

1 JAMES S. THOMSON, ESQ. - SBN 79658  
Law Offices of JAMES S. THOMSON  
2 819 Delaware Street  
Berkeley, CA 94710  
3 (510) 525-9123  
james@ycbtal.net  
4

5 JOHN T. PHILIPSBORN, ESQ. - SBN 83944  
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 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA, )

14 Plaintiff, )

15 vs. )

16 RAYMON HILL, et al., )

17 Defendants. )  
18 )  
19 )  
20 )

**Case No. CR-05-00324-MMC**

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
CYRUS DEFENSE POST-  
CONVICTION MOTION FOR  
DISCOVERY OF INFORMATION  
AND EVIDENCE BEARING ON  
VALIDITY OF CONVICTIONS  
DEPENDING ON DRUG-RELATED  
EVIDENCE**

**Date: June 2, 2010**

**Time: 2:30 PM**

**Dept: Hon. Maxine M. Chesney,  
District Judge**

21

22

23

24

25

26

27

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. PERTINENT TIME-LINE ..... 5

    May, 2010 guilt verdicts ..... 7

III. STATEMENT OF PERTINENT FACTS ..... 9

IV. BASED ON THE ABOVE-DESCRIBED FACTS, THE COURT  
SHOULD ORDER DISCOVERY, OR PERMIT SUBPOENAS,  
OR BOTH ..... 13

CONCLUSION ..... 21

1 **TABLE OF AUTHORITIES**

2 **Federal Cases**

3 *Brady v. Maryland*, 373 U.S. 83 (1963) ..... 16-19

4 *Gantt v. Roe*, 389 F.3d 908 (9th Cir. 2004) ..... 19

5 *Kyles v. Whitley*, 514 U.S. 419 (1995) ..... 18

6 *U.S. ex rel Smith v. Fairman*, 769 F.2d 386 (7th Cir. 1985) ..... 18

7 *U.S. v. Auten*, 632 F.2d 478 (5th Cir. 1980) ..... 18

8 *U.S. v. Diaz, et al.*, CR 05-00167 WHA ..... 15

9 *U.S. v. Estrada*, 430 F.3d 606 (2nd Cir. 2005) ..... 15

10 *U.S. v. Glenn*, 667 F.2d 1269 (9th Cir. 1982) ..... 15

11 *U.S. v. Nichols*, 67 F.Supp.2d 1198 (D.Colo. 1999) ..... 18

12 **U.S. Code**

13 18 U.S.C. §1512(a) ..... 6

14 18 U.S.C. §1513(a) ..... 6

15 18 U.S.C. §1962(d) ..... 6

16 21 U.S.C. §846. .... 6

17 **Federal Rules of Evidence**

18 FRE 607. .... 16

19 FRE 609(a) and (b) ..... 15

20 FRE 609(a)(2) ..... 15

21 **Texts**

22 Media Advisory, SFPD Media Relations Unit, March 9, 2010 ..... 17

23 Moser, Kate, “San Francisco Crime Lab Scandal is Fiasco for Law Enforcement  
24 and Feast for Defense Bar,” *The Recorder*, April 6, 2010 ..... 5

25 Moser, Kate, “Adachi: More Cases Touched by Lab Scandal,” *The Recorder*,  
April 15, 2010 ..... 15

26 *New York Times*, “Hundreds of Drug Cases Are At Risk in San Francisco,”  
27 April 4, 2010 ..... 16

28 Van Derbeken, Jaxon , “SF Drug-Test Technician Accused of Skimming”  
*SF Chronicle*, March 10, 2010 ..... 17

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Van Derbeken, Jaxon, "Drug Lab Scandal Could Undermine Murder Case,"  
*SF Chronicle*, April 6, 2010. . . . . 16

1 JAMES S. THOMSON, ESQ. - SBN 79658  
Law Offices of JAMES S. THOMSON  
2 819 Delaware Street  
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 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA, )

14 Plaintiff, )

15 vs. )

16 RAYMON HILL, et al., )

17 Defendants. )

18 )

19 )

20 )

**Case No. CR-05-00324-MMC**

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
CYRUS DEFENSE POST-  
CONVICTION MOTION FOR  
DISCOVERY OF INFORMATION  
AND EVIDENCE BEARING ON  
VALIDITY OF CONVICTIONS  
DEPENDING ON DRUG-RELATED  
EVIDENCE**

**Date:**

**Time:**

**Dept: Hon. Maxine M. Chesney,  
District Judge**

21

22 I. INTRODUCTION

23 Through this motion, the Cyrus defense seeks a Court Order directing the  
24 disclosure of information through the Office of the U.S. Attorney, bearing on the integrity,  
25 validity, and believability, of the several convictions obtained by the Government in the  
26 jury trial of this matter. The convictions at issue are those depending, at least in part, on  
27 testimony concerning the operations at the San Francisco Police Department Crime  
28 Laboratory, including testimony bearing on drug-related issues. It is axiomatic, in this

1 serious case, that at least some of the sentencing issues that this Court will have to decide,  
2 including the ultimate sentences on drug-specific, and drug-related, counts will be  
3 dependent not only on the believability of testimony that illegal drugs were involved in  
4 this case, but also on the believability and integrity of the evidence demonstrating the  
5 relative weight of the drugs involved.

6 The reason for this motion has been explained, to a degree, in a motion to continue  
7 the sentencing date to permit effective case preparation of the merits of this case (Doc.  
8 1610, the motion, and Doc. 1611, the supporting declaration). The motion at issue, which  
9 was not opposed by the Government (Doc. 1613), mainly because no probation report had  
10 been prepared, was granted by the Court in an Order issued on April 7, 2010 (Doc. 1614).

