

1 JAMES S. THOMSON, ESQ. - SBN 79658
Law Offices of JAMES S. THOMSON
2 819 Delaware St.
Berkeley, CA 94710
3 (510) 525-9123
james@ycbtal.net

4 JOHN T. PHILIPSBORN, ESQ. - SBN 83944
5 Law Offices of JOHN T. PHILIPSBORN
507 Polk Street, Suite 350
6 San Francisco, CA 94102
(415) 771-3801
7 jphilipsbo@aol.com

8 Attorneys for Defendant DENNIS CYRUS, JR.

9

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,)
13 Plaintiff,)
14 vs.)
15 RAYMON HILL, et al.,)
16 Defendants.)
17)
18)
19)

Case No. CR-05-00324-MMC
DECLARATION OF JAMES THOMSON IN SUPPORT OF MOTION TO RESET COMMENCEMENT OF EVIDENCE TO PERMIT EFFECTIVE ASSISTANCE OF COUNSEL AND EFFICIENT CASE MANAGEMENT
Date: January 9, 2009
Time: 2:00 PM
Dept: Hon. Maxine M. Chesney

20 I, JAMES THOMSON, declare that:

21 **Background**

22 1. John Philipsborn and I represent Dennis Cyrus Jr. in this capitally charged
23 case. The government is seeking the death penalty, having filed its Death Notice on
24 November 1, 2006. (Doc #266).

25 2. On January 22, 2007, the Government announced that it would pursue death
26 as to Mr. Cyrus (Doc # 389), and not seek death against Aquil Peterson. (Doc #386). On
27 January 24, 2007, in open court, the Government confirmed that it was not withdrawing
28 the death notice as to Mr. Cyrus. (Doc # 391).

1 h. The completion of discovery generally; and as to the government experts, in
2 particular, because the government provides more scientific evidence, defense counsel will
3 have to consult with forensic scientists on drug, firearm and crime reconstruction matters;
4 and

5 i. The litigation of additional trial and jury related motions;

6 j. The start and completion of the investigation into the confidential witnesses
7 to be disclosed. At this point, the defense does not know how many witnesses will be
8 revealed, nor how many documents will be turned over, nor how many additional
9 witnesses will be uncovered or how many additional documents will need to be acquired.
10 Receiving records from the Hall of Justice can take weeks, and it then will take significant
11 time to locate witnesses and interview them.

12 7. Mr. Cyrus' defense counsel have been diligently preparing this case, but at
13 this juncture, despite our best efforts, counsel concur that Mr. Cyrus' case is not ready to
14 proceed at this time. The Cyrus defense cannot yet make informed decisions on both guilt
15 and penalty defenses. And, significantly, at this time, jury selection cannot be conducted
16 in an informed manner. Counsel cannot make informed cause challenges and/or exercise
17 peremptory challenges at this stage of readiness.

18 8. Resetting jury selection and extending the date that evidence is set to
19 commence is warranted and required, not only because of the constitutional issues, and
20 protections involved in the litigation of a death penalty case, but also because the resetting
21 of this matter is permitted under 18 U.S.C. §3161(h)(8)(A) and (B), in that the ends of
22 justice would be served by so doing as the case is complex, and the failure to do so would
23 deny Mr. Cyrus the reasonable time necessary for effective preparation.

24 **Settlement.**

25 9. Since the government's decision to seek and pursue death against Mr. Cyrus,
26 many circumstances have changed in this case, and now, in the (soon to be) administration
27 of the Department of Justice. The changed matters need to be fully prepared and presented
28 to the government in hopes of reaching a resolution of this case.

1 10. The Cyrus defense is aware that the Government will not take part in the
2 Court's ordered settlement conference. That fact is very troubling to the defense and
3 should be of grave concern to the Court. A meaningful settlement conference would go a
4 long way in assisting this process. A one sided "talking to" will hardly achieve a just
5 result. Nevertheless, defense counsel are required to, and we intend to, pursue settlement
6 even if there is a reluctant prosecutorial agency on the other side. See *ABA Guidelines for*
7 *the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 10.9.1.E.

