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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)

21)

22)

23)

Case No. CR-05-00324-MMC

TRIAL MOTION NO. 18

**MOTION TO EXCLUDE EXPERT
TESTIMONY BASED ON
LABORATORY WORK WHERE
(A) THERE IS NO CURRENT
RECOLLECTION OF THE WORK,
AND (B) THERE IS INSUFFICIENT
DOCUMENTATION TO
ESTABLISH USE OF
ACCEPTABLE AND VALID
METHODS AND (C) WHERE THE
DEFENSE HAD NO
OPPORTUNITY TO RETEST
SUSPECTED DRUGS**

Date: October 23, 2008

Time: 9 a.m.

Dept: The Hon. Maxine M. Chesney

24

25 DENNIS CYRUS, JR. moves for orders excluding the testimony of SFPD
26 criminalists Corbin Scott Yem; Lois Woodworth; Michael Tan; Francis Woo; Debra
27 Madden; Sandra Sachs, Johansen; Lee, all identified by the Government as experts on
28 'narcotics testing' (October 30, 2007, Rule 16 disclosures) on grounds that:

1 a) they are believed not to have independent recollection of the specific analyses in
2 this case;

3 b) the testing they are reported to have conducted on allegedly illegal drugs does
4 not conform to scientific principles, is not verifiable, and cannot be established to have
5 been reliable;

6 c) any 'results' reported in their paperwork are insufficiently documented to be
7 independently verified;

8 d) that in order to testify they will be reading into the record the contents of reports
9 evidencing insufficient testing procedures, and inadequately verified results, and given
10 their professed lack of present memory of the tests, that reading will deprive the accused
11 of the right of cross-examination;

12 e) that in any event the 'documentation' of the alleged narcotics testing and
13 assessment procedure is insufficient to establish the reliability and validity of any resulting
14 opinions; and/or where drug evidence was destroyed, and the defense has no opportunity
15 to retest the suspect or identified drugs (this latter point is also the subject of a separate
16 defense motion;

17 2. If the Court is not inclined to grant the defense motion as a result of a review of
18 the pleadings, the Court should grant an evidentiary hearing, at which the admissibility of
19 the testimony to be offered by 'narcotics experts' and 'firearms experts' as categorized and
20 described by the Government should be reviewed on the basis that the documentation
21 alone is insufficient to establish that any of these experts have admissible evidence to
22 present to this Court or to any jury;

23 3. In addition, that the Court order that any further notes, work papers, or
24 documentation available and relevant to the proffered expert opinions be tendered to the
25 defense for its review pre-trial, and that further hearings on the admissibility of expert
26 testimony be calendared.

27 The motion is based on this Notice and Motion, the following Memorandum of
28 Points and Authorities, the separately filed Declaration of counsel, as well as on any

1 further authorities, arguments, evidence, and information supplied to the Court at the time
2 of the hearing.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **1. Statement of facts specific to this motion**

5 The following statement of facts is based on the discovery, and expert disclosures,
6 that the Government has provided to the defense through a combination of the initial
7 voluntarily provided discovery and the responses to defense requests for discovery. Most
8 of the information at issue was not provided to the defense until September or October,
9 2007. The names of the analysts and criminalists, and the content of their reports comes
10 largely from the Government's discovery pages 9297-9460; 9784-9921. The defense has
11 also relied on the Government's October 30, 2007 Rule 16 disclosures, which identify
12 certain experts whose credentials were not in the discovery provided to the defense.

13 **As to 'narcotics experts'**

14 Several analysts and criminalists from the San Francisco Police Criminalistics
15 Laboratory are identified as having been involved in some aspect of drug identification,
16 weighing and analysis. These criminalists or analysts include: Corbin Scott Yem; Lois
17 Woodworth; Michael Tan; Francis Woo; Sandra Sachs; Debbie Madden; and Criminalists
18 Johansen and Lee. According to the discovery (and the supporting declaration of counsel):

19 Criminalist Corbin Yem will be offered as an expert to identify cocaine base and
20 the weight of cocaine in two different cases;

21 Criminalist Lois Woodworth will be offered as an expert to testify about the
22 identification of matter as cocaine base in two different cases, and she will be asked to
23 provide weights as well;

24 Criminalist Ralph Whitten will be asked to provide identification and rates in four
25 cases in which material allegedly was tested to be cocaine base;

26 Criminalist Michael Tan will be called to testify that evidence in one case was
27 identified as cocaine base with a weight associated with it, and a green leafy substance was
28 marijuana and weighed a given weight. In a second case, Mr. Tan will be called to

1 identify a substance as cocaine base with a specific weight.