11 There were various intersecting predicates for the bringing of this motion for  
12 discovery. First, beginning in early March, 2010, counsel for the defense (as evidenced in  
13 the supporting Declaration of counsel) saw press coverage of an investigation into alleged  
14 improprieties at the San Francisco Crime Laboratory. In close conjunction with that  
15 observation, undersigned counsel received an email from Assistant U.S. Attorney William  
16 Frentzen on March 10, 2010 asking whether the undersigned had seen local news coverage  
17 about Crime Lab issues. Thereafter, on March 18, 2010, the defense wrote a letter to  
18 counsel for the Government requesting information (Exhibit A, March 18, 2010 discovery  
19 letter, appended to counsel's Declaration). The defense sent a second letter dated March  
20 30, 2010 seeking further information (Exhibit B).

21 The information at issue was related in part to what was initially reported in the  
22 press as an investigation into the alleged disappearance of some drug evidence, and  
23 information that resulted in an investigation into the operation of the SF Police Department  
24 Crime Laboratory (as a whole), which conducted the drug testing involved in this case.

25 For the convenience of the Court, the defense has prepared a time-line (*infra*)  
26 setting out the significant developments that precede the bringing of this motion. This  
27 motion is necessitated by the following developments. Mr. Cyrus has been convicted of a  
28 series of offenses, several of which were based in part on expert drug identification

1 testimony, and on testimony concerning the aggregate and (in certain cases) the specific  
2 weight of drugs alleged in the various charges in the redacted Indictment.

3         After the verdict in this case, but prior to sentencing, evidence has surfaced, some  
4 of which has issued from the SFPD, to the effect that: 1) one of the criminalists who  
5 testified in this case, Debbie Madden, had been the subject of a criminal prosecution, and  
6 criminal conviction, prior to her testimony in this case; 2) Ms. Madden has been the  
7 subject of a recent investigation into alleged malfeasance in her professional duties as a  
8 drug analyst at the SF Crime Laboratory; 3) Ms Madden in turn made allegations  
9 concerning the sloppiness of work in the Crime Laboratory; 4) the Madden allegations are  
10 in line with findings made by a site inspection team of the American Society of Crime Lab  
11 Directors (ASCLD), which issued a report on the Crime Laboratory in November, 2009;  
12 and by a two-day audit conducted by law enforcement auditors apparently at the request of  
13 the SFPD in late March, 2010.

14         The Cyrus defense had alleged in pre-trial motions: first, that no analyst who tested  
15 suspected drugs would have an independent recollection of the analyses; second, that the  
16 drug identification and weighing procedures were inadequate, and unreliable; and third,  
17 that, in addition, any documentation alleged supporting drug identification laboratory  
18 procedures, and drug weights, were insufficient to establish the reliability and validity of  
19 any opinions. The defense had also sought a Court Order that any further information and  
20 evidence bearing on drug identification and weight testimony be provided. These matters  
21 were addressed in the Cyrus defense's Trial Motion No. 18, Motion to Exclude Expert  
22 Testimony Based on Laboratory Work, etc. Trial Motion No. 18 was filed as Doc. 914 on  
23 August 28, 2008. That same day, the Cyrus defense filed a motion to exclude "forensic  
24 science testimony on drug and firearms where destruction of the suspected drugs or  
25 weapons... render the basis for expert opinion unreviewable." This was defense Trial  
26 Motion No. 20. The Government opposed both, the Court denied any pre-trial hearings on  
27 the motion, but did allow inquiry into drug analysis methodologies at the time of the  
28 testimony of the various witnesses.

1           During the trial, on March 24, 2009, the Government called Lois Woodworth, an  
2 analyst at the SFPD Police Crime Lab to testify about her analysis of suspected drug  
3 evidence. Later, on April 6 and 7, 2009, the Government called a series of witnesses who  
4 either had been drug analysts, or were currently drug analysts, at the SF Crime Laboratory.  
5 These witnesses included Corbin Yem; Michael Tan; Debbie Madden; Daniel Lee; Francis  
6 Woo and Ralph Whitten. All of the testimony was given subject to motions to strike based  
7 on reiterated objections by the defense. The Court heard and denied the motions to strike.

8           Having gleaned information in the public domain that might bear on the validity of  
9 the convictions in this case, the Cyrus defense has sought, on its own, to obtain as much  
10 information as it can, relying on media sources; court filings; meetings with counsel,  
11 former lab employees, and other persons knowledgeable about the SFPD Crime Lab  
12 situation. At this juncture, the defense is informed (mainly through media sources  
13 reporting alleged statements by SFPD spokespersons) that the SF Crime Laboratory has  
14 stopped work by its drug analysis unit pending further audit procedures, and efforts to  
15 comply with audits already conducted in 2009 and 2010. The defense's efforts have not  
16 yielded access to information that is critical to understanding whether the scientific  
17 evidence tendered to the jury in this case was misleading and unreliable to the point of  
18 requiring convictions to be vacated. As the undersigned prepared this pleading, both  
19 media courses and local counsel have indicated that there is a movement towards auditing  
20 the DNA section of the SFPD Crime Lab because of allegations of improper procedures,  
21 and in one specific case, of potential malfeasance.