8 11. In order to accomplish settlement, it will take the defense additional time to
9 prepare a proper settlement packet. The Cyrus defense has been diligently working with
10 experts and others to ready this aspect of the case.

11 12. Thus, by having the Court order the parties to attend a settlement conference,
12 counsel are hopeful that settlement can be advanced, and the case can be resolved. Mr.
13 Cyrus needs the opportunity to finish preparing materials that will detail the change in
14 circumstances and the reasons to settle this case. This task should be completed by the end
15 of January 2009.

16 **Extent of Trial Case.**

17 13. The government will be required to call a substantial number of witnesses at
18 the guilt phase of the trial. The crimes span a fourteen year period, 1994 through 2005.
19 There are three homicides, four attempted homicides, and a conspiracy to commit murder
20 alleged.

21 14. In Count One, thirty-two Overt Acts are alleged. In Count Two, Fifteen
22 RICO Acts are alleged. Significantly, RICO Act One is itself a thirty-two act conspiracy.
23 Additionally, fourteen other Counts are personally alleged against Mr. Cyrus. In sum,
24 there are thirty-six (36) separate crimes to be tried in this case.

25 15. The Cyrus defense does not know who, or, even the number of government
26 witnesses that, will be called at trial because the government has not provided a witness
27 list. Government Pretrial Memo, at 37. (Doc #691). The defense knows that the
28 government intends on using at least twenty-three (23) experts at trial in the guilt phase.

1 And, finally, after defense persistence, on December 24, 2008, the government provided a
2 list of ninety-nine (99) potential law enforcement witnesses. The government's revised
3 exhibit list includes 441 exhibits. (Doc #765). The government has not filed a pretrial
4 memo or exhibit list as to Mr. Cyrus' upcoming trial. The defense has no governmental
5 witness list less than 30 days prior to the intended commencement of trial.

6 16. Accordingly, the Cyrus defense does not know who, or the number of guilt
7 phase witnesses it intends to call. The defense does not know what to rebut because it
8 does not know what will be presented by the government.

9 17. Thus, the Cyrus defense has been diligently preparing this capital case for
10 trial, it is not ready at this time. The Cyrus defense has not been able to adequately
11 prepare despite counsel's best efforts.

12 18. At this point, the guilt phase defense experts have reviewed records
13 and laboratory materials regarding evidence and have assisted us in generally formulating
14 a non mental state guilt phase defense case. If the government turns over additional
15 scientific evidence, counsel will have to consult with our experts on drugs, firearms, DNA
16 and other matters. As of this date, counsel are unaware of the status of further disclosures
17 of this evidence.

18 19. As to penalty matters generally, the Cyrus defense is conducting the
19 investigation into the statutory and non-statutory aggravation factors and special findings
20 in the blind. Since the defense has not been provided a basis for some of the allegations,
21 we are continuing to try to identify, locate and interview the relevant witnesses. The
22 defense mitigation investigation is continuing as well but there is much to do as detailed
23 later.

24 20. At this point, the defense is still assessing what additional and necessary
25 experts to retain for penalty issues. The defense is still assessing Mr. Cyrus' mental and
26 emotional functioning. Importantly, we do not have a full picture of the social history or
27 institutional mitigating circumstances that affected Mr. Cyrus as he was raised and
28 developed in a variety of situations.

1 **Confidential Witness Matters.**

2 21. As it stands now, counsel for Mr. Cyrus will receive the materials on
3 confidential witnesses on January 12, 2009 (assuming that a protective order can be agreed
4 upon). The Cyrus defense will have to gather records, locate witnesses, and interview
5 witnesses during the jury selection. This cuts the real time to prepare these matters
6 significantly. That state of affairs will cause delay during the trial. The Cyrus defense has
7 previously noticed the Court and the parties of the difficulties in getting records from the
8 Hall of Justice, where most records will be housed.

