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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,)
)
 v.)
)
 ERIC ROBERT RUDOLPH,)
)
 Defendant.)

CR-00-S-422-S

DEFENDANT'S REPLY
TO
PROSECUTION'S RESPONSE TO
DEFENDANT'S MOTION TO RECONSIDER TRIAL DATE

In reply to the "Response of the United States to Defendant's Motion to Reconsider Trial Date." [Doc. 230],¹ defendant states as follows .

1. The prosecution's response contains an inaccurate and mistaken representation of defense counsel's ability to prepare for a trial set for August 2, 2004, consistent with defense counsels' obligation and responsibility to render effective assistance of counsel.

2. The prosecution's response contains inaccurate and misleading information.

The Prosecution Has Not Finished its Voluntary Production

3. The prosecution claims it "has provided extensive and very liberal discovery in this case" and that it "has been very forth coming with discovery in this case." [Response at pp. 1, 7] Initially, the local prosecutors stated that this would be an "open file" discovery case. At a status conference held June 4, 2003, this Court encouraged the prosecution by stating its preference for an "open file" policy. By June 30, 2003, the Birmingham US Attorney's position

¹ Defendant has this date filed a motion for leave to file this reply.

had changed to be that it “did not like to use the term 'open file’” and was going to provide discovery “consistent with” what the Atlanta prosecution would be providing. On that same date, the Birmingham prosecution indicated that it would give “notebooks” to defense counsel and an “index,” including an index of the telephone records and a list of what the prosecution would not produce. Neither the index of telephone records nor the list of material not produced has been produced. The “notebooks” or “binders” included “Brady binders” which one of the prosecutors physically identified for defense counsel on June 30, 2003. To date, the prosecution has produced no information it has specifically identified as “Brady.” In addition, no “Brady binders” have been produced. On August 19, 2003, the defense did receive the “binders” - 40 binders (3.5”) contained in 12 banker's boxes.

4. This Court has repeatedly indicated that the defense should or would have to be prepared to answer both the Birmingham and the Atlanta bombings².

5. On October 15, 2003, the prosecution stated that all the discovery from both Birmingham and Atlanta would be produced by the end of February 2004. On February 25, 2004, the prosecution announced that it had “completed our discovery.” [February 25, 2004; R. 4]. Yet in its Response to defendant's motion to reconsider the trial date the prosecution asserts

² At a status conference on July 30, 2003, with regard to the death penalty authorization hearing the magistrate judge stated: “All of what I'm getting at is the defense is going to have to be prepared, in your situation, to try to respond to not only the Birmingham facts, but the universe of facts, including Atlanta facts.” [July 30, 2003; R. 50]

At the status conference on September 3, 2003: “Even though your defense theory, irrespective of the government's theory, it seems to me the argument could be made that your defense theory is that all of the bombings here in Atlanta and Birmingham were by the same person; and that to the extent that somebody other than Eric Rudolph could be argued to be involved in one or more of those bombings, that at least creates the possibility of reasonable doubt as to whether Eric Rudolph did any of the bombings.” [September 3, 2003; R. 31-32].

that “[b]y August, defense counsel will have had almost all of the discovery in the case for more than six months, and much of it for much longer.” [Response at p. 2 (emphasis added)] This appears to be an admission that even in August some discovery will still be outstanding.

6. The prosecution neglects to mention and, in fact, ignores the sheer magnitude of the volume of materials provided to the defense. Given the volume of documents to read and absorb and the number of witnesses that were interviewed by the prosecution, the prosecution fails to take into consideration that such materials need to be organized and indexed into some usable format in order for the defense to make any use of them. In addition, the materials need to be analyzed and the witnesses investigated. Often once witnesses are investigated and interviewed by the defense, the identity of other witnesses is revealed. Some of those witnesses have never been interviewed by the prosecution. Many of the witnesses who were contacted by the prosecution were never questioned on specific issues concerning the defense. If it takes the prosecution five years to investigate Eric Rudolph, the defense would need a reasonable time to undertake its own independent investigation, especially if the prosecution's investigation was flawed or incomplete.

7. As stated above, the defense is still receiving numerous items of discovery that must be organized and analyzed in order to be effectively utilized in its own investigation.

8. The defense asserts that the prosecution has still not produced all of the discovery that the defendant is entitled to receive. To date, the prosecution has only produced only what the prosecution has decided to “allow” the defense to see. Without making any allegation of impropriety, the defense believes there exist additional evidence and information to which it is entitled and which the prosecution has not produced.