22           The defense's concern in bringing this motion is to use legally permissible means to  
23 obtain information that Mr. Cyrus is entitled to - which is information bearing on the  
24 believability, reliability, and truthfulness of the evidence presented against him. At this  
25 juncture, the Government has not provided the defense any information pursuant to written  
26 discovery requests. It may be that the federal Government (notwithstanding statements  
27 and press accounts attributed to the Office of the U.S. Attorney) does not have access to  
28 information that is sought in this motion. Since the Office of the U.S. Attorney has issued

1 statements to the effect that it is reviewing the implications of SFPD drug issues. The  
2 defense notes that in a story bearing in part on the Cyrus defense's motion to continue the  
3 sentencing in this matter, the legal newspaper *The Recorder* states: "A spokesman for the  
4 U.S. Attorney's office said on Friday the government is working on preparing a response  
5 to Cyrus' motion but that he had no further comment on what, if anything, the office is  
6 doing to handle the implications of the Crime Lab scandal on federal cases." (From April  
7 6, 2010 article from *The Recorder* entitled "San Francisco Crime Lab Scandal is Fiasco for  
8 Law Enforcement and Feast for Defense Bar"). The same article indicates that in another  
9 case pending in this Court, one of the U.S. Attorneys in this case (Mr. Frentzen) allegedly  
10 argued in a motion about an ongoing audit of the Crime Lab (Moser article, final  
11 paragraphs, Exhibit C).<sup>1</sup> Depending on the Government's viewpoint, the defense  
12 respectfully notes that the only alternative open to it (other than taking the time to see what  
13 results may be produced at the state courthouse), is to apply for this Court to issue Rule 17  
14 subpoenas directed at the SFPD, any auditing body, and any investigating bodies  
15 providing the information sought in the instant motion so that the Court and Government,  
16 as well as the defense, have some notion of how problematic the 'San Francisco lab  
17 scandal' is with respect to the integrity of the convictions in this case.

18 Mr. Cyrus has made a detailed, and ample, showing entitling him to any  
19 information bearing on the credibility of testimony provided, and on the integrity of the  
20 evidence used to convict him in these matters. If the Government has information in hand,  
21 that information must be provided to the defense. If it does not, then the defense requests  
22 that the Court use the showing made here to permit the defense to issue Rule 17 subpoenas  
23 addressed to the SFPD allowing the requested information to be provided.

24 II. **PERTINENT TIME-LINE**

- 25 ● August 28, 2008, the defense filed motions to exclude drug identification  
26 and drug weight evidence, and testimony based on unreliable laboratory  
27

---

28 <sup>1</sup> The Moser article copy is appended to counsel's Declaration as Exhibit C.

1 practices and unreliable and unverifiable laboratory documentation, as well  
2 as on insufficient evidence due to the loss or destruction of drug evidence,  
3 and a failure to make such evidence available to the defense for retesting,  
4 and/or failure to provide adequate documentation to allow the defense to  
5 have drug testing identification and weight verified.

- 6 ● February 20, 2009 (Doc. 1222), the Government filed a redacted Indictment  
7 alleging a conspiracy to distribute and possess with intent 50 grams or more  
8 of cocaine base in Count 1, in violation of 21 U.S.C. §846. There are 32  
9 overt acts, the majority of which involve allegations of the possession of  
10 cocaine or cocaine base, with weight allegations; in Count 2 a violation of 18  
11 U.S.C. §1962(d) conspiracy to participate in a RICO enterprise. The  
12 enterprise known as “Page Street” among other things is alleged to be  
13 involved in ongoing drug commerce as alleged in Racketeering Act 1. There  
14 are 15 Racketeering Acts alleged. Acts 1; 2; 3; 5; 7; 10; 12 involve drug  
15 offenses. Count 3 charges the VICAR attempted murder of Marcus  
16 Atkinson; Count 4 the assault with a deadly weapon on Marcus Atkinson is a  
17 VICAR offense; Count 5, the murder in aid of racketeering of Joseph Hearn  
18 is a VICAR offense; Count 6, the kidnaping of Joseph Hearn is a VICAR  
19 offense; Count 7, the murder of Randy Mitchell is a VICAR offense; Count  
20 8, the murder of Raymond Jimmerson is a VICAR offense; Count 9, the  
21 murder of Mr. Jimmerson to prevent testimony or communication with a law  
22 enforcement officer under 18 U.S.C. §1512(a); in Count 10, the murder of  
23 Mr. Jimmerson as witness retaliation under 18 U.S.C. §1513(a); in Count 11,  
24 the August 31, 2002 possession with intent to distribute 5.88 grams of  
25 cocaine base by Mr. Cyrus; Count 12, the possession of the same cocaine on  
26 the same day within a thousand feet of an elementary school; Counts 13  
27 through 16, weapons counts associated with the shooting of Marcus  
28 Atkinson; the killing of Joseph Hearn; Randy Mitchell and Ray Jimmerson,

1 Jr.

- 2 ● March 24, April 6 and 7, 2009 - over objection, drug analysts from the  
3 SFPD, including Debbie Madden, testify as to both drug weights and drug  
4 identification. Objections in advance of the testimony and motions to strike  
5 the testimony overruled. Evidence concerning laboratory procedures is  
6 taken.

7 **May, 2010 guilt verdicts**

- 8 ● November, 2009 ASCLD lab inspection report - indicating that the San  
9 Francisco Criminalistics Laboratory has inadequate chain of custody  
10 records; has insufficiently detailed documentation to support the conclusions  
11 and opinions reported by examiners; does not require technical review of  
12 reports; does not use annual blind proficiency testing; could not demonstrate  
13 to the site team qualifications for ongoing competency testing of analysts;  
14 and does not maintain a generally clean work area.
- 15 ● March 9, 2010, SFPD George Gascon issues a press release (Exhibit D) that  
16 states that an employee made allegations about practices in the Crime Lab  
17 that do not meet professional standards.
- 18 ● March 11, 2010, San Francisco Public Defender Jeff Adachi addressed a  
19 letter to DA Kamala Harris (SF District Attorney) which was published in  
20 some media outlets requesting information in response to reports that analyst  
21 Debbie Madden had been implicated in taking cocaine from drug samples.
- 22 ● March 18, 2010, the Cyrus defense writes its first letter requesting  
23 information on SFPD lab matters to the Office of the U.S. Attorney.
- 24 ● On March 23-25, 2010, a specifically commissioned lab audit focused on the  
25 drug analysis section occurs, which includes some interviews of analysts  
26 (not included in the audit report), which concludes that there are some issues  
27 at the Lab that require response, including balance and instrumental  
28 calibration records

