

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.

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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)
21)

Case No. CR-05-00324-MMC
TRIAL MOTION NO. 20
**MOTION TO EXCLUDE
FORENSIC SCIENCE TESTIMONY
ON DRUG AND FIREARMS
WHERE DESTRUCTION OF THE
SUSPECTED DRUGS OR
WEAPONS (AND AMMUNITION);
RENDER THE BASIS FOR
EXPERT OPINION
UNREVIEWABLE [Exhibits
Appended]**
Date: October 23, 2008
Time: 9:00 a.m.
Dept: Hon. Maxine M. Chesney

22 **I. INTRODUCTION**

23 _____Dennis Cyrus, Jr. moves this court pursuant to Federal Rules of Evidence 104(a);
24 403; 702; 703 and the Fifth, Sixth, and Eighth Amendments to the United States
25 Constitution, to exclude any proffered expert testimony of drug identification, and/or
26 identification of a firearm and/or related ammunition, casings, recovered bullets and the
27 like, where the alleged drug, drug evidence or firearm and firearm evidence was destroyed
28 by a law enforcement agency or otherwise lost and thus where the defense had no

1 opportunity for reliable independent review of the basis for the Government’s expertise on
2 the issue. The grounds for this motion are that:

3 There is no reliable scientific basis for the proposed testimony especially in view of
4 the lack of ‘reviewability’ of test results within the meaning of *Kumho Tire Co. v.*
5 *Carmichael*, 526 U.S. 137 (1999) (hereafter ‘*Kumho Tire*’) and *Daubert v. Merrell Dow*
6 *Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The destruction of the actual evidence,
7 especially when combined with the Government’s inability to provide sufficiently
8 reviewable documentation, deprives the defense and the Court as well of the opportunity
9 to ensure the court’s gatekeeping function under *Daubert* and Rules 104(a) and 702 is
10 fulfilled. In Trial Motions 18 and 19, Mr. Cyrus has complained about the insufficiency of
11 the documentation made available by the Government due to the San Francisco Police
12 Department’s Criminalistics Laboratory practices.

13 Also, the Government’s destruction of, or failure to provide, evidence to ensure
14 reviewability violates Mr. Cyrus’s rights under the Fifth Amendment due process
15 requirement, under the Sixth Amendment’s confrontation and fair trial requirements, and
16 under the Eighth Amendment’s guarantee of heightened reliability in a death penalty case.

17 **II. DESCRIPTION OF LOST OR DESTROYED EVIDENCE**

18 Early in the litigation of this case, the Cyrus defense made clear that it is seeking an
19 Order for Preservation of Evidence in part to allow the defense access to case evidence for
20 reexamination. After prolonged negotiations, and notwithstanding defense seeking an
21 earlier order, on September 8, 2006 (Doc. 250), this Court entered an “Order Regarding
22 Preservation of Interview Notes and Physical Evidence.” Several days prior to the
23 issuance of that order, Assistant United States Attorney James Keller had written a letter to
24 the court responding to the court’s directive regarding the status of destroyed evidence.
25 That letter (appended here as Exhibit A) lists approximately 19 overt acts and/or
26 racketeering acts concerning which evidence was destroyed including: suspected or
27 identified drugs (including alleged cocaine and marijuana), firearms, bullet jackets, shell
28 casings, and ammunition.

1 Thereafter, on September 27, 2006, in a declaration filed with the Court, Special
2 Agent Brian Gilhooly, the case agent, reviewed Mr. Keller’s list of evidence and provided
3 dates on which the evidence was destroyed, or otherwise dissipated (Exhibit B).

4 On November 14, 2006, Agent Gilhooly added an additional two page declaration
5 in which he stated that two additional categories of evidence, photographs referred to in
6 Overt Act 20, and SEM blocks referred to in Racketeering Act 10, were, to his knowledge,
7 no longer in police custody.

8 On November 14, 2006, the Cyrus defense brought a “Motion to Dismiss the
9 Indictment, in the Alternative Motion for Sanctions in View of Destruction/Loss of
10 Critical Evidence”.