9 **Client Examinations**

10 22. [*] [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED] [*]

17 23. [*] [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED] [*]

23 24. [*] [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED] [*]

27 25. [*] [REDACTED]
28 [REDACTED] [*]

1 have requested them from the government on numerous occasions. To date we have
2 sworn reports on only 12 of the officers and at least 3 of those (Officers Ghiselli, Hanley,
3 and Lozada) are known to be incomplete. Without a sworn report, trying to determine the
4 disposition of a sustained complaint requires searching OCC records month by month.
5 The defense has so far found only 12 dispositions, and that took a little more than 6 hours.
6 As tedious as the process might be, the results are necessary and worth the time and effort.
7 While some allegations were ultimately determined to have been proper conduct, others
8 were found to be serious enough to warrant charges being filed with the San Francisco
9 Police Commission. To be both fair and accurate, the Cyrus defense has to make this
10 effort, despite the fact that it increases the time to investigate each complaint.

11 31. [*] [REDACTED]

12 [REDACTED] [*]

13 **Status of Case Investigation.**

14 32. Here, the two multi-year conspiracies, three killings and attempted killings,
15 and associated counts require a thorough defense investigation and the reasoned
16 consultation with experts. This task has been slowed considerably by the length of time
17 that has passed since the 1990's crimes and by the withholding of discovery, together with
18 the redaction of witness names and addresses, and the timing in providing confidential
19 related information.

20 33. The Government's decision not to provide evidentiary detail regarding the
21 factors in aggravation, or provide a narrative of the three homicides has required the Cyrus
22 defense to painstakingly attempt, through contacts in the community, to obtain information
23 concerning what 'motive' could be attributed to Mr. Cyrus for the three homicides given
24 that he apparently did not know Mr. Hearn or Mr. Jimmerson. While the Government has
25 verbally informed the defense that it believes that Mr. Cyrus did know Mr. Mitchell, the
26 Government's description of the motive for the killing (a dispute over drug territory), is
27 insufficient to allow focused investigation, given that the source of information about the
28 motive is still being withheld.

1 34. As this Court is aware from the defense funds requests seeking the
2 appointment of experts and investigators, the case in mitigation is still at the formation
3 stage because we do not know the government's guilt case well enough to address it at this
4 juncture in the case, and we do not know the government's penalty evidence beyond the
5 statements in the notice in aggravation that simply reference categories of information.
6 The Government has not been compelled to reveal the evidentiary basis for the
7 government's theories of future dangerousness, the heinous, atrocious and cruel allegation
8 and the allegation of lack of remorse. Without knowledge of this evidence, the defense is
9 essentially running in place.

10 35. Thus, defense investigation and expert assistance is ongoing and unfinished.
11 The defense is making contact with a variety of persons in Mr. Cyrus' community, and
12 obtaining social history information. The defense is also making a detailed review, and
13 investigation, of institutional history, in addition to the review of Mr. Cyrus' complex
14 social history. This includes, of course Mr. Cyrus' juvenile and adult placements. All of
15 this work is time-consuming and will require additional time to complete.

16 **Guilt Phase Investigation.**

17 36. The Government's decision not to disclose documents in its possession and
18 this Court's order allowing such a procedure has caused the investigators to spend time on
19 tasks such as door-to-door canvassing in efforts to locate unknown witnesses from
20 incidents that occurred more than a decade ago. As a result, the Cyrus defense has
21 traveled across the country, from the [*] [REDACTED]
22 [REDACTED] [*] trying to locate individuals.