2 Criminalist Francis Woo will be called to identify evidence tested in at least four
3 different cases, all of which are alleged to involve cocaine base, with a specific associated
4 weight.

5 Criminalist Debbie Madden is identified as connected with the analysis of five
6 matters in the Government's October 30, 2007 disclosure letter. These appear to be related
7 to Overt Acts 10, 11, 12, 19 and 23.

8 The Government's October 30, 2007 letter also makes reference to the testimony of
9 Criminalists Johansen and Lee, each of whom are intended to testify about one analysis
10 involving cocaine base. Criminalist Lee is also intended to cover the identification of
11 marijuana. (October 30, 2007 letter at p. 5)

12 The San Francisco Police Criminalistic Laboratory has produced varying
13 documentation about drug identification and weights over the years. The laboratory has
14 had at least three different SOPs in place concerning drug identification during the years
15 pertinent to this case. All of these have involved some combination of presumptive
16 chemical reagent test and some allegedly confirmatory test.

17 For marijuana, the laboratory's identification process involves the combination of a
18 chemical reagent test (principally the Duquenois-Levine 'color test', in which when
19 marijuana is added to the proper amount of correctly mixed chemical reagent, a violet
20 color appears after a given time period) and both a visual examination of the evidence to
21 assess its physical resemblance to marijuana, and then a microscopic confirmatory
22 examination. The Laboratory does not require photographs of the examination process.
23 This examination process has remained generally the same in the 1995 and 2005 SOPs of
24 the San Francisco Police Department Criminalistics Laboratory. Additional (or
25 'supplemental' as per the SOPs) tests can be employed, but laboratory personnel do not
26 regularly employ them.¹

27
28 ¹Thin layer chromatography and GCMS (Gas Chromatography Mass Spectrometry) are
identified 'supplemental' tests in the SOPs.

1 For suspected cocaine, or cocaine base, the Laboratory procedures provide for
2 chemical testing of various kinds, including the cobalt thiocyanate color test for screening
3 (mixing substance containing cocaine with a correctly mixed batch of the chemical
4 produces a blue color, which can also be produced by other substances). The platinum
5 chloride microcrystalline test and the gold chloride microcrystalline tests are used as
6 'confirmatory' tests. These two tests involve mixing a properly diluted testing solution
7 with a specified amount of the suspected cocaine, that produces a reaction, which is then
8 visually reviewed by the analyst—who is looking for a specified shape or pattern in the
9 aftermath of the preparation of the sample.

10 The Laboratory does not usually apply further testing to suspected cocaine,
11 although as with marijuana, there are instrumental tests that can be applied to suspected
12 cocaine. Nor does the Laboratory document the chemical/microcrystalline testing with
13 photographs. At most, the 'results' of a drug test are noted on a Laboratory worksheet,
14 and another piece of paper records weight.

15 ARGUMENT AND AUTHORITIES

- 16 a) **Whether based on newly validated or accepted scientific methodologies,
17 or on standards applicable to a field of expertise, there is a foundation
18 that must be established and a basis upon which to assess the reliability
19 of any stated expert opinion.**

19 In the wake of *Daubert*, with its emphasis on empirical
20 validation, challenges to reliability have been raised with
21 regard to numerous techniques of forensic identification,
22 such as fingerprinting, handwriting analysis, ballistics, and
23 bite mark analysis. DNA typing may well be the only area
24 of forensic identification in which research has been conducted
25 in accordance with conventional scientific standards
26 [footnote omitted]. In other areas, experts have in large
27 measure relied on their experience to arrive at subjective
28 conclusions that either have not been validated or are not
objectively verifiable.

25 Berger, "The Supreme Court's Trilogy on the Admissibility of Expert Testimony" in
26 *Reference Manual on Scientific Evidence* (2d ed. Federal Judicial Center) 2000, p.31.

27 This motion challenges the Government's attempt to introduce evidence from
28 identified experts in two areas. The first of these is in the area of narcotics identification.

1 At issue is the identification of substances (here suspected marijuana) through the use of
2 botanical science, and then the identification of the chemical and pharmacological
3 constituents of suspected illegal narcotics through chemical testing in a laboratory setting
4 (marijuana and cocaine).

