their house for a period of time. She pled guilty to the
14 charge under a settlement statute in Florida which allows for a parent to enter a guilty plea, the
15 court to defer sentencing, the parent to participate in classes and parenting skill improvement and
16 complete a period of non-probation, and, if the parent successfully completes everything, for the
17 charge to be dismissed. The Florida statute specifically directs that the charge, once dismissed,
18 will NOT be considered as a conviction and that the parent can honestly answer that she has not
19 been convicted.

20 That's exactly what happened in this case. The Florida court never sentenced Ms.
21 Sommer, the case was dismissed, but this court still allowed this action to be considered a felony
22 for purposes of impeachment. The conviction was raised both when Ms. Sommer testified and
23 when Ms. Peter's testified.

24 This decision was improper.

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1 **Cindy entered a Wet T-shirt contest; bared her breasts; drank heavily; had parties;**
2 **and slept with four men within two months of Todd's death** - Through some seven witnesses
3 all of this evidence was allowed to be presented to the jury. It was the grossest form of character
4 assassination. It had powerful and shocking impact, but added nothing to a claim that Cindy
5 killed Todd.

6 It cast Cindy with a “Scarlet Letter” as a wanton woman.

7 The court didn't allow this testimony in initially, but after Cindy's mom testified that on
8 the day after Todd's death she saw Cindy lying on her bed, in a fetal position, holding Todd's
9 shirt, the court ruled that the “door had been opened” and allowed all this other evidence in.

10 If this evidence had *any* probative value, it was far outweighed by the unduly prejudicial
11 nature of the evidence.

12 The fact that weeks and months after his death, Cindy was no longer lying in bed, crying,
13 and holding Todd's shirt is so remote and unrelated to Cindy's motive for killing that it is
14 irrelevant.

15 The prosecution made considerable “hay” with this evidence, presenting it just before the
16 jury deliberated, and arguing that it was a “window” into the thinking of Cindy - “it showed the
17 type of person she was”. In essence, the D.A. argued that Cindy killed Todd so she could be free
18 and go party. Of course, we know that Cindy and Todd had a healthy sex life while he was alive,
19 and that they “partied” before, and she was hardly repressed - but so what.

20 She didn't grieve like the D.A. thought she should have? So what?

21 She didn't grieve like a Hollywood script would have depicted? So what?

22 It served its purpose of poisoning the jury toward Cindy, but its relevance was virtually
23 non-existent.

24 To the extent that defense counsel failed to object, in the above areas, his representation
25 was inadequate. To the extent that the court allowed this evidence in over objection, it was
26 contrary to California law.

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CONCLUSION

There are certain cases which go through our criminal courts, where it is clear that through the actions of the parties or even just the confluence of legal events, a “perfect storm” of events result in the accused not getting her “day” in court. The case of Cynthia Sommer is one such case. The initial investigation was handled by Navy investigators with limited criminal experience and where many different events caused there to be months and years of delays, resulting in the loss and/or contamination of the evidence against her. She had a professional and effective D.A. prosecuting her who, perhaps for reasons beyond her control, didn’t provide the defense with key data which could have been used to challenge the highly controversial scientific lab results presented against her. She had a passionate attorney working for her who, perhaps because of that passion, overlooked so many different parts of her case that her defense was greatly hampered. And she had a jury which was constituted of some members who violated their obligations. All in all, she had a trial which resulted in “the jury getting it wrong”.

In order to insure that, before she faces a lifetime of imprisonment, Ms. Sommer receives a trial where her lawyer does everything that should be done on her case, where her experts are allowed to respond to the entirety of the prosecution case, and where only relevant evidence is presented to a jury who’s conduct comports with its obligations, this court should grant this motion for new trial.

Dated: May 14, 2007

Respectfully submitted,

Allen Bloom
Attorney at Law

LIST OF EXHIBITS

- 1
- 2 Exh D-1 Supplement to Alternate Juror’s Lori Cosio Azar
- 3 Exh E Todd’s Autopsy Report performed by Dr. Stephen Robinson
- 4 Exh F *Baselt* - “Dr. Labay’s Big Red Book” with arsenic ranges
- 5 Exh G *Rehling* - the foundation for Baselt’s arsenic ranges
- 6 Exh H *Benramdane* Study
- 7 Exh I Arsenic Species - prepared by Dr. Centeno
- 8 Exh J Dr. Hillary Goodwin Report (will be addended)
- 9 Exh K *Science* article regarding *Daubert* and DNA exonerations
- 10 Exh L Dr. Robinson’s statement re: two sets of Tissue samples at Todd’s autopsy
- 11 Exh M *Jenkins* article re: bacterial conversion from AsB to DMA
- 12 Exh N Bloom declaration regarding Udell statements
- 13 Exh O Memo advising that SPI would not give arsenic to just anyone
- 14 Exh P Grant’s Kills Ants stake cover and Article
- 15 Exh Q Ephedra - Navy found pills; article re: cause of death

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