

## Withheld evidence casts doubt on murder conviction

by Greg Moran

SAN DIEGO - Lawyers for a man incarcerated for 16 years for rape and murder say they have uncovered evidence that could exonerate him - evidence that was not turned over at his 1993 trial by a prosecutor who is now a Superior Court judge in Vista, Calif.

The information is the newest development in the long-running case of Samson Dubria, 44, a doctor serving a sentence of life without the possibility of parole in the killing 16 years ago of traveling companion Jennifer Klapper in a Carlsbad, Calif., motel room.

Dubria's lawyers claim prosecutors deliberately withheld medical evidence from the defense during the high-profile trial, prompting a local judge to order the San Diego District Attorney's Office to explain why the murder conviction should not be overturned.

Prosecutor Tim Casserly, who became a judge three years after the trial, told jurors that Dubria gave Klapper a fatal dose of chloroform so he could rape her. Now defense attorneys say that they have evidence the 20-year-old woman had a heart problem and that the chloroform found during her autopsy could have come from contamination in the Medical Examiner's Office.

In issuing his order to prosecutors last week, Superior Court Judge Richard Whitney pointed to the allegation of withheld evidence, information about the autopsy and the testimony of the deputy medical examiner on the case.

Whitney's ruling is the first step in what could be a long - but significant - process for Dubria.

"In the overwhelming majority of cases, you don't get this far," said Justin Brooks, a executive director of the Innocence Project at California Western School of Law. The organization has won the freedom of five inmates long after they were convicted.

"They've passed a big hurdle. The judge is saying there is some merit to their case," Brooks said.

Dubria's new lawyers, Tracy and Thor Emblem, say Klapper's medical records were in the district attorney's file but were not turned over to the attorneys defending him at trial. The Emblems obtained the documents in April 2006 during their post-conviction investigation of the case.

Dubria, with the backing of his now-elderly parents, has repeatedly appealed his conviction in state and federal courts.

The records show Klapper had a history of heart troubles that had sent her to the emergency room at least three times in 1989, two years before she died.

The condition provides an alternative explanation for Klapper's death and could exonerate Dubria, Tracy Emblem said.

She obtained the records from the District Attorney's Office by using a law passed in 2003 that allows inmates who have been sentenced to death or life without parole to force prosecutors to reopen their case files so they can challenge their convictions.

Withholding information that could show someone is not guilty is a serious error for any prosecutor. Under the law, prosecutors have an obligation to turn over evidence that could show someone is not guilty to defense lawyers before trial.

Casserly declined to comment this week. Judicial ethics discourage judges from commenting on ongoing cases.

Deputy District Attorney Richard Armstrong said his office will file a response to the allegations. He declined to comment extensively because the case is pending. "We disagree with the facts as they are alleged," Armstrong said.

Authorities were puzzled at first by Klapper's death on Aug. 16, 1991. There were no signs of violence, no obvious injuries. The medical examiner could not immediately determine a cause of death.

Dubria and Klapper, both from the East Coast, were in the Carlsbad area on a weeklong sightseeing trip. He consistently told investigators that when he got up to go to the bathroom around 3 a.m., he heard a thud, and found Klapper unconscious on the floor.

He said he tried to revive her and called paramedics, but she died.

Several months later, prosecutors charged Dubria with the rape and murder of Klapper. Tests showed she had small amounts of chloroform in her body. Prosecutors theorized Dubria had used the powerful anesthetic to rape her and in the process accidentally killed her.

Dubria was a medical resident at a New Jersey hospital at the time. He and Klapper met at a hospital in Cincinnati, where he had been an intern and she worked in the medical library. Klapper repeatedly told friends the relationship was platonic and she had not been attracted to him.

Dubria told police the two had sex for the first time on the night of her death. He testified in his own defense at the trial.

The jury found Dubria guilty of first-degree murder during the commission of a rape.

In 1999, his conviction was reversed by a three-judge federal appeals panel, which ruled the verdict was tainted by evidence the jury should not have been allowed to hear. It also found statements by Casserly to be inflammatory and defense work defective.

A larger panel of the court reversed that decision in 2000, but his family has continued to fight. Last week, his 71-year-old mother, Lourdes, was heartened by the Superior Court judge's ruling.

"We are happy and very optimistic," she said. "He was charged falsely with the crime."

The medical records show that Klapper had several episodes of tachycardia - a rapid heart beat - and heart palpitations over a four-month period in 1989. One occurred when she was resting and another "without clear provocation," according to the Emblems' court papers.

Klapper's physician told an investigator for the Emblems that he had turned over her medical file to prosecutors before the 1993 trial. But the issue was not raised by defense lawyer Barry Bernstein at trial.

Citing the litigation, Bernstein declined to comment.

Dubria's appeal was handled by San Diego lawyer Charles Sevilla, one of the top appellate lawyers in the state. Sevilla said he never had the records and did not raise the issue in his appeal.

The court papers filed recently also contain a declaration from Dr. Gregory Reiber, a professor and forensic pathologist who has performed more than 6,500 autopsies.

Reiber said Klapper had damaged heart muscles and he believes she died as a result of a sudden abnormal heart rhythm that led to a heart attack. He said she also suffered from chronically low sodium levels that contributed to her medical problems.

Reiber concluded that the amount of chloroform in Klapper's body was not enough to kill her. None was found in her urine.

The Emblems contend in court papers that the chloroform came from contamination inside the medical examiner's lab, which uses the chemical for some procedures.

At trial, the jury was told tissue samples for toxicology tests were stored in glass containers. But the Emblems say former workers in the office since have said samples were stored in more permeable plastic containers - which could more easily lead to contamination.

The Emblems' motion is also critical of the work of Dr. Leena Jariwala, the deputy medical examiner who handled the case and determined Klapper died of chloroform intoxication.

It contends Jariwala did not review Klapper's medical records before concluding the cause of death. It also says she did not conduct a microscopic examination of Klapper's heart that could have shown the heart damage, and she misled the jury on this point when she testified.

Jariwala could not be reached for comment last week. The court papers say she refused to be interviewed by Dubria's lawyers about the case.

Whitney gave prosecutors a month to respond.

The Emblems have been successful in appealing long-closed cases.

They are the lawyers who collected new medical evidence that led to the release in 2004 of Kenneth Marsh. He had spent 21 years in prison for a murder he insisted he did not commit.

"If you are the prosecutor, you have to turn this over," Tracy Emblem said of medical documents. "The evidence in this case is as compelling as any other case I've seen."

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