5 The identification of a substance as an illegal (or legal) drug is the result of a
6 scientific process that is dependent on the scientific reliability and validity of testing
7 methodologies that use chemical tests, or drug processing machinery, to obtain chemical
8 analysis results. See, generally, A.J. McBay, *Drug-Analysis Technology - Pitfalls and*
9 *Problems of Drug Testing*, CLINICAL CHEMISTRY, 33.11 (B) 1987.

10 Testing in a laboratory environment is the subject of a number of standards. For
11 example, the American Society of Crime Laboratory Directors accredits forensic
12 laboratories. The accreditation process introduces to a given laboratory an auditing
13 procedure, requiring a variety of quality assurance programs, proficiency testing and the
14 like.² The question of whether a given laboratory performs its work reliably and with
15 accepted proficiency is a matter that is subject to reporting. See, generally, Peterson and
16 Markham, *Crime Laboratory Proficiency Testing Results (1978-1991), I: Identification*
17 *and Classification of Physical Evidence*, 40 *Journal of Forensic Sciences* 994 (November,
18 1995). The question of whether technicians and scientists in a laboratory are likely to
19 correctly identify narcotics depends in part on the laboratory's quality of performance,
20 from the procedures (and documentation) concerning the handling of evidence in the
21 laboratory, its record management (including maintenance of documentation of testing,
22 adherence to machinery calibration standards, and use of quality control samples, etc.), and
23 both internal and external proficiency testing.

24 There are standards pertinent to any U.S. based laboratory's weighing and testing or
25 processing of these suspected illegal drugs. The failure to adhere to these standards is
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27
28 ²See, generally, www.asclcd.org; also, The American Society of Crime Laboratory
Directors', *Laboratory Accreditation Board Manual* (1997, with updates).

1 known to have produced scandals in several well known laboratories.³ More specific to
2 the subject at hand was the suspension of a ‘veteran’ DEA chemist, Ann Castillo, in 1996.
3 She admitted filing false test results, which the Dallas DEA lab director, Howard
4 Schlesinger, said involved possibly hundreds of cases. (The Dallas Morning News,
5 Friday, July 19, 1996.) There have been concerns aired about drug testing in the San
6 Francisco Police Department Laboratory, as well.

7 The Scientific Working Group for the Analysis of Seized Drugs (SWGDRUG) is a
8 group that was organized under the auspices of the United States Department of Justice to
9 systematize forensic sciences often brought to bear in criminal cases. The August 9, 2007
10 edition of the SWGDRUG *Recommendations for Laboratories* describes casework
11 documentation (an aspect of quality assurance in a laboratory) as follows: “Documentation
12 shall contain sufficient information to allow a peer to evaluate case notes and interpret the
13 data.” [Standard 9.1.1] SWGDRUG goes on to state:

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

17 A well regarded scientist writing on drug identification stated, with respect to the
18 validation of microcrystal tests: “It must, however, be emphasized that the descriptions of
19 crystals, or for that matter drawings or photographs, can only enable a tentative
20 identification to be made.” Clarke’s *Isolation and Identification of Drugs*, Volume I at
21 page 137. Another leading scientist writes that: “The use of photomicrographs or
22 drawings of the crystals for comparing the unknown sample to standards would be
23 valuable and would address one of the criticisms raised against microcrystal tests
24 regarding limits of documentation as compared to that of modern instrumentation.”

26 ³One prominent example is the well known history of the DOJ’s investigation into the
27 FBI lab after ‘whistle-blowing’ by then-supervisory Special Agent Frederic Whithurst, which
28 uncovered laboratory misconduct at the FBI lab (1997). [U.S. DOJ, Office of Inspector
General, *The FBI DNA Laboratory: A Review of Protocol and Practice Vulnerabilities*, May,
2004.]

1 Swiatko *et al.*, *Further Studies on Spot Tests and Microcrystal Tests for the Identification*
2 *of Cocaine*, 48 *Journal of Forensic Sciences* (2003),(At p. 5)

3 As one court explained it, where it is not possible to tell whether a reliable
4 methodology was applied (or misapplied) in the case, a crucial step is missing: "...any step
5 that renders the analysis unreliable...renders the expert's testimony inadmissible. This is
6 true whether this step completely changes a reliable methodology or merely misapplies
7 that methodology." *In re Paoli R.R. Yard P.C.B. Litigation*, 85 F.3d 717, 745 (3rd Cir.,
8 1994).