11 The motion at issue noted that as to approximately 19 separate overt acts or
12 racketeering incidents, it had been reported that at least 30 different items had been
13 destroyed or lost. Some of these were specific to the case against Mr. Cyrus,
14 notwithstanding the fact that he had been arrested shortly after allegedly having
15 committing three homicides and one attempted murder in 2002.

16 The case against Mr. Cyrus that attracted the federal government’s attention was the
17 September 8, 2002 killing of Ray Jimmerson, Jr. Mr. Cyrus was arrested in Kansas City
18 on September 12, 2002. By September 17, 2002, the San Francisco Police Department
19 Criminalistics Laboratory was processing Jimmerson case evidence. By late September,
20 early October, 2002, Mr. Cyrus was appearing in San Francisco Superior Court charged
21 with the murder of Joseph Hearn and the attempted murder of Marcus Atkinson. The San
22 Francisco Police Department, FBI, U.S. Attorney’s Office Northern District of California,
23 SFPD/FBI Joint Task Force, San Francisco District Attorney’s Office were coordinating
24 their efforts, and in communication, about the investigation of Mr. Cyrus, and his various
25 cases from prior to the time of his arrest through the time of the destruction and loss of the
26 evidence.

27 The evidence at issue is central to Mr. Cyrus’s case in several respects (in addition
28 to be related, in all respects, to the 2 conspiracy counts charged against him, Counts 1 and

1 2). The evidence includes, in addition to alleged drugs, currency and weapons pertinent to
2 overt acts that involved Mr. Cyrus's former co-defendants, the loss or destruction of one
3 spent shell casing, clothing and other materials related to the shooting death of Joseph
4 Hearn on August 23, 2002, one of the capital charges against Mr. Cyrus. The evidence
5 destroyed also involves the 9 mm handgun alleged to have been involved in the killing of
6 Randy Mitchell on August 31, 2002 (charged against Mr. Cyrus in Count 10).

7 On March 8, 2008, the government filed a supplemental declaration in support of
8 the government's opposition to the Cyrus motion to dismiss the indictment or for sanctions
9 for loss or destruction of evidence. The declaration is six pages long, and in it Agent
10 Gilhooly reviews some of the lost evidence, and provides an analysis, on behalf of the
11 government for what occurred in connection with various pieces of evidence, cases
12 connected to them, and allegations made by the defense. In this declaration, (Doc. 413,
13 appended as Exhibit C), Agent Gilhooly reviews specific requests made by the Cyrus
14 defense (at pages 5-6), noting that not only was the alleged murder weapon in the Randy
15 Mitchell case disposed of, but that the car in which Mr. Mitchell was allegedly sitting at
16 the time of his killing had been released, and that other material inquired into by the
17 defense had been destroyed.

18 With respect to both the Hearn and Jimmerson killings, Agent Gilhooly noted that
19 the suspected murder weapon had not been recovered in either case. He also declared that
20 a blue Chrysler vehicle associated with the Jimmerson shooting investigation had been
21 released, and thus is no longer available to the parties.

22 **III ARGUMENT AND AUTHORITIES**

23 Justice Scalia has explained in *Kumho Tire, supra*, that while "...district courts have
24 considerable leeway in determining how to assess reliability, they do not have the
25 discretion to simply abandon their gate-keeping function by foregoing a reliability
26 analysis." *Kumho Tire, supra*, 526 U.S. at 158-159, Scalia, J., concurring. The proponent
27 of evidence must satisfy the preponderance of evidence test that the basis for any proffered
28 expert opinion is reliable. *Daubert, supra*, 509 U.S. at 592, fn 10. As applied to any given

1 case, even where a court may have the notion that the science at issue is fairly well
2 established, expert testimony is not automatically acceptable. As the district court put it in
3 *U.S. v. Sullivan*, 246 F. Supp. 2d 700, 702 (E.D. Ky 2003), “accepting the uniqueness and
4 permanence of fingerprints, however, does not force the conclusion that law enforcement
5 and other entities have developed a sound and reliable methodology for identifying or
6 excluding individuals based on the comparison of fingerprints.”

