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Second trial in pool death

*Prosecutors trying for less in
drowning of a Chinese bride*

By Millie Lapidario
RECORDER STAFF WRITER

The case of the Cupertino woman found floating dead in her backyard swimming pool in 2003, just weeks after moving from Shanghai to live with her new husband, reached a verdict once. But it wasn't a clean ending.

A Santa Clara County prosecutor tried Ying Deng's husband, Jason Cai, for murder last year. But the jury acquitted Cai of first- and second-degree murder, and hung on voluntary manslaughter. After spending three years in jail, Cai was released.

But the case isn't over. Cai, 48, will face a second trial in the next few months — this time for voluntary manslaughter, a charge neither the prosecutor nor the defense wanted the jury to consider at the first trial. Despite objections from attorneys on both sides, Superior Court Judge Diane Northway had instructed jurors on voluntary manslaughter, and they hung 8-4 on that charge, with the majority in favor of the defense.

What makes this case especially compelling to legal experts — and especially frustrating to the defense — is Deputy District Attorney Jeffrey Rosen's decision to go forward with the voluntary manslaughter argument after explicitly telling the jury in the first trial that the lesser charge didn't apply in Cai's case.

The prosecution's decision to retry the case has already had Cai's attorneys crying double jeopardy, and claiming due process violations and improper jury instructions. But Judge Northway dismissed their mo-

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JASON DORN

GEARING UP: San Francisco defense lawyer Shari Lynn Greenberger's client refused a plea deal in the death of his wife, saying he is innocent. A second trial is expected.

Pillsbury cut from case over conflict

*Judge delays decision
on refunding of fees*

By Zusha Ellinson
RECORDER STAFF WRITER

A judge kicked Pillsbury Winthrop Shaw Pittman off a bankruptcy case for a conflict that may end up costing the firm its \$4 million in fees.

Citing a "complete breakdown of creditor confidence" due to a conflict the firm had failed to disclose, San Jose U.S. Bankruptcy Judge Marilyn Morgan granted a motion Monday to disqualify Pillsbury in the bankruptcy case of SonicBlue, an electronics maker that went belly up in 2003. She also ordered the appointment of a Chapter 11 trustee, but put off any discussion of disgorging the fees Pillsbury has earned as debtor's counsel.

A 2002 letter promised three hedge funds who were investing in a \$75 million bond issue by client SonicBlue that they'd be repaid in full even if SonicBlue declared bankruptcy. Lawyers for Pillsbury call that assurance a "scrivener's error," but in September the senior note holders threatened to sue unless the firm indemnified them for their full investment. The U.S. trustee said in court papers that Pillsbury was conflicted because "for every dollar the senior note holders' claim was reduced, [Pillsbury's] corresponding exposure would increase."

The conflict didn't come to light until

Manslaughter charge leads to double jeopardy concerns

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tions, the Sixth District Court of Appeal wouldn't touch their case and just last week, the California Supreme Court rejected their petition for review.

At the original trial, Rosen had argued Cai was guilty of second-degree murder in his closing arguments.

"We're thinking, 'Wait a second, [the prosecution] disavowed this theory,'" said Cai's attorney, Shari Lynn Greenberger. "Why are they going to proceed, and are they allowed under the law to proceed under this different theory?"

Rosen declined to answer whether new evidence or witnesses had surfaced since the last trial, explaining he could not comment on pending cases.

"The evidence showed he murdered her," he said.

A CHINESE LACI PETERSON

To some observers, Deng's story seemed a cautionary tale of what could happen to a naive immigrant woman who married a domineering U.S. citizen to live the American dream.

Deng, a Shanghai nightclub singer, had married Cai, a Chinese American IBM software engineer, after dating long-distance for two years. Her murder attracted heavy coverage from the Chinese press, which considered the victim the Chinese community's version of Laci Peterson.

While the defense argued Deng's death was an accident that didn't involve Cai, the prosecution painted a picture of an unhappy marriage that, at the very least, directed suspicion toward the husband. The newlyweds slept in separate bedrooms, ate meals separately — and in Deng's last days, she seemed to be looking to date other men on the Internet, according to the prosecution's trial brief. Her body was also heavily bruised.