9 The question of the ingredients of a suspected illegal drug may have implications in
10 a criminal case, both in terms of criminal liability and at sentencing. See, for example, the
11 discussion in *U.S. v. Scrivner*, 114 F.3d 964, 967-70 (9th Cir. 1997), taking the defense to
12 task for not having raised in the District Court the question of what form of
13 methamphetamine was at issue, and thus raising the pertinent sentencing issue there. See
14 also *U.S. v. James*, 915 F.Supp. 1092, 1095 (S.D.Cal. 1995) on the same issue.

15 The examination and chemical analysis of suspected illegal drugs is an area in
16 which there is a wide range of scientific and professional literature. This includes
17 literature specific to the training of the analysts. See, for example, *Basic Training*
18 *Program for Forensic Drug Chemists* (Bureau of Narcotics and Dangerous Drugs, U.S.
19 Department of Justice.) It also includes literature on the type of tests that are used for
20 particular substances, including so-called 'field tests' used to conduct an initial
21 'presumptive' test (the so-called color reagent and crystal tests at issue in this case)
22 together with more sophisticated 'confirmatory' testing. See, for example, Shapiro,
23 Amenta, Kinter, and Tomer, *Mass Spectral Analysis of Cocaine and Pseudococaine*, 2
24 *Spectroscopy International Journal* 227, 228 (1983). See also *Method of Analysis for*
25 *Alkaloids, Opiates, Marijuana, Barbiturates, and Miscellaneous Drugs* (IRS, 1996).

26 There is an abundance of scientific literature specific to the testing used in this case.
27 See, for example, Hauber, *Marijuana Analysis with Recording of Botanical Features*
28 *Present and Without Environmental Pollutants of the Duquenois-Levine Test*, 37 *Journal*

1 of Forensic Sciences 1656 (1992). Also, Hughes and Warner, *A Study of False Positives*
2 *in the Chemical Identification of Marijuana*, 23 Journal of Forensic Sciences 304 (1978).
3 Generally accepted literature explains that the use of presumptive tests alone to identify
4 drugs, including marijuana, is likely an unreliable practice. Giannelli and Imwinkelried,
5 *Scientific Evidence*; also Siegel, *Forensic Identification of Controlled Substances* (in
6 Saferstein, editor, *II Forensic Science Handbook*, 1998).

7 Because identification through chemical testing of suspected marijuana and cocaine
8 involves scientific expertise, it involves *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,
9 509 U.S. 579 (1993), as well as Federal Rule of Evidence 102 which provides that:

10 These rules shall be construed to secure fairness in administration,
11 elimination of unjustifiable expense and delay, and promotion
12 of growth and development of the law of evidence to the end
that the truth may be ascertained and proceedings justly
determined.

13 In context, it is useful to note what the Supreme Court described as ‘scientific’ in *Daubert*:

14 The adjective “scientific” implies a grounding in the methods
15 and procedures of science. Similarly, the word “knowledge”
16 connotes more than subjective belief or unsupported
speculation...Of course it would be unreasonable to conclude
17 that the subject of scientific testimony must be “known” to
a certainty; arguably, there are no certainties in science...
18 but in order to qualify as “scientific knowledge”, an inference
or assertion must be derived from the scientific method.

19 *Daubert, supra*, 509 U.S. at 585.

20 Thus, the *Daubert* court noted that: “[o]rdinarily, a key question to be answered in
21 determining whether a theory or technique is scientific knowledge that will assist the trier
22 of fact will be whether it can be (and has been) tested....” *Id.* at 592-593. Delving into the
23 scientific literature, the court cited with approval Hempel’s statement that: “[T]he
24 statements constituting a scientific explanation must be capable of empirical test...”
25 Hempel, *Philosophy of Natural Science* 49 (1966), quoted in *Daubert* at 592-593. The
26 court emphasized, however, that where expertise depends on the sciences, “[t]he inquiry
27 envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the
28 scientific validity.” *Id.* at 594.

1 Thus, the court set out the factors that it would apply to the assessment of the
2 reliability of scientific endeavor and expertise in a given case. These include the view that
3 for a theory or technique to be “scientific knowledge” it must be testable and should have
4 been tested. The court should also review whether the knowledge has been subjected to
5 peer review and publication; the known or potential error-rates for the field of knowledge,
6 and the standards regulating how the technique or scientific principles are applied. Also,
7 the court should consider the widespread acceptance of the principles at issue.