- 1 ● March 24, 2010, according to a press report attributed to the American Bar  
2 Association, SF Superior Court Judge Massullo is said to be reviewing 1,100  
3 Crime Lab documents concerning drug cases.
- 4 ● March 25, 2010, undersigned Cyrus counsel attends a meeting at the SF  
5 Public Defender's office involving many local criminal defense lawyers, a  
6 former SFPD Crime Lab director, and SF Public Defender Jeff Adachi.  
7 Information about the SFPD Crime Laboratory situation is discussed, as are  
8 a number of plans for litigation in state court cases.
- 9 ● March 30, 2010, the Cyrus defense makes its second written request for  
10 SFPD related Crime Lab material.
- 11 ● April 9, 2010, attorney David Wise addresses a discovery request to the  
12 Office of the SF District Attorney requesting further information about the  
13 SFPD Crime Lab DNA section, which is alleged by Mr. Wise to have had  
14 two demonstrated instances of sample contamination, one disclosed by the  
15 DA, and the other by the defense. Mr. Wise indicates an understanding that  
16 there is ongoing audit.
- 17 ● April 13, 2010, SF Superior Court Judge Christine Massullo orders materials  
18 disclosed to the defense. Local newspapers continue covering SFPD Crime  
19 Lab stories.
- 20 ● April 15, 2010, local newspapers cover the release of SFPD drug analysis  
21 section information. Analyst Debbie Madden is quoted as saying that police  
22 investigators would see drug weight "discrepancy in a lot of different cases."  
23 She was also quoted as saying that drug weights were off "tons of times,"  
24 that the discrepancies were never reported, and that "we just kinda just  
25 laughed at it."<sup>2</sup>
- 26 ● April 22, 2010, the Bar Association of San Francisco reports to its criminal  
27

---

28 <sup>2</sup> Kate Moser, *The Recorder*, p.1, April 15, 2010 - Exhibit F.

1 law panel members that some SFPD lab-related material is being distributed  
2 to local counsel under a protective Order. Mr. Cyrus' counsel have not  
3 received this material.

4 **III. STATEMENT OF PERTINENT FACTS**

5 Above, the Court has a summary of the background to this defense motion. Below,  
6 the Cyrus defense is providing an admittedly basic summary of trial testimony to provide  
7 the Court a case-specific showing of the background for the bringing of this discovery  
8 motion. The factual background summarized here is the testimony of analysts and  
9 criminalists from the SFPD who testified about drug identification and weights at trial.  
10 The Cyrus defense is preparing a more elaborate and detailed statement of facts to address  
11 the specific drug analyses testified to by each separate analyst. It will be submitted to the  
12 Court under separate cover. The objective of the following statement of facts is to provide  
13 an outline of the factual background that the Cyrus defense believes is important to an  
14 understanding of the basis for this discovery motion.<sup>3</sup>

15 Lois Woodworth, a criminalist who had worked at the SFPD Crime Lab for eight  
16 years, possessed a B.S. degree. She described SFPD laboratory procedures, and the  
17 analytical methodology employed with suspected cocaine. According to her, once the  
18 suspected drugs were in the lab, the law enforcement packaging was opened (RT 6205), a  
19 suspect evidence weight was recorded. The analyst then proceeded with testing. With  
20 suspected cocaine base, a presumptive and two confirmatory tests were done. These tests  
21 produced reactions that had to be observed and noted by the analyst. It was also possible  
22 to do confirmatory instrumental testing that produced spectra in the form of a print out (RT  
23 6213).

24 The usual drug analysis results would be recorded on pre-printed lab forms, some  
25

---

26 <sup>3</sup> The Cyrus defense is not summarizing DNA evidence here, as it has not yet obtained  
27 detailed information about concerns about the DNA section and the contamination issue  
28 reference at p.7, above, in connection with a case being defended by attorney David Wise. The  
Cyrus defense has seen Mr. Wise's April 9, 2010, four-page discovery request, not nothing else.

1 of which would be reviewed to ensure that there were no spelling errors and that the form  
2 was properly signed and dated (RT 6237). Some of the data would be entered into the  
3 electronic recording system called "Cable." RT 6238.

4 Over objection, Ms. Woodworth testified to her analysis in two different cases,  
5 including one in the name of Dennis Cyrus, Jr.

6 Ms. Woodworth acknowledged that the SFPD Crime Lab was a "high throughput  
7 operation." RT 6266. She would work on 10 to 20 drug cases a day. Unless instrumental  
8 analysis through the use of gas chromatograph mass spectrometer was done, the only  
9 documentation that could be reviewed would be "... handwriting on a Crime Lab narcotics  
10 analysis report form." RT 6271:5-7. The only way an independent scientist would have  
11 of knowing what occurred in a given analysis would be to be familiar with the lab  
12 operating procedures and to discuss a particular test with the analyst. RT 6272:9-19.

13 The 'technical review' of the paperwork produced was the confirmation of correct  
14 entries on a lab sheet. It was only required to be done in about 10 percent of the cases.  
15 RT 6285-86.

16 According to Ms. Woodworth, the scales or balances that were in use to weigh  
17 suspected drug evidence when she did her 2002 analysis in this case would have been  
18 calibrated every six months, but she had no idea when the balance she used was calibrated,  
19 and there was no record kept of the calibration process. RT 6287.