7 In *Kumho Tire, supra*, the court examined the single ‘task at hand’ in framing the
8 issues presented. The court then observed:

9 Contrary to respondent’s suggestion, the specific issue before
10 the court was not the reasonableness in general of a tire
11 expert’s use of a visual and tactile inspection...rather, it was
12 the reasonableness of using such an approach, along with [the
13 expert’s] particular method of analyzing the data thereby
14 obtained, to draw a conclusion regarding the particular matter
15 to which the expert testimony was directly relevant. The
16 relevant issue was whether the expert could reliably determine
17 the cause of *this* tire’s separation.

18 *Kuhmo Tire*, 529 U.S. at 153-154 (emphasis in original)

19 A number of cases discuss the admissibility of both drug identification and firearms
20 testimony. In most of those cases, the issue of the reviewability of an expert’s findings did
21 not have to be reached – as the findings had either been reviewed by an ‘opposing’ expert
22 or the evidence at issue is at least available for review. The question raised here is where
23 laboratory, or police agency, has maintained little (or no) documentation that provides the
24 opportunity for defense (or indeed any outside) review of an analyst or expert’s
25 conclusions, and where the opponent’s opportunity for review has been eliminated by the
26 destruction of the drug or weapon (or ammunition), what is the implication of the
27 elimination of the opportunity for reviewability and validation ?

28 When the Ninth Circuit decided *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d
1311 (9th Cir., 1995), after the Supreme Court’s decision, Judge Kozinski wrote that a
gatekeeping court must decide in part whether “...scientists have derived their findings
through the scientific method or whether their testimony is based on scientifically valid
principles.” *Id* at 1316. In its gatekeeping role, the trial court should review reliability as

1 follows:

2 This means that the expert's bald assurance of validity is not
3 enough. Rather, the party presenting the expert must show that
4 the expert's findings are based in sound science, and this will
require some objective, independent validation of the expert's
methodology.

5 The Ninth Circuit discussed the subject of peer review, a subject also discussed by
6 the United States Supreme Court in its *Daubert* opinion in 1993. As the Ninth Circuit
7 pointed out, peer review increases the likelihood that substantial flaws in methodology will
8 be detected, and that basic errors will be exposed. *Daubert, supra*, 43 F.3d 1318, and fn 7.
9 Once the party proffering scientific testimony (here, the Government) makes an initial
10 showing that it was derived from a scientific method, the opposing party (here, the
11 defendant) could, under Rule 702, show either that the proffered expert employed unsound
12 methodology or failed to otherwise follow a sound protocol. *Id* at 1319, fn 10. But where
13 the evidence is destroyed, so is the opportunity for peer review.

14 **A. The reliability and validity of reported results associated with destroyed**
15 **identified drugs cannot be assessed**

16 Authoritative weight has been given to the publications of the Scientific Working
17 Group for the Analysis of Seized Drugs (SWGDRUG). The August 9, 2007 edition of the
18 SWGDRUG Recommendations for Laboratories provides definitions of reviewable data
19 and describes casework documentation (an aspect of quality assurance in a laboratory) as
20 follows: "Documentation shall contain sufficient information to allow a peer to evaluate
21 case notes and interpret the data." [Standard 9.1.1] SWGDRUG goes on to state:

22 Analytical documentation should include procedures,
23 standards, blanks, observations, test results, and supporting
24 documentation including charts, graphs, and spectra generated
during an analysis. [Standard 9.1.3]

25 A well regarded scientist writing on drug identification stated, with respect to the
26 validation of microcrystal rests: "It must, however, be emphasized that the descriptions of
27 crystals, or for that matter drawings or photographs, can only enable a tentative
28 identification to be made." Clarke's *Isolation and Identification of Drugs*, Volume I at

1 page 137.

2 Other well-respected scientists write that: “The use of photomicrographs or
3 drawings of the crystals for comparing the unknown sample to standards would be
4 valuable and would address one of the criticisms raised against microcrystal tests
5 regarding limits of documentation as compared to that of modern instrumentation.”
6 Swiatko *et al.*, *Further Studies on Spot Tests and Microcrystal Tests for the Identification*
7 *of Cocaine*, 48 *Journal of Forensic Sciences* (2003) at p. 5. Here, there are no such graphs
8 or drawings.