8 In sum: the proffered Government narcotics experts must qualify under rules
9 pertinent to the testimony of experts who rely on the scientific method to arrive at
10 opinions. Under Rule 702, in order to permit the experts to testify their testimony must be
11 “based upon sufficient facts or data”, and be “... the product of reliable principles and
12 methods”, where “... the witness has applied the principles and methods reliably to the
13 facts of the case.” See Rule 702. In this case, because of the lack of documentation of the
14 testing process, it is not possible to obey *Daubert’s* command that the “... focus, of course,
15 must be solely on principles and methodology, not on the conclusions they generate.” *Id.*
16 at 595. The specific methodologies used are neither documentary nor sufficient to
17 establish relevance or reliability. As a result, it is not possible in this case to assess
18 whether the proposed narcotics identification testimony is reliable, and it is clear that it
19 risks prejudice and confusion within the meaning of FRE 403. *General Electric Company*
20 *v. Joiner*, 522 U.S. 136, 148-149 (1997). (Breyer, J., concurring.) As the *General Electric*
21 court noted there are instances in which a “... court may conclude that there is simply too
22 great an analytical gap between the data and the opinion offered [citations omitted].” *Id.*
23 at 146.

24 Under the circumstances, the Cyrus defense “... raises a material dispute as to the
25 admissibility of expert scientific evidence [here], [and that] the district court must hold an
26 *in limine* hearing (a so-called *Daubert* hearing) to consider the conflicting evidence and
27 make findings about the soundness and reliability of the methodology employed by the
28 scientific experts [citations omitted].” *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d

1 1311, 1318-1319 (9th Cir. 1995).

2 The defense is aware of the San Francisco Police Department Criminalistics
3 Laboratory's June 23, 2005 "Controlled Substances SOP". The Government has provided
4 some Laboratory SOPs in this case (most specifically in relation to DNA testing), but not
5 revealed if it will contend that these 'Standard Operating Procedures' describe the manner
6 in which the Laboratory performed the testing and the weighing in this case; though this
7 SOP was published in June, 2005 - well after the majority of the substances at issue in this
8 case were analyzed.

9 The 'SOP' of 2005 describes the Laboratory as using three levels of testing, which
10 were briefly discussed above. First, screening to "... aid an analyst in narrowing the scope
11 of possibilities such that appropriate confirmation technique may be employed." (SOP at
12 p.12.) Second, presumptive tests which require "... that an analytical test be performed,
13 the result of which eliminates some drugs from consideration. These tests also indicate
14 which class of controlled substance *might be* present, though it does not identify which
15 drug *is* present." (SOP at p.12.) Among the tests described are some of the tests used
16 here, notably the Duquenois-Levine test for marijuana.

17 According to the SOP, the last level of testing is confirmatory testing, which
18 includes microcrystalline tests; various forms of spectroscopy, mass spectrometry, gas
19 chromatography. (SOP at p.13.) In the case of marijuana only, the color reaction from a
20 Duquenois-Levine test "that causes a color change and subsequent extraction of the color
21 is high enough that in combination with stereomicroscopy used to identify specific
22 morphological characteristics [citation to a later portion of the SOP omitted], these two
23 tests serve as confirmation of marijuana." (SOP at p.13.) There is no scientific literature
24 source for this statement, which is open to question both by scientific literature and
25 pertinent case law.

26 The SOP provides "guidelines for analysis of controlled substances", beginning at
27 p.15. There is a description of the use of the Duquenois-Levine test, noting a three-step
28 methodology for confirmation of the color test in a marijuana case (p.16). Similarly, there

1 is a protocol for cocaine analysis involving a presumptive test (the use of a reagent, cobalt
2 thiocyanate). (SOP at p.17.) Cocaine also requires confirmatory microcrystalline tests
3 (pp.17-18), and a gas chromatograph.

4 The “work progression” of a narcotics case, or methodology ‘during analysis’ is
5 specified in the SOP (beginning at p.28). It may require use of a form on which
6 observations are recorded (p.29).

7 There are specific controls and standards described in the laboratory’s 2005 SOP
8 under the section “Quality Assurance Program” (p.30). This requires the logging of
9 reagent preparations, and verifications of standards. It also requires a technical review of
10 10 percent of the cases (p.35). Each analyst undergoes initial competency training and
11 then yearly proficiency training (SOP at p.37). In this case, however, only some of the
12 information about proficiency testing, competency testing, or documentation of the various
13 steps is made available, most specifically in connection with DNA testing. Moreover, a
14 review of the standard “report of SFPD crime lab narcotics analysis form” shows that the
15 form has changed over a period of time, and that not all of the drug-related reports
16 pertinent to this case are consistent with the detail (such as it is) of the current form. (See
17 SOP at p.49.)