23 37. [*] [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED] [*]

28 38. [*] [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [*]

5 39. [*] [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED] [*]

10 40. [*] [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED] [*]

15 41. [*] [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED] [*]

24 42. Also, due to the government's stated position that at least ninety-nine
25 (99) officers are to be called at trial, the Cyrus defense needs to attempt to interview all
26 potential law enforcement witnesses for whom the defense needs to prepare. [*] [REDACTED]

27 [REDACTED]

28 [REDACTED]

1 [REDACTED] [*]

2 **Penalty Investigation.**

3 43. The defense will have a substantial number of witnesses to call at the
4 penalty phase, if that stage is reached. Mr. Cyrus' family is large. There are a number of
5 witnesses that need to be interviewed about Mr. Cyrus' life. The process of assembling
6 Mr. Cyrus' social history is progressing. [*] [REDACTED]

7 [REDACTED]

8 [REDACTED] [*]

9 44. Mr. Cyrus comes from a relatively large family that is spread out around the
10 San Francisco Bay Area. These witnesses need to be reinterviewed and then ultimately
11 prepared by counsel for testimony. Many persons still need to be interviewed in an effort
12 to assemble Mr. Cyrus' complete social history to explain his life growing up in the Page
13 Street area in San Francisco, [*] [REDACTED]

14 [REDACTED] [*]

15 **Conclusion.**

16 45. While the preparation of this case has progressed, the progress has not been
17 sufficiently extensive for counsel to be satisfied that the case is ready to commence jury
18 selection or to commence trial effectively prepared as contemplated by pertinent standards
19 and case law. Within the meaning of *Williams v. Taylor*, 529 U.S. 362, 396 (2000), the
20 Cyrus defense has not yet fulfilled its obligation to have conducted a sufficient guilt phase
21 or a complete investigation of Mr. Cyrus' background due to factors outside its control.

22 46. There are several areas in which the Cyrus defense will not have completed
23 our investigation sufficiently by the time of evidence presentation to allow effective cross-
24 examination of the Government's guilt phase witnesses on the one hand, or the
25 presentation of responsive defense witnesses on the other.

26 47. As to the matters redacted from this declaration, which relate to the case
27 preparation as a whole, and as to my own work. Both Mr. Philipsborn and I are prepared
28 to explain in detail *in camera* the efforts undertaken by the defense regarding the Cyrus

1 defense efforts as a whole, or by me in particular. Both Mr. Philipsborn and I are also
2 prepared to go through each incident in the Superseding Indictment, including substantive
3 charges, appended Overt and Racketeering Acts, and provide the Court (*in camera*) an
4 inventory of what has been omitted, or redacted, from the discovery; what efforts the
5 defense has undertaken to obtain the information notwithstanding the omissions, and the
6 current status of the defense investigation. Counsel can do the same with respect to the
7 status of the government's experts exam and our follow-up work, the mitigation case, the
8 case in aggravation and to our tasks in particular.

9 48. I know of the professional responsibilities incumbent on me in helping to
10 represent Mr. Cyrus. I know of my ethical responsibilities as well. I know that both Mr.
11 Philipsborn and I are, under the circumstances of this case and with our professional
12 responsibilities in other cases that predate our appointment in this case, working diligently.
13 I also know that the investigation, development of guilt phase theories and mitigation, and
14 the preparation of some of the legal work has advanced to the point at which we are
15 rendering effective assistance to Mr. Cyrus in all areas. However, there are other areas of
16 necessary preparation of this case that have not sufficiently advanced at this point for us to
17 make informed strategic and tactical decisions before selecting a jury in this case.

18 49. I believe that I have an ethical and legal duty to the Court, and to Mr. Cyrus,
19 to make the above opinions and information known. I have called ready to try a capital
20 case nine (9) times. I know what it takes to say you are ready both legally and ethically.
21 And, both Mr. Philipsborn and I knows that, this case is not ready at this time despite our
22 best effort.

23 I declare under penalty of perjury the foregoing is true and correct, except as to
24 those matters alleged on information and belief and as to those matters I believe this
25 Declaration to be true and accurate.

26 Executed this 8th day of January, 2009, at Berkeley, California.

27 /s/ James Thomson

28 JAMES THOMSON