9 As one court explained it, where it is not possible to tell whether a reliable
10 methodology was applied (or misapplied) in the case, a crucial step is missing: “...any step
11 that renders the analysis unreliable...renders the expert’s testimony inadmissible. This is
12 true whether this step completely changes a reliable methodology or merely misapplies
13 that methodology.” *In re Paoli R.R. Yard P.C.B. Litigation*, 85 F.3d 717, 745 (3rd Cir.,
14 1994).

15 As a result of prior litigation in this case, and as evidenced by the supporting
16 exhibits to this motion, it is clear that certain drug evidence is no longer available for the
17 defense to analyze – notwithstanding efforts by the defense in seeking preservation of
18 evidence (and in eventually obtaining an order for that preservation). While this Court
19 denied the defense motion to dismiss or for sanctions in view of the government’s failure
20 to ensure the preservation of its evidence, the question now is focused on ensuring
21 reliability in the presentation of evidence in the courtroom in this capital case.

22 The San Francisco Crime Laboratory uses drug identification methods that do not
23 require documentation that allows any meaningful opportunity for independent review.
24 For example, while some of the documentation produced by the SFPD Criminalistics
25 Laboratory complies with SWGDRUG’s recommendations, it is clear that technical review
26 by another analyst, or outside analyst, is not possible. SWGDRUG’s recommendations
27 provide that “Laboratories shall have documented policies establishing protocol for
28 technical and administrative case review.” (SWGDRUG published recommendations,

1 August 9, 2007, subsection 9.3, 9.3.1.) But an outsider would have no way of
2 independently verifying what the analyst observed in order to fill out the paperwork.

3 As to drug testing, because the laboratory fails to use analytical methods that either
4 produce a photograph to document the result of crystal testing, or technologies that
5 produce documentation of results, the only thing that the defense has access to, particularly
6 where the substance at issue has been destroyed, is a handwritten entry on one pre-printed
7 form. The defense has no opportunity for independent review, is the combination of an
8 analyst's worksheet, and in most cases a written description of weight of substance. The
9 question of whether mistakes were made in filling out paperwork, or in actually doing the
10 bench tests, cannot be answered.

11 Under the circumstances, the destruction of the listed drug evidence deprives the
12 defense of the opportunity to have assessed, and indeed tested, the reliability and validity
13 both of the methodology employed on a given sample, and the result "documented".

14 **B. Similarly, the destruction of firearms and/or firearm evidence**
15 **associated with specific counts, overt acts, or racketeering acts, deprives**
16 **the Court, and Mr. Cyrus of the means to verify results.**

17 Several courts recently conducted hearings on the admissibility of firearms
18 evidence – where an expert is offered to identify that particular bullets or shell casings
19 came from a specific weapon and/or weapon from a particular manufacturer. See,
20 generally, *U.S v. Monteiro* 407 F. Supp. 2d 351 (D. Mass. 2006); *U.S. v. Green*, 405 F.
21 Supp. 2d 104 (D. Mass. 2005).

22 The number of authoritative (and sometimes controversial) publications are
23 available to discuss the theories, standards, and scientific issues involved with firearms
24 and tool mark identification. Biasotti and Murdoch, *The Scientific Basis of Firearms and*
25 *Tool Mark Identification*, in 3 *Modern Scientific Evidence* 143 (Saigman, et al., editors,
26 1997). Professor Adina Schwartz has offered a scholarly discussion of reliability issues
27 presented in firearms and tool mark identification in her article: *A Systematic Challenge to*
28 *the Reliability and Admissibility of Firearms and Tool Mark Identification*, 6 *Columbia*
Science and Technology Law Review 2 (2005).

1 Generally speaking, an examiner looking at suspected tool marks (including various
2 marks that appear on firearms related evidence) will seek to assess whether individuality
3 can be determined given the evidence available. Thus, the examiner will search out class
4 characteristics (“family resemblances which will be present in all weapons of the same
5 make and model”).¹ The examiner will also seek out individual characteristics which are
6 said to be marks produced by the random imperfections or irregularities of tool surfaces.
7 They are considered specific to a particular tool or weapon.² Finally, the examiner will
8 seek out subclass characteristics that are suspected of being found on similarly
9 manufactured tool working surfaces.³ Judge Gertner explained in her ruling in *Green* that:
10 “... even assuming that some of these marks are unique to the [tool] in question, the issue
11 is their significance, how the examiner can distinguish one from the other, which to
12 discount and which to focus on, how qualified he is to do so, and how reliable his
13 examination is. *Green, supra*, 405 Fed. Supp. 2d at 110.