18 In this case, it is clear that not all of the marijuana (or cocaine) ‘identifications’
19 were made in accordance with the 2005 SOP. Moreover, even assuming the SOP was
20 ‘properly’ followed, the use of presumptive chemical testing to identify any controlled
21 substance has been described in widely accepted scientific literature as improper, and
22 given the failure of the SFPD crime lab to document other ‘confirmatory’ findings, it is
23 clear that the foundation relied upon by the Government to identify certain evidence as
24 specific illegal drugs is insufficient.

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1 b) San Francisco police laboratories protocol uses a presumptive test to
2 find as such since the late 1970's as 'definitive'. Under the
3 circumstances, adherence to that protocol, to say nothing of the lack of
4 documentation establishing adherence to it, demonstrates the
5 insufficiency of the foundation for establishing the existence of
6 marijuana

7 There are numerous discussions of the evolution of legal standards pertinent to the
8 identification of drugs, and the science of drug identification, on the other. See, generally,
9 Imwinkelried, “*Jackson v. Virginia: Reopening the Pandora’s Box of the Legal Sufficiency*
10 *of Drug Identification Evidence*” 73 Kentucky Law Journal 1 (1984). During the course of
11 the 1970's, because of variations in laws outlawing drugs, there were questions about what
12 form of drug identification would suffice where an accused was charged with possession,
13 or possession for sale (or related offenses) of marijuana. Early case law, and most notably
14 *State v. Wind*, 60 WIS.2d 267; 208 N.W.2d 357 (1973), reviewed the use of specific drug
15 identification methodologies. There, a chemist testified about the visual and microscopic
16 examination of “material” sold by the accused (Wind), and use of both the Duquenois-
17 Levine test, and thin-layer chromatography. As the court pointed out, these tests “... were
18 not specific for marijuana.” 60 Wis.2d at 270-271. The literature reviewed by the
19 Wisconsin Supreme Court noted that even at the time of the decision in that case (1973)
20 there were articles warning about the lack of specificity of these tests - one of which, a
21 thin-layer chromatography which is not even used by the San Francisco Police Department
22 laboratory today. *Id.* at 271-272.⁴

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27 ⁴*State v. Wind, supra*, 60 WIS.2d 267 is referred to in several other cases reviewing
28 similar issues in the same time period. See, for example, *Moore v. U.S.*, 374 A.2d 299 (D.C.
Appeals 1977), a case also noting arguments raised to the effect that the Duquenois-Levine test is
presumptive.

1 c) **It is a violation of Due Process, and the Fair Trial Right, under the Fifth**
2 **Amendment, and of confrontation and cross-examination under the**
3 **Sixth Amendment, for the Government to be permitted to call expert**
4 **witnesses to testify where these witnesses will rely mainly on a**
5 **conclusory report, especially where their work papers and**
6 **documentation is insufficient to demonstrate adherence to the scientific**
7 **process**

8 It is likely that none of the laboratory analysts, criminalists and technicians called to
9 testify about given examinations will remember them specifically. Testimonial hearsay
10 cannot be introduced in a criminal trial in violation of the accused's right to confrontation.
11 *Crawford v. Washington*, 541 U.S.36 (2004). Admittedly, prior to *Crawford*, there was a
12 view that in the absence of competing constitutional values, reports of certain categories of
13 tests could be introduced as an exception to the federal hearsay rule as public records.
14 See, for example, *U.S. v. DeWater*, 846 F.2d 528 (9th Cir. 1988). The Cyrus defense is
15 aware that *Melendez-Diaz v. Mass.*, No. 07-591 is currently pending before the United
16 States Supreme Court, and may eventually resolve whether there is a *Crawford* issue
17 presented by the admission, at trial, of a certificate of drug analysis.

18 But even prior to *Crawford*, not all laboratory reports were deemed admissible
19 under FRE 803. For example, in *Wigglesworth v. Oregon*, 39 F.3d 578 (9th Cir. 1995), the
20 Ninth Circuit reversed a lower case ruling denying an Oregon *habeas* petitioner relief.
21 The petitioner's state conviction was based in large part on a state crime lab report that
22 described the presence of cocaine in water that was taken from a sink in the petitioner's
23 proximity when she was arrested. At the time, Oregon had a statute that was interpreted to
24 allow the introduction of a lab report without any authenticating testimony - the onus was
25 on the defendant to call the state's criminalist. The court found that the procedure violated
26 the accused's Due Process right by relieving the prosecution of its burden of proving an
27 essential element. It noted, generally, that the lab report might have been introduced under
28 an exception to the hearsay rule but the court could not "... decide this question because we
cannot tell from the record before us what test was performed to determine the presence of
cocaine in the sample of water; nor do we know whether the report recorded
simply the objective results of a routine test, or whether it was dependent on some

1 subjective evaluation....” *Id.* at 581.

