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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
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO RESET
COMMENCEMENT OF
EVIDENCE TO PERMIT
EFFECTIVE ASSISTANCE OF
COUNSEL AND EFFICIENT CASE
MANAGEMENT
Date: Jan. 9, 2009
Time: 2:00 p.m.
Dept: Hon. Maxine M. Chesney,
District Judge

20

21 I. INTRODUCTION

22 This memorandum supports defense counsels' motion to reset the commencement
23 of this trial to ensure that counsel can provide effective assistance of counsel to Mr. Cyrus,
24 not only in their preparation of trial, but also in seeking to resolve this case if at all
25 possible. Resetting the commencement of evidence will also allow efficient case
26 management. While the defense understands that the Court has shown indulgence because
27 of certain problems in the defense's ability to timely prepare this case, the reality is that the
28 meat of the Government's evidence against Mr. Cyrus can only be understood in relation

1 to the acts and statements attributed to him by a series of witnesses who have cooperated
2 in varying ways with the Government. This evidence will not reach the defense until
3 January 12, 2009 on the current schedule.

4 Defense counsels' obligations in preparing this case are described in the 2003 *ABA*
5 *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty*
6 *Cases* (and the 2008 *Mitigation Supplement*) as critical areas of defense performance.
7 These obligations include: the duty to investigate (Guideline 10.7); the duty to assert legal
8 claims (Guideline 10.8); the duty to seek an agreed-upon disposition (Guideline 10.9.1);
9 the duty of trial preparation overall (Guideline 10.10.1); the duty to prepare the defense
10 case concerning penalty (Guideline 10.11). These 2003 *Guidelines* are the definitions that
11 will be used to assess the effectiveness of counsel in death penalty cases. Lawyers
12 defending capital cases in California are familiar with the *Guidelines* because of their
13 repeated mention in publications, and training programs, that cover the duties of death
14 penalty cases defenders. There is no doubt that the *Guidelines* define what Mr. Cyrus's
15 defense lawyers are required to do in his defense.

16 The Court has been persuaded by the Government that the short period of time
17 separating disclosure of hundreds of pages of 'sensitive witness' materials and the
18 commencement of trial, during which period of time the Court and counsel are selecting
19 the jury, is sufficient to provide the defense a fair and full opportunity for defense counsel
20 to prepare their defense of Mr. Cyrus. This scheme is unrealistic, and the defense renews
21 its objection to it.

22 In addition, Mr. Cyrus falls in that tragically select group of persons who have been
23 targeted for death penalty prosecution - and whose defense team is seeking to find a way,
24 as required by ABA Death Penalty *Guidelines*, Guideline 10.9.1, to seek an agreed-upon
25 disposition. The Government has made a record of its restrictions in the settlement
26 process, and its position on settlement conferences.

27 In sum, this is the rare capital case in the Northern District of California that is
28 headed for trial. It is moving in that direction without defense counsel being sufficiently

1 prepared to provide effective representation, particularly in that defense counsel are having
2 to investigate critical information ‘on the run’ while the case is proceeding into trial.

3 **II. DISCUSSION AND AUTHORITIES**

4 Defense counsel “... must, at a minimum, conduct a reasonable investigation
5 enabling [them] to make informed decisions about how best to represent [their] client.”
6 *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). This paraphrases the position
7 taken by the Seventh Circuit in *Birt v. Montgomery*, 709 F.2d 690, 701 (7th Cir. 1983)
8 that: “Essential to effective representation... is the independent duty to investigate and
9 prepare.” This duty has been at the heart of the *ABA Standards for Criminal Justice*
10 through their various editions.¹ Standard 4-4.1 describes the duty of lawyers to conduct
11 prompt investigations into the circumstances of the case and to explore all avenues leading
12 to facts relevant to the merits of the case and the penalty in the event of conviction. (*ABA*
13 *Standards, the Defense Function*, Standard 4-4.1 (a)). As a Commentary to Standard 4-4.1
14 points out

15 ... without adequate investigation the lawyer is not in a position
16 to make the best use of such mechanisms as cross-examination or
17 impeachment of adverse witnesses at trial or to conduct plea
18 discussions effectively. The lawyer needs to know as much as
19 possible about the character and background of witnesses to take
20 advantage of impeachment. If there were eyewitnesses, the lawyer
21 needs to know conditions at the scene that may have affected their
22 opportunity as well as their capacity for observation.