20 Corbin Yem, analyst at the drug lab between 1994 and 2000, had worked on about  
21 30,000 drug cases during his career. RT 7192. He testified about two case-specific  
22 analyses, noting that he would have done a presumptive test and two confirmatory tests.  
23 He would have logged in most of the entries on the Cable system, though some of the  
24 entries would have been generated before he worked on the case. RT 7210-11. The only  
25 documentation he produced was a one-page pre-printed lab report. The lab was not  
26 accredited when Yem was there. As for drug weight issues, Yem said that the scales and  
27 balances would have been calibrated by someone else. He did not know when the  
28 balances were calibrated. He had no documentation showing any calibration. RT 7214.

1 Michael Tan, a retired SFPD criminalist, had also done thousands of suspected drug  
2 cases. He testified about analyses he did in 1998 and 2002 as pertained to this case. He  
3 did not recall the analyses, but he would have done a presumptive test and two  
4 confirmatory tests for cocaine, and would have looked at the structure of a suspected  
5 marijuana leaf and would have done some confirmatory testing. He did not believe he  
6 would have done any instrumental testing to confirm his other findings.

7 Asked about his recollection of the balance calibration process in 1998 and 2002,  
8 he indicated that he felt the balances were calibrated at least once a year. He had no idea  
9 about the calibration records for either year (1998 or 2002). RT 7249-52.

10 Debbie Madden, a criminalist at the Lab, testified about drug analyses done in  
11 2000, 2001, 2002, and 2009 - the last of these being further testing on a sample involving  
12 Dennis Cyrus. She would have recorded weights for suspected drugs, and did a  
13 presumptive and two confirmatory tests for suspected cocaine. She had not noted, with  
14 one exception, whether the weights were net or gross. She had done one confirmatory  
15 instrumental analysis with a gas chromatograph on one of the drug samples (RT 7277-78).  
16 She could not recall why she had done the instrumental testing, and she had no idea where  
17 the documentation, or spectra, for the gas chromatograph test was located. RT 7295.

18 The only documentation of a drug analysis that she would have normally produced  
19 would have been the notes on the one-page pre-printed SFPD Lab drug analysis form,  
20 though the instrumental analysis should have had a separate printout.

21 As for the confirmation of drug weights, she thought that the balance was calibrated  
22 twice a year by the company, and checked by the laboratory every month. She did not  
23 know what the parameters of error for the calibration process were. She had no record of  
24 calibration for any of the weighing involved. RT 7304-06. Ms. Madden also confirmed  
25 that none of the presumptive or confirmatory testing was photographed.

26 Daniel Lee had worked at the SFPD Crime Lab from 1974 to 2000. He was asked  
27 to testify about his work on a 1998 case, and on another in 1999. One was a suspected  
28 marijuana case, and the other a suspected cocaine case. He had identified the marijuana

1 through microscopic and color reagent tests, and the cocaine through the presumptive and  
2 confirmatory testing. He noted that with the confirmatory testing "... a picture is worth a  
3 thousand words," (RT 7325) though there were no pictures taken of his analyses. He had  
4 no documentation beyond the lab sheets, and had done no instrumental analysis.

5 As for the balances and scales used to weigh substances, he stated that some were  
6 calibrated by an outside contractor and others were checked internally (RT 7334-35). He  
7 could not recall if any record of calibration was kept, and was not asked to review the  
8 calibration related to his work (RT 7335-36).

9 Francis Woo, supervising criminalist at the SF Crime Lab had just retired after 33  
10 years of service. He had been in charge of the narcotics and chemical section since 2001,  
11 and was asked about analyses that he had done in 1996, 1997, and 2001 in the context of  
12 this case. He usually would have written net weights, but had not recorded specific weight  
13 categories on his lab sheets in this case. He too had tested suspected cocaine with  
14 presumptive and confirmatory testing. While he believed he would have made bench  
15 notes at the time of his testing, he no longer had them, and the only thing he would have  
16 had to document his work were the pre-printed lab forms he had filled out.

17 Asked about the balance calibration process, he testified that the calibration was  
18 done by an outside source at least once a year, and monthly internally. RT 7377. The lab  
19 would have had a record of the calibration, but he had not been asked to bring any  
20 calibration information. RT 7377.

21 It would have been possible to take photographs of the analyses, but these were not  
22 taken as a matter of routine, in part because of the case load, and the time it would have  
23 taken to photograph the test results. RT 7383-84.

24 Ralph Whitten, who had been at the Crime Lab (with a few years hiatus) from 1971  
25 to 2005, testified about analyses he had done in 2001 and 2004 - in four separate cases.  
26 He too had reported weights and had done lab work to identify suspected cocaine by doing  
27 a color test and some crystalline tests. He then filled out a form. While he acknowledged  
28 that one of the options with drug analysis was instrumental work, he noted that there had

1 been no GCMS machine available in the lab until the 1990's when it began moving  
2 towards accreditation. There were discussions about giving instrumental analysis of drugs  
3 a greater role. (RT 7423-24). However, none of his analyses involved instrumental  
4 analysis (in this case), and there were no photographic records of them.

5 The technical review of his work was simply the review of the filling out of the  
6 forms (RT 7427-28).

7 The balances were calibrated by an outside service and in the lab. He had no  
8 knowledge of calibration records with respect to the balances he used. RT 7428.

9 Motions to exclude the testimony of all these analysts were brought prior to their  
10 testimony; objections were made just before they testified; their testimony was made  
11 subject to defense objections; it was received subject to a motion to strike; and the  
12 defense's motions to strike were denied.