2 Both *DeWater, supra*, and *Wigglesworth, supra*, were decided prior to *Crawford*.
3 Since *Crawford*, there are no controlling decisions dealing with the subject matter at hand,
4 and the question of its application to the governmental attempt to introduce scientific
5 testing resulted through the reading of reports remains largely unanswered. See, generally,
6 J. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*,
7 15 J.L. & Policy 791 (2007).

8 However, the U.S. Supreme Court noted in *Daubert, supra*, that “... vigorous cross-
9 examination, presentation of contrary evidence, and careful instruction on the burden of
10 proof are the traditional and appropriate methods of attacking shaky but admissible
11 evidence.” *Id.* at 596. But the defense cannot cross-examine a witness without a present
12 memory of past events. That was the whole point of *Crawford v. Washington*, and the
13 outlawing of the use of police reports, traditionally prepared in preparation of and for
14 litigation, as a basis for a conviction.

15 Professor Imwinkelried, an acknowledged expert in the field of forensic sciences,
16 and the legal standards for the admission of scientific evidence (and one of the authors of a
17 previously cited standard work on forensic sciences), noted recently that: “For several
18 decades there has been mounting evidence of a substantial margin of error in expert
19 analysis. Numerous proficiency studies of laboratories have documented that expert
20 analysis is far from infallible.” Imwinkelried, “*Flawed Expert Testimony: Striking the*
21 *Right Balance in Admissibility Standards*” 18 ABA CRIM.JUST. 28, 29 (2003).⁵ Where
22 analysts have used a methodology (in this case, a combination of a reagent test and, on
23 occasion, botanical microscopic identification) that is memorialized in a few cursory notes,
24 without contemporaneous peer review and without further documentation, and especially
25 where the analysts are then asked to testify on the basis of conclusory notations the

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27 ⁵ Professor Imwinkelreid has even more recently written on this issue that the
28 ruling in *Melendez-Diaz* may have extensive clarifying effect. Imwinkelreid, *A Case*
Worth Watching, National Law Journal, July 28, 2008, p. 13.

1 likelihood of unreliability clearly is presented. Moreover, the encouragement of the
2 ‘reading’ into the record of previously reported results under the circumstances would be
3 in violation of Due Process, and the right of cross-examination.

4 d) **Given the legal significance of establishing that cocaine is involved in**
5 **this case, the Government’s failure to have available reliably**
6 **documented analysis results, reviewable by independent scientists, is a**
7 **major impediment to ascertaining whether reliable and valid scientific**
8 **evidence will be presented to the jury**

9 As explained above, the San Francisco Criminalistics Laboratory SOPs (in their
10 most recent incarnation) permit analysts to employ the combination of a screening
11 chemical test and then confirmatory microcrystalline tests for the presence of cocaine in
12 establishing the basis for an opinion that evidence submitted to the Lab contains cocaine.

13 The majority of the ‘drug testing’ opinions to be offered by the Government center
14 on cocaine—either cocaine powder, or cocaine base. The screening test for the presence of
15 cocaine used by the SFPD Lab is a cobalt thiocyanate test. A technical note in the DEA’s
16 *Microgram Journal* by Anna Beakin, “A Study of Acids Used for the Acidified Cobalt
17 Thiocyanate Test for Cocaine Bases” indicated that: “Acidified cobalt thiocyanate is
18 required for cocaine base because that form of cocaine is not water soluble...there are
19 several different forms of the test and that some can give ambiguous results.”⁶ The test
20 itself is available in kit form. Literature produced by law enforcement analysts cautions
21 about the care that must be put into the use of such initial testing processes. See,
22 Schlesinger, “*Topics in the Chemistry of Cocaine*” UNODC (1985). Because reagents,
23 and chemical tests, require certain standards of cleanliness, adherence to protocol, and the
24 use of tests within their ‘shelf life’, documentation of the processes used is critical.