20 The duties discussed by the *ABA Standards* are echoed in the *Model Rules of*
21 *Professional Conduct* which are also published by the ABA (and are distinguished from

23 ¹The *ABA Standards* are applicable to lawyering in the criminal court system, applicable
24 to the prosecution and defense functions. Last published as a whole in 1993, they are subject to
25 on-going interpretation and commentary. The *ABA Guidelines for the Appointment and*
26 *Performance of Defense Counsel in Death Penalty Cases* were first published in 1989. A
27 considerably expanded set of *Guidelines* was published in 2003, with cross references to a
28 number of sources of professional responsibility and practice for criminal case defenders, and
with extensively annotated commentaries which draw heavily on the decisions of reviewing
courts in capital cases. In 2008, a *Mitigation Supplement* was published by the ABA, covering
the development and presentation of mitigation in capital cases.

1 the California Rules of Professional Conduct). The *Model Rules* were adopted by the ABA
2 in their present form in 2002. According to them, the lawyer who undertakes
3 representation must do so competently with "... the legal knowledge, skill, thoroughness,
4 and preparation reasonably necessary for the representation." (*Model Rules of*
5 *Professional Conduct*, Rule 1.1).

6 The 2003 *ABA Guidelines for the Appointment and Performance of Defense*
7 *Counsel in Death Penalty Cases* describe the obligation to investigate as follows:
8 "Counsel at every stage have an obligation to conduct thorough and independent
9 investigations relating to the issues of both guilt and penalty." (Guideline 10.7(A)). In the
10 Commentary to the *ABA Guidelines*, the authors note: "This duty is intensified (as are
11 many duties) by the unique nature of the death penalty, has been emphasized by recent
12 statutory changes, and is broadened by the bifurcation of capital trials."

13 In *Strickland v. Washington*, 466 U.S. 668, 690-691 (1984), the United States
14 Supreme Court made reference, in its description of source materials pertinent to the basic
15 duties of defense counsel, to the then-recent article by Professor Gary Goodpaster entitled
16 *A Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. Law
17 Rev. 299 (1983). Professor Goodpaster's article was one of the first detailed guides to
18 capital defense practice published in the aftermath of the restoration of the death penalty,
19 particularly in jurisdictions which used "weighing" systems that balance aggravating
20 factors against mitigating ones. Professor Goodpaster noted that a number of investigative
21 and preparative tasks are incumbent on capital case defenders particularly where the
22 defense is not only preparing the guilt phase, but also preparing its case in mitigation on
23 the one hand, and its rebuttal to aggravation on the other.

24 The theme of the just-described article was continued when in 1989 the American
25 Bar Association published its first set of *Guidelines for the Appointment and Performance*
26 *of Counsel in Death Penalty Cases*. Those *Guidelines* were much more basic, and the
27 explanatory commentaries far less detailed, than the above-described 2003 *Guidelines* with
28 the 2008 *Mitigation Supplement*. In 1989, because of the unevenness in the indigent

1 defense systems throughout the United States, the *Guidelines* addressed systemic issues, as
2 well as issues bearing on the representation of individual clients. It was in part because of
3 the development of the law throughout the United States (as evidenced in the
4 Commentaries appended to each of the 2003 *Guidelines*), that the 2003 *Guidelines* state a
5 highly detailed set of professional obligations incumbent on capital cases defenders that
6 are generally agreed upon in the majority of jurisdictions that employ the death penalty.

7 This case is unlike many capital cases which involve one homicide alleged to have
8 been committed by an individual whose criminal history is the principal basis for
9 qualification/eligibility for the death penalty. Mr. Cyrus' case involves a Superseding
10 Indictment alleging intertwined, and complex, crimes together with three capital murders
11 and one attempted murder, together with drug possession charges, and weapons
12 use/possession charges associated with various VICAR counts. Crime facts will play an
13 extremely important part in Government's presentation. "The penalty phase of a capital
14 trial is undertaken to assess the gravity of a particular offense and to determine whether it
15 warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt
16 or innocence of capital murder." *Monge v. California*, 524 U.S. 721, 731-32 (1998). The
17 guilt case has required, and is requiring, extensive investigation efforts by the defense.