13 IV. **BASED ON THE ABOVE-DESCRIBED FACTS, THE COURT**  
14 **SHOULD ORDER DISCOVERY, OR PERMIT SUBPOENAS, OR**  
**BOTH.**

15 In bringing a case against him, the Government developed evidence that Mr. Cyrus  
16 was a member of a conspiracy to distribute drugs (Count 1), and a member of a  
17 racketeering conspiracy involving the distribution of drugs (Count 2). Evidence of drug  
18 identification and drug weights was critical to demonstrate the existence of the elements of  
19 these crimes. Evidence of drug identification and weight was also focused on Count 11,  
20 the August 31, 2002 possession with intent to distribute crack cocaine weighing  
21 approximately 5.88 grams (Count 11), as well as Count 12 charging possession for  
22 distribution of crack cocaine within a thousand feet of a public elementary school, a public  
23 housing facility and a playground. This incident is also alleged to have occurred on  
24 August 31, 2002. The several VICAR counts of which Mr. Cyrus was convicted (Counts  
25 3-8) also depended on the existence of evidence to support the existence of a specified  
26 racketeering enterprise involved in drug possession and sales.

27 The Cyrus defense sought adequate discovery prior to and during the trial of this  
28 case. There is little doubt, based on a review of the record of this case, that Mr. Cyrus

1 sought first to challenge, and then to open to question, the practices and procedures  
2 pertinent to drug identification at the San Francisco Police Crime Laboratory. While the  
3 defense had been informed (as evidence by some of the cross-examination) of allegations  
4 of dry labbing in the mid-1990's; of the SF Civil Grand Jury's investigation of the  
5 laboratory; and of periodic changes in the laboratory processes (and standard operating  
6 procedures) as a result of the accreditation process, the Cyrus defense did not know that:  
7 one of the testifying criminalists (Debbie Madden) had been convicted of a criminal  
8 offense after the filing of the charges in this matter and prior to trial; there were questions  
9 concerning this criminalist which were raised during the course of litigation between her  
10 and the City and County of San Francisco; the criminalist at issue was suspected of using  
11 cocaine from the SF Crime Laboratory in 2009; the same criminalist was of the opinion  
12 that her colleagues used sloppy practices, including cavalier practices regarding drug  
13 weights, and that there had been quality assurance problems with the Crime Laboratory in  
14 2009, and prior to that, but which were not revealed in publically available documents.

15       As a separate matter, the defense in this case was unaware that information in the  
16 possession of the SF Crime Laboratory would cause ASCLD's site visitors in 2009 to find  
17 chain of custody and documentation problems in line with the questions that the Cyrus  
18 defense raised about the reliability and validity of laboratory practices at the SF Crime  
19 Laboratory.

20       During trial, the Cyrus defense made inquiry into the paucity of documentation of  
21 drug identification testing at the SFPD Crime Lab that made the work of analysts  
22 essentially unreviewable by outside scientists, particularly where the suspected (or  
23 identified) drugs had been destroyed, and thus were not subject to re-testing. Now, it  
24 appears that the analyst whose alleged theft of drug evidence caused the current scrutiny of  
25 the Lab has given an interview to SFPD investigators in 2010 admitting that the drug  
26 analysis unit was sloppy in its work, and that reported drug weights were known to be  
27 erroneous. She reportedly has said that this was a known 'laughable' matter.

28       Madden's reported statements were foreshadowed by the testimony in this case.

1 All of the analysts who testified in the case had varying descriptions of when, and  
2 by whom, balance and scale calibration were performed - and there were varied opinions  
3 about when the calibration actually occurred. One or two of the analysts testified that the  
4 calibration was likely recorded (though others stated that they knew of no such records).  
5 None of the analysts ever produced such calibration. It has now been reported that Ms.  
6 Madden believed that drug weights were incorrect “tons of times,” and that analysts “...  
7 kinda just laughed at” the discrepancies - which they did not report.<sup>4</sup>

8 Clearly, had defense counsel had in hand an allegation from an experienced, long-  
9 tenured, SFPD drug analyst (like Ms. Madden) that she observed sloppy or dishonest  
10 practices at the Crime Laboratory, that information would have been explored at some  
11 length in the defense’s effort to demonstrate the existence of less than reliable evidence of  
12 drug identification and weight.<sup>5</sup>

13 Moreover, the fact of Ms. Madden’s conviction on state domestic abuse charges (as  
14 misdemeanors) should have been revealed to the defense. She was tried in 2007. The  
15 existence of a conviction is subject to inquiry during a criminal trial. FRE 609(a) and (b)  
16 permit such inquiry. Evidence of the bare fact of the conviction, and some greater detail,  
17 may be permitted. See *U.S. v. Estrada*, 430 F.3d 606, 616 (2nd Cir. 2005). Crimes of  
18 dishonesty are admissible regardless of whether the offense is for a misdemeanor or  
19 felony. FRE 609(a)(2). On the other hand, generally, crimes of violence are not crimes of  
20 dishonesty. *U.S. v. Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982). The elements of a crime  
21 can help resolve whether it involves dishonesty.

22 Where an individual is tried for a criminal offense, gives a statement to law  
23 enforcement officers, and then testifies at trial, there may be a basis for impeachment.

---

24  
25 <sup>4</sup> These quoted statements are attributed to Ms. Madden, and to her February 26, 2010  
26 interview with SFPD Police Inspectors. See Kate Moser, *supra*, “Adachi: More Cases Touched  
by Lab Scandal,” p.1, *The Recorder*, April 15, 2010.

27 <sup>5</sup> Ms. Madden had testified about SFPD drug lab procedures in 2006 in front of Judge  
28 Alsup in *U.S. v. Diaz, et al.*, CR 05-00167 WHA. Ms. Madden had not testified about drug  
weight issues at any length in that case.

1 Thus even if a criminal conviction is not of itself admissible as impeachment, it is possible  
2 that some aspects of a criminal investigation, or trial, particularly one involving a member  
3 of a law enforcement agency, may produce a basis for impeachment under FRE 607.