The prosecution has the upper hand in the second trial, some criminal law experts say. Unlike with murder, voluntary manslaughter — an unlawful killing upon a sudden quarrel or heat of passion — does not require malice. The prosecution only has to prove Cai committed an act that caused Deng's death, and that when he acted, he intended to kill her, according to the Judicial Council of California's Criminal Jury Instructions.



RECORDER FILE (1994)

GET TO TRIAL: Santa Clara Judge Diane Northway denied defense efforts to halt a second prosecution of Jason Cai.

Furthermore, the defense has already laid out all its cards, a reality which Greenberger and her co-counsel, J. Tony Serra, pointed out in their petition to the California Supreme Court. The two San Francisco solos say they don't plan on introducing new evidence.

"A retrial gives the prosecution the opportunity to respond to expert testimony presented at the first trial that perhaps they weren't fully prepared for," said Gerald Uelman, a professor at Santa Clara University School of Law.

But the defense still has its strengths. In the first trial, no witnesses testified that they saw Deng die. "If there are no witnesses, [the prosecutor's theory] may be difficult to prove," Uelman said.

And the combination of the murder acquittal, and the jury's heavy tilt toward the defense on the voluntary manslaughter charge, had Santa Clara University School of Law professor Ed Steinman thinking Cai has a good chance of never being found guilty.

According to Cai's attorneys, Rosen has offered Cai credit for time served in exchange for a plea agreement on voluntary manslaughter. Rosen would not confirm

this, saying it would be inappropriate to have settlement discussions in the newspaper.

But Greenberger and Serra say their client is innocent and will not accept a plea. If Cai is found guilty of voluntary manslaughter, he faces a sentence of three, six or 11 years in prison. Deng's mother also has filed a wrongful death lawsuit against Cai, which is trailing the criminal case.

HOW DID SHE DIE?

Cai had called police that June evening in 2003, saying his wife was missing, according to court filings.

In the first trial, the prosecution argued Cai attempted to cover up the murder. Deng's body was found in the pool, which was covered halfway with a tarp. A detective found Deng's wet blood stain

ly.

The prosecution did not spell out how Deng died as clearly as the defense's expert witness did; instead, the person responsible for Deng's death was the government's main focus, Liang recalled.

The Santa Clara County chief medical examiner who prepared Deng's autopsy, Gregory Schmunk, had termed Deng's cause of death as undetermined in his initial report with a caveat that he wanted further investigation, Greenberger said.

Schmunk, who was no longer working in Santa Clara County during the trial last year, later testified he was persuaded the cause of death was an accident based on the additional investigation done after his initial report, said Greenberger and Sara Zalkin, another defense attorney who represented Cai in the first trial.

In the prosecution's brief for the first trial, Rosen uses the testimony of another forensic pathologist and medical examiner, Judy Melinek, who worked under Schmunk. She testified Deng's injuries were consistent with someone holding her down in the water and hitting the top of her head, according to the prosecution's court papers.

Greenberger points out Melinek based her conclusions on Schmunk's report — not the actual body. But the prosecution's trial brief adds that Melinek also reviewed sheriff's reports, autopsy photos and microscopic sections removed from the body.

The defense's expert witnesses, however, constructed another theory as to how Deng died. Recalling testimony from Dr. Michael Laufer, Greenberger said Deng had dropped an earring in the pool and was standing at the edge trying to pick it up with a long pole. Deng then fell, hit her head on the diving board and struggled with the pool tarp and scraped against a step in the pool, Greenberger said.

The May verdict didn't close the case for the Chinese press, according to Liang.

"People think [Jason Cai] is mysterious," she said, "and this case is mysterious, too."

Attorneys will set a date for Cai's second trial this week.

Millie Lapidario's e-mail address is mlapidario@alm.com.

Perhaps what left the jury unconvinced that Cai was a murderer was the lack of a solid explanation about how the murder was actually carried out.

in the house, and criminalists later discovered more blood in other parts of the house.

Perhaps what left the jury unconvinced that Cai was a murderer was the lack of a solid explanation about how the murder was actually carried out.

"The prosecutor didn't present a scenario," said Pearl Liang, a reporter for *Sing Tao Daily* who covered the first trial close-