18 At the same time, the Government has alleged factors in aggravation that require
19 the defense to prepare a case in rebuttal that is related to crime facts on the one hand, and
20 Mr. Cyrus' history of juvenile and adult institutionalization on the other. This is
21 particularly true of the future dangerousness allegation which, given that it has survived
22 several facial attacks by the defense challenging its constitutional validity and sufficiency,
23 has both common sense and esoteric definition. The Government is of the view that lack of
24 remorse and factors inherent in the commission of the crimes charged in the Superseding
25 Indictment play a part in defining Mr. Cyrus's future dangerousness, whereas the defense
26 believes that future dangerousness requires an assessment of how an individual has
27 behaved during recent incarceration. Thus, the defense needs to address all of the likely
28 characteristics of future dangerousness as these may apply to this case.

1 The United States Supreme Court determined in *Williams v. Taylor*, 529 U.S. 362,
2 393 (2000) that a defendant "... has a right - indeed, a constitutionally protected right - to
3 provide the jury with ... mitigating evidence." In the current case, part of the defense's
4 handicap, which this Court has been told about repeatedly, is the procedure permitting the
5 Government to shield categories of disclosures. The Government has repeatedly argued
6 that the legitimacy for the delay in disclosures is provided by the Ninth Circuit opinion in
7 *U.S. v. Fort*, 472 F.3d 1106 (9th Cir. 2007), *rehearing denied* 478 F.3d 1099 (9th Cir.
8 2007). But as the defense has attempted to point out, *Fort* does not deal with delays in
9 disclosures based on asserted security issues - it held that this Court's Judge William
10 Alsup incorrectly ruled that the Government be sanctioned for failing to turn over
11 unredacted local police reports, which the Ninth Circuit held qualified as case reports
12 under Federal Rule of Criminal Procedure 16(a)(2). The Government's position here (as
13 in *Fort*) is that the danger to certain classes of its witnesses permits the withholding of
14 disclosures under Rule 16(d). Clearly, as both this Court, and Judge Alsup, have noted,
15 the Government can withhold certain categories of disclosure, but the Court can use its
16 inherent power in relation to discovery. See, generally, *U.S. v. Grace*, 526 F.3d 489, 513-
17 516 (9th Cir. 2008) (*en banc*).

18 Regrettably, the Ninth Circuit's ruling in *Fort*, *supra*, did not address the tension
19 between the procedural rules related to the discovery process which allow the Government
20 the prerogative to decide to turn over certain categories of disclosures, while defense
21 counsel are required to provide effective representation, and the trial courts are obligated
22 to ensure that the constitutional rights of accuseds, particularly those facing the death
23 penalty, are protected. Clearly, once a case is in trial, and witnesses are testifying, the
24 Court has the power to order categories of statements produced, and has the case
25 management prerogative to provide delays when necessary to allow defense investigation.

26 Here, the Government is providing critical disclosures shortly prior to trial, leaving
27 the defense little opportunity to review and digest the discovery, and to conduct follow-up
28 investigation - while the opportunity to integrate evidence bearing on penalty issues into

1 its case preparation prior to trial is practically non-existent, especially when the defense (as
2 indicated in its witness list) may have in mind working with experts during the penalty
3 hearing.

4 In sum, there is insufficient time for defense counsel to adequately and effectively
5 prepare guilt and penalty defenses, given that evidence central to the Government's case
6 against Mr. Cyrus is being provided shortly before trial; during the jury selection process;
7 in advance of the disclosure of Government witness lists; and at a time when defense
8 counsel can devote only limited time to trying to review and digest the information to
9 organize suitable investigation and legal responses.

10 **The duty to assert legal claims**

11 According to the 2003 *ABA Guidelines* (Guideline 10.8), counsel must consider all
12 legal claims potentially available, and where legal claims have been researched and
13 assessed, should "... present the claim as forcefully as possible, tailoring the presentation
14 to particular facts and circumstances in the client's case and the applicable law in the
15 particular jurisdiction." (Guideline 10.8(B)(1)).

16 The Commentary to this rule indicates that it is one of the 'most fundamental
17 duties' of lawyers defending capital trials to raise legal issues. Moreover, counsel have to
18 do so in terms of the constitutionally rooted protections at issue in order to avoid issue
19 preclusion on appeal. See, generally, *McCleskey v. Zant*, 499 U.S. 467 (1991) where a
20 Sixth Amendment claim made on appeal was denied because at the trial court level
21 counsel had only raised a Fifth Amendment issue.

22 Lawyers defending capital cases must raise the legal issues in terms of the current
23 state of the law. In that sense, counsel are expected (as is pointed out in the *ABA*
24 *Guidelines*) to know the "... tools to construct their constitutional claim[s]..." *Engle v.*
25 *Isaac*, 456 U.S. 107, 133 (1982).