4 As evidenced in the accompanying Declaration of counsel, the Cyrus defense had  
5 no idea that criminalist Debbie Madden had been the subject of a criminal investigation,  
6 and prosecution in San Mateo County in 2007-2008 - or that she had been convicted. The  
7 Government never provided that information in discovery or *Brady, et al.* disclosures.  
8 Moreover, the defense was not informed, and therefore unaware of the details of the  
9 offense which have recently been discussed in media sources, and which the defense is  
10 seeking further records on.

11 Perhaps even more critical to the Cyrus defense's current inquiry is the  
12 investigation of the SF Crime Laboratory's drug analysis section that followed the  
13 revelation (or allegation) that Ms. Madden was allegedly using cocaine from the Crime  
14 Laboratory - and that she had been doing so over a period of time. On April 4, 2010, the  
15 New York Times reported a story with the headline "Hundreds of Drug Cases Are At Risk  
16 in San Francisco," stating, in the body of the piece:

17 But there are signs that problems at the crime laboratory might have  
18 been percolating since before 2007. On Friday, The San Francisco  
19 Chronicle reported that four grams of cocaine handled by Ms. Madden  
and being used as evidence at a federal racketeering trial disappeared  
in 2005, expanding the time frame for potentially corrupted cases.<sup>6</sup>

20 SF Chronicle staff writer Jaxon Van Derbeken wrote a story titled "Drug Lab  
21 Scandal Could Undermine Murder Case," published on Tuesday, April 6, 2010. The  
22 Cyrus case was referenced, as were statements from undersigned counsel. With respect to  
23 the U.S. Attorney's office, the article states:

24 U.S. Attorney Joseph Russoniello said Monday that his office is  
25 reviewing a "large number of documents and we will make the  
appropriate disclosures at the appropriate time." He said

---

26  
27  
28 <sup>6</sup> From page 20, New York Times national edition, Sunday, April 4, 2010.

1 prosecutors are working long hours to do the review.<sup>7</sup>

2 According to an SFPD “media advisory” dated March 9, 2010, which was  
3 submitted to this Court in support of the Cyrus motion to continue the sentencing date, SF  
4 Police Chief George Gascon stated that: “During the course of the Department’s interview  
5 with this civilian employee, the employee made allegations about practices at the Crime  
6 Lab that do not meet professional standards.” The reference was to a February 26, 2010  
7 interview of a former criminalist at the SFPD Crime Lab.<sup>8</sup>

8 In another story authored by Chronicle staff writer Van Derbeken (“SF Drug-Test  
9 Technician Accused of Skimming”), the SF Police Chief was described as stating “... that  
10 when interviewed as part of the investigation, [Debbie Madden] had leveled charges of her  
11 own about the lack of control over drug evidence. One official said Madden called the  
12 drug-testing process at the lab ‘sloppy’.”<sup>9</sup>

13 The question framed is whether the Office of the U.S. Attorney has any obligation  
14 to turn over information that it has acquired as part of the investigation into malfeasance at  
15 the SF Crime Laboratory, particularly malfeasance that may pertain to the time period of  
16 this case, and to any criminalists who may have been involved in it.

17 Mr. Cyrus understands that this motion comes after conviction, and thus is brought  
18 under rules that are somewhat different than those pertinent to trial. Nonetheless, this was  
19 a case in which the death penalty was at issue. Mr. Cyrus still faces onerous punishment.  
20 Thus, the defense is relying on those cases that have applied the principles of *Brady v.*  
21 *Maryland*, 373 U.S. 83 (1963) post-conviction - though it must be noted that the  
22 information in the *Brady* case itself (a statement attributed to the co-defendant that he, and  
23 not Brady, had shot the victim) was discovered by the defense after conviction. Thus, the  
24 discovery here is not Rule 16 discovery, but rather *Brady* disclosure placed on the

---

25  
26 <sup>7</sup> From page two of three pages of the cited article from sfgate.com (Exhibit G).

27 <sup>8</sup> From media advisory, SFPD Media Relations Unit, March 9, 2010 at p.1 (Ex. D).

28 <sup>9</sup> March 10, 2010 Van Derbeken article, downloaded at sfgate.com at p.1.

1 Government by a series of cases, including *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)  
2 noting that the responsibility for *Brady* compliance lies exclusively with the prosecution,  
3 including the “duty to learn of any favorable evidence known to others acting on the  
4 government’s behalf in the case.”

5 Especially because the Government took varying positions with respect to its ability  
6 to produce all evidence and information in the hands of the SFPD, the Cyrus defense notes  
7 that the SFPD Crime Laboratory acted as part of the prosecution team. As the Fifth  
8 Circuit recognized in *U.S. v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980), courts have  
9 consistently declined to draw a distinction between different agencies functioning under  
10 the umbrella of the prosecution team.

11 A number of the rulings that have considered the implications of physical evidence  
12 in a case have come up during litigation of post-conviction habeas corpus actions.  
13 However, trial courts, including the trial court in the Oklahoma City bombing case, have  
14 allowed post-conviction discovery. In the banking case, the defense was allowed to  
15 review the lead sheets that had been generated during the course of the investigation, prior  
16 to a hearing on a motion for new trial, and which were discussed not only during trial, but  
17 during proceedings related to a Rule 33 motion. The court there allowed the defendant the  
18 opportunity to review material that he claimed was pertinent to the integrity of the  
19 convictions, though the court eventually rejected the motion for new trial. *U.S. v. Nichols*,  
20 67 F.Supp.2d 1198, 1199-1200 (D.Colo. 1999).