14 The San Francisco Police Department Criminalistics Laboratory has, relatively
15 recently, published its current *Firearms and Tool Marks Procedures Manual*. The manual
16 includes an appendix that specifically sets forth report wording, which is of specific
17 importance in the community of tool mark and firearms examiners. The *Manual* makes
18 reference to the *AFTE*, which is the Association of Firearm and Tool Mark Examiners,
19 formed in 1969. The Association now certifies persons in specific areas of endeavor such
20 as firearms evidence examination and identification. It also sets forth a Code of Ethics
21 requiring application of scientific method. The *AFTE* Code specifically states: “a proper
22 scientific method demands reliability of validity in the materials analyzed. Conclusions
23 will not be drawn from materials which themselves appear unrepresentative, atypical or

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26 ¹*Monteiro, supra*, 407 F. Supp. 2d at 360.

27 ²*Biasotti, supra*, at 206. FN 3.

28 ³*Biasotti* 212; *Green, supra*, 405 Fed. Supp. 2d at p. 1112.

1 unreliable”.⁴

2 Similarly, under the auspices of the U.S. Department of Justice, the scientific
3 working group for firearms and tool marks (SWG GUN) has published *Guidelines for the*
4 *Standardization of Comparison Documentation*, setting forth the objective of the
5 guidelines, which is “...to set forth a scientifically acceptable standard for documenting, in
6 a case record, the observations that support the reported conclusion.” The documentation
7 produced in the context of a firearms (or firearm related) examination should be sufficient
8 to allow another qualified examiner to understand what was compared and evaluate why
9 the examiner arrived at the reported conclusion.⁵

10 In this case, where documentation of the examination of firearms evidence exists, it
11 is insufficient to allow independent review in certain areas, and the fact that law
12 enforcement authorities destroyed critical pieces of evidence (a shell casing from a murder
13 scene, an alleged murder weapon, etc.) places the Cyrus defense in the position of having
14 to rely on, at best, according to the SWG GUN Guidelines, the “minimum” allowable
15 documentation available to seek to validate the Government’s work. In some instances,
16 this means using copies of computerized photographs, with a one or two word handwritten
17 conclusion, as the means of validating an inclusion or exclusion of a weapon as relevant to
18 Mr. Cyrus’s case.

19 Moreover, reliance on notes, worksheets, or photographs, where they exist, does not
20 allow an individual examiner the ability to look at the class, individual, and subclass
21 characteristics of the actual evidence to ensure that whether, according to the pertinent
22 literature, an informed judgment call by an expert, is in fact just that, and neither a
23 mistaken identification, nor an otherwise erroneous opinion.

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27 ⁴ AFTE Code of Ethics, www.afte.org [Code of Ethics]

28 ⁵SWG GUN Guidelines Procedure 2.1.

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CONCLUSION

The destruction or loss of evidence in this capital case puts the defense in the position, in an adversarial system of adjudication, of either being forced to accept the ‘results’ obtained on certain drug and firearms related laboratory procedures in the absence of any ability to verify them, or in need of challenging their admissibility. The Cyrus defense moves to exclude *all* alleged results, opinions, and data about drug and/or firearms related evidence which involves evidence which has been lost or destroyed.

Dated: August 28, 2008

Respectfully submitted,

JAMES S. THOMSON
JOHN T. PHILIPSBORN

By /s/ John T. Philipsborn
Attorneys for Defendant
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 Suite 350, 507 Polk Street, San Francisco, California 94102.

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

MOTION TO EXCLUDE FORENSIC SCIENCE TESTIMONY ON DRUG AND WEAPON IDENTIFICATIONS WHERE DESTRUCTION OF THE SUSPECTED DRUGS OR WEAPONS (AND AMMUNITION); RENDER THE BASIS FOR EXPERT OPINION UNREVIEWABLE

- 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 28th day of August, 2008, at San Francisco, California.

Signed: /s/ Steven Gray
Steven Gray