25 The documentation submitted to the defense does not (with the exception of the
26 SOPs) indicate how reagents and chemicals involved in *the tests specific to this case* were
27 handled. In addition, the documentation of the cobalt test is basic—it simply ‘requires’ an
28 entry on to a form.

⁶www.usdoj.gov/dea/programs/forensicscience/microgram/journal

1 The confirmatory tests used by the Lab, platinum and gold chloride, involve adding a
2 reagent to a suspected drug and using a microscope to observe how the crystals form
3 thereafter - for example gold chloride which bonds with cocaine and is said to give the
4 cocaine a specific appearance (cross-shaped crystals). Attempts to standardize practices
5 pertinent to the handling, analysis and reporting of drug evidence in forensic science
6 laboratories resulted in the formation of the previously mentioned *Scientific Working*
7 *Group For Analysis of Forensic Drug Samples* in 1997. Because these testing processes
8 require the combination of the use of the correct methodology in preparing the 'front end'
9 of the test (meaning the verification of the appropriate reagent, and the use of the
10 appropriate amount of suspected drug, with a still current reagent), as well as a correctly
11 made analyst's observation of the product of the test, documentation of the process is an
12 important part of the process. The observation cannot be subjected to independent review
13 unless the end product of the test on any given sample is photographed.

14 Because no documentation is offered, the question of how many suspected 'rocks'
15 of cocaine may have been sampled in any given testing process, cannot be ascertained
16 based on the documentation produced. Moreover, the documentation itself allows for no
17 independent review, other than the ascertainment that a form was filled out by an analyst.

- 18 e) **As argued above, intertwined legal problems are raised where**
19 **criminalists/analysts testify about testing have no present memory of the**
20 **specific tests conducted in this case, and no documentation of the testing**
21 **processes, or contemporaneous detailed notes of observations assists in**
22 **the process of verifying adherence to the scientific method.**

23 Given the lack of documentation pertinent to either marijuana or cocaine testing,
24 Dennis incorporates here as though fully set forth below the objections that: the lack of the
25 criminalists' current memory of their testing methodologies and procedures on specific
26 samples will result in their essentially reading conclusory reports into the record in
27 violation of *Crawford v. Washington, supra*; this reading of conclusory reports, and lack of
28 documentation of actual testing done on specific samples, deprives this Court, the parties,
and any trier of fact of the opportunity to ensure that there were verifiable, reliable, and
valid results obtained, and that the scientific method was followed; finally, adherence to a

1 June, 2005 version of a laboratory “SOP” does not assist in the assessment of the
2 numerous results obtained on testing prior to the year 2005.

3 f) **The absence of any disclosure of the methodology used (other than**
4 **adherence to an SOP); and given the disclosure that the analysts and**
5 **criminalists who will be called have no specific recollection of the work**
6 **that they did on these cases, the danger here (as with the narcotics**
7 **experts) is that witnesses will be called to read reports, and provide**
8 **opinion testimony, based on previously recorded, unverified and**
9 **unverifiable work.**

10 The ‘narcotics testing’ experts offered by the Government will likely be testifying
11 about tests that they cannot remember performing on substances which, in many instances,
12 have been destroyed and are not subject to retesting (an issue raised in a separate defense
13 motion). They will make reference to SFPD Lab SOPs, and will point to paperwork as the
14 evidence of their work. Nothing in the paperwork would assist any consulting scientist to
15 confirm the scientific reliability of their work.

16 **CONCLUSION**

17 For the reasons stated here, this Court must exclude the testimony of the identified
18 narcotics and firearms experts.

19 If the Court is not inclined to do so, it should order a hearing at which the analysts,
20 criminalists, and scientists are called to testify outside of the presence of the jury so that
21 this *Daubert/Kumho* challenge can be determined.

22 Also, the Court should order the Government to provide the documentation,
23 particularly with respect to the quality control issues (setting up of testing, cleaning of the
24 laboratory areas, setting up of chemical solutions, quality assurance, proficiency testing).

25 Dated: August 28, 2008

26 Respectfully submitted,

27 JAMES S. THOMSON
28 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 EXPERT TESTIMONY BASED ON LABORATORY WORK WHERE (A) THERE IS NO CURRENT RECOLLECTION OF THE WORK, AND (B) THERE IS INSUFFICIENT DOCUMENTATION TO ESTABLISH USE OF ACCEPTABLE AND VALID METHODS AND (C) WHERE THE DEFENSE HAD NO OPPORTUNITY TO RETEST SUSPECTED DRUGS

- 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