21 *U.S. ex rel Smith v. Fairman*, 769 F.2d 386 (7th Cir. 1985) involved a gun that the  
22 accused had allegedly used to shoot at two police officers and commit a robbery.  
23 However, the officer who had examined the gun as a gun expert had test-fired the gun the  
24 day after the shooting, and found it to be inoperable. *Id.* at 389. The officer failed to  
25 include this finding in his report, which was placed in the investigative files and not  
26 disclosed to the prosecutor or to the defendant. The reviewing court found that the  
27 prosecutor had no knowledge of the evidence, but on considering it post-conviction, it held  
28 that the evidence of inoperability must be viewed as material exculpatory evidence,

1 notwithstanding the fact that the prosecutors did not know of it. “The fact that the  
2 prosecutor in this case was blameless therefore does not justify the State’s failure to  
3 produce [the] firearms worksheet.” *Id.* at 391-392.

4 As the Ninth Circuit observed in *Gantt v. Roe*, 389 F.3d 908, 912 (9th Cir. 2004)  
5 “Even a prompt disclosure after the verdict would have been useful in supporting  
6 defendant’s motion for new trial.” That observation pertains in this case. *Gantt* involved  
7 a murder/robbery case. The only physical evidence in the crime was a matchbook that had  
8 a number written inside of it. The prosecution’s position was that the defendant had lifted  
9 the matchbook off the victim. There were questions about how a particular phone number  
10 would have come to be in the matchbook - and whether the phone number could be shown  
11 to have been written in the matchbook. Towards the end of trial, the prosecutor was  
12 informed by investigators that an attempt had been made to track down the number -  
13 which led law enforcement officers to someone who could not identify the victim from a  
14 photograph, thus undermining the prosecution’s theory of the significance of the  
15 defendant’s possession of the matchbook. The initial ruling on this issue by a District  
16 Court was that it had been up to the defendant, not the Government, to investigate the  
17 information at issue. The Ninth Circuit disagreed, remanding the case for a hearing on  
18 whether the Government had failed to disclose the information, which the Ninth Circuit  
19 found to be *Brady* evidence.

20 Clearly, the 2009 site visitors from ASCLD, as well as the specifically  
21 commissioned SF Crime Laboratory auditors in March, 2010, had concerns about quality  
22 assurance and documentation issues at the laboratory. The latest of the audit reports that  
23 was obtained by the defense is appended to the Declaration of counsel as an exhibit, and it  
24 indicates that there were problems in documentation of maintenance and repair for  
25 balances and microscopes, and inconsistencies in the calibration documentation (at p.2).  
26 There are problems with the adequacy of case reports (particularly Madden’s reports) and  
27 notes, and only a small percentage of drug cases are looked at using instrumental analysis  
28 (audit report at p.3). There are problems with evidence handling and chain of custody

1 documentation; the audit report indicates that Ms. Madden failed to record the description  
2 of packaging in her notes, and that she was "... repeatedly counseled and the issue was  
3 brought to the attention of all the analysts at a unit meeting." (March 2010 audit at p.5.)  
4 The rapid turn-around time on drug analysis was described as creating "... an untenable  
5 situation and directly affects the quality of the analytical work." (March 2010 audit at  
6 p.6.)

7       As evidenced by the testimony in this case, some of the lab practices that were  
8 described in the audit are clearly mis-described - since some analysts alternated between  
9 reporting gross weights and net weights of drugs, and in any event nobody could produce  
10 evidence of the calibration of the balances used to do particular sample weighing.

11       Clearly, those sorts of issues have been inquired into - or will be inquired into,  
12 given the concerns that prosecutors must have for the convictions they obtained in drug  
13 cases. Thus, the Cyrus defense should benefit not only from what work was done by its  
14 own lawyers to obtain the information used in this analysis of the issues, but also from the  
15 Government's far greater opportunity to obtain information bearing directly on the issues  
16 in this case.

17       Part of the defense concern here involves public statements from the Office of the  
18 U.S. Attorney, some of these reported in the local press, to the effect that the Office of the  
19 U.S. Attorney is making inquiry into the SFPD Crime Lab - notwithstanding the fact that  
20 the Government has decided not to respond to any of the inquiries that the defense has  
21 made concerning the U.S. Attorney's knowledge of the Crime Laboratory inquiry, and the  
22 specific investigation of criminalist Debbie Madden, as well as the taking of a statement  
23 from her which the SF Police Chief characterized as containing her observations and  
24 opinions of the laboratory's practices.

25       The March 23-24, 2010 audit commissioned by the SFPD (see supporting  
26 Declaration of counsel and exhibits) indicates that drug analysts, including one who  
27 testified in this case, were interviewed concerning laboratory practices, and that there are  
28 interviews available to the Office of the U.S. Attorney which the defense should have in

1 its possession. The defense has attempted, without success, to obtain Ms. Madden's  
2 interview with police, and the interviews of Lois Woodworth (who testified in this case),  
3 and two other criminalists, Tasha Smith, and Theresa Wong, also a criminalist at the  
4 laboratory. Defense counsel have reviewed publically available files and records to locate  
5 the just-mentioned information - without success. A Court Order should issue.

6 **CONCLUSION**

7 For the reasons stated here, and in the supporting Declaration of counsel, the Court  
8 should grant this motion for discovery.

9 Dated: April 27th , 2010

10 Respectfully submitted,

11 JAMES S. THOMSON  
12 JOHN T. PHILIPSBORN

13 By /s/ John T. Philipsborn  
14 Attorneys for Defendant  
15 DENNIS CYRUS, JR.

16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**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 Suite 350, 507 Polk Street, San Francisco, California 94102.

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

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
CYRUS DEFENSE POST-CONVICTION MOTION FOR DISCOVERY OF  
INFORMATION AND EVIDENCE BEARING ON VALIDITY OF  
CONVICTIONS DEPENDING ON DRUG-RELATED EVIDENCE**

- By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, CA, 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.

Robert Rees  
William Frentzen  
Assistant United States Attorneys  
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 27th day of April, 2010, at San Francisco, California.

Signed: /s/ Steven Gray  
Steven Gray