26 According to the current format, for the proceedings to take place, defense counsel
27 are to: participate in an effective manner in jury selection; direct an investigation into the
28 heart of the Government's guilt phase case; obtain an understanding of how new

1 disclosures affect the penalty phase, assess where the new evidence may constitute
2 evidence in aggravation, and direct an investigation of rebuttal; and raise legal claims so as
3 to protect the record in this matter, and to assert Mr. Cyrus' rights. Given the time
4 constraints, it is simply not possible to do all of this effectively. Moreover, it is not
5 possible to do it timely, since the trial is due to begin as soon as jury selection has been
6 completed.

7 **The duty to pursue a negotiated disposition**

8 Counsel have an obligation to seek an agreed-upon disposition if possible. ABA
9 Guideline 10.9.1. The Government has made clear that it has limited prerogative, as far as
10 it is concerned, to participate in any court-ordered efforts at resolving this case. Indeed,
11 counsel for the Government explained to the Court, more than once, that they were
12 informed/instructed that they could not attend what the Court might tout as a settlement
13 conference - a situation that puts the defense at a considerable disadvantage in attempting
14 to resolve the case.

15 This reality is of great concern to the defense given that a federal administration
16 that accelerated and amplified the use of the federal death penalty is about to leave office,
17 paving the way for the new administration to take over. The confirmation of the new
18 Attorney General is weeks away, and the defense is in an impoverished settlement
19 position. Having requested an opportunity to negotiate with supervisors in the United
20 States Attorneys' office, the defense has yet to receive a responsive letter, and has been
21 told several times by the current trial court that the opportunity for settlement here is
22 extremely narrow. The undersigned defense counsel do not dispute this information, since
23 it is the only information they have been provided. They respectfully note that in other
24 death penalty prosecutions in this District, defense counsel were offered a wider
25 prerogative to negotiate not only with line prosecutors, but also with supervisors and
26 others who, on occasion, have been able to resolve what seemed to be unresolvable
27 matters.

28 At this juncture, given the scheduling of the conclusion of jury selection, and the

1 beginning of evidence, Mr. Cyrus' opportunities for resolution of this case are slipping
2 away, notwithstanding the fact that new Department of Justice management might be
3 willing to further review this matter.

4 **CONCLUSION**

5 In sum, the Cyrus defense respectfully makes it clear that going to trial on the
6 Court's current schedule will place defense counsel in the position of rendering ineffective
7 assistance to Dennis Cyrus, Jr. While recognizing that the Court, and Government, have
8 allowed the defense more time than originally anticipated to prepare this matter for trial,
9 information that is necessary to the defense to effectively prepare this case will not be
10 provided until shortly before trial; the defense will not be able to timely and effectively
11 protect Mr. Cyrus' record by filing necessary pleadings because it will be selecting the
12 jury, and reviewing the new discovery, while attempting to conduct last minute trial
13 preparations; and, finally, Mr. Cyrus' ability to negotiate his case at a time when the
14 federal decision-makers are changing, and the opportunity for resolution may be greater
15 than it has been for years, is dependant on the Court's trial schedule.

16 Dated: December 30, 2008

17 Respectfully submitted,

18 JAMES S. THOMSON
19 JOHN T. PHILIPSBORN

20
21 By /s/ John T. Philipsborn
22 Attorneys for Defendant
23 DENNIS CYRUS, JR.
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PROOF OF SERVICE

I, Steven Gray, declare:
That I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is 507 Polk Street, Suite 350, San Francisco, California 94102.

On today's date, I served the within document entitled:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO RESET COMMENCEMENT OF EVIDENCE TO PERMIT EFFECTIVE ASSISTANCE OF COUNSEL AND EFFICIENT CASE MANAGEMENT

- By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as set forth below;
- By electronically transmitting a true copy thereof;
- By having a messenger personally deliver a true copy thereof to the person and/or office of the person at the address set forth below.
- By delivering a true copy thereof to "Federal Express" to be delivered to the person at the address set forth below.
- By serving a true copy by facsimile to the person and/or office of the person at the address set forth below

Robert Rees
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Office of the United States Attorney
450 Golden Gate Avenue, 11th Floor
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 30th day of December, 2008 at San Francisco, California.

Signed: /s/ Steven Gray

Steven Gray