The First Continuance

9. This case was first set for trial in August of 2003. The case was continued, without opposition by the defense³, on motion of the prosecution. In its order granting that continuance, this Court made the following findings:

“The question of the postponement of trial is brought before the court by the government's motion. ...

“The government's motion asserts three, interrelated grounds for continuance of the trial. First, the government contends that the case involves **a massive amount of discovery materials that must be studied, absorbed, and organized by both the prosecution and defense counsel**. Second, the government's attorneys state that, '[a]s this case has death penalty implications, the matter must be submitted to the Department of Justice for death penalty review and authorization,' which the Government estimates 'will take several months to complete.' The third ground is a corollary of the second: because this case is one in which the government is likely to seek the death penalty, **the trial will be legally complex, and one in which numerous pretrial motions will be necessary to prepare the case for trial**.

“... The ends of justice will be best served by assuring that this matter is carefully considered, prepared, and tried in a deliberate manner.”

Order Continuing Trial Setting and Making Findings Under the Speedy Trial Act, July 28, 2003, Doc. #216 at 6-7 (footnotes omitted, emphasis added). In that order, this Court recognized that “a miscarriage of justice could result if the parties are not allowed adequate time to review and digest the massive amount of investigative and forensic material involved in this case.” *Id.* at 7.

This Court also recognized that

“the complexity of the case stems from the voluminous discovery and the anticipated necessity of extensive pretrial motion practice. Numerous issues are

³ Defense counsel “very clearly refused to join” the part of the prosecution's motion seeking a continuance to allow submission to the Department of Justice for death penalty review and authorization. *Order Continuing Trial Setting and Making Findings Under the Speedy Trial Act*, July 28, 2003, Doc. #216 at 9.

expected to arise that will require multiple pretrial hearings related to multiple investigative searches, fugitive searches over a five-year period of time, and the qualifications of various experts to be offered by both sides. Given this complexity of the issues that arise from not just one, but multiple bombing investigations, and which cover a period of time spanning seven years, it is unreasonable to expect counsel for either party to be ready for trial in August, much less during calendar year 2003.”

Id. at 9.

Defense Funding Delayed

10. The prosecution fails to take into account that the defendant is indigent and dependent upon obtaining the necessary financial resources to undertake the massive investigation required in this case⁴. Due to administrative and bureaucratic delays beyond the control of this Court and the defense, it was not until early 2004 that the defense was granted the funds necessary to retain the investigators and experts essential to conducting an effective investigation.

Independent Defense Investigation is Required

11. Further, and by far the greatest flaw in its argument, the prosecution wrongly assumes that the mere receipt of discovery ends the matter. Interestingly, in seeking a continuance for its own purposes, the prosecution recognized this problem:

“As this Court is aware, this case involves an immense amount of discovery and will undoubtedly require an extensive motion practice once discovery is complete. Discovery in this case consists of tens of thousands of reports, documents, interviews, laboratory reports, photographs and items of physical evidence. In order for both the prosecution and defense teams to prepare pretrial motions, prepare for the capital case certification process, and prepare for the trial and

⁴ Regarding the change of venue, the Court observed: “[T]he problem we’re faced with is that ... the defense team has asked for certain resources in trying to prepare for that. And at this point, we’re still working on trying to get those resources available. So really it’s kind of still out of their hands.” [October 15, 2003; R. 23].

penalty phase[s] of this case, the large amount of discovery material must be reviewed and, more importantly, assimilated.”

Prosecution's *Motion to Continue*, July 3, 2003, Doc. #21 at 1.

12. The fact of the matter is that, to date, the prosecution has decided what it will produce and has produced only what it wants the defense to have. While that production has been massive in quantity, the quality of the production remains to be determined.

13. By April 22, 2004, the Department of Justice had produced a total of 499,213 “images.” Letter of Assistant United States Attorney Phyllis B. Sumner to William M. Bowen, April 22, 2004. If one person did nothing else and spent only one minute per page reviewing all 499,213 images or pages, it would take a little more than 8,320 hours (or 208 weeks at 40 hours per week working a full eight hours per day) or four years to review all the images/pages. Since April 22nd, additional documents have been produced and more documents are promised.

14. As the prosecution notes in its opposition to the rough notes motion, “It is worth noting that agents interviewed thousands of witnesses during this investigation.”⁵ A substantial portion of the production has taken the form of “302 report of interview.” Those 302s have presented the defense with a mass of unorganized investigative information that the defense is still trying to organize and analyze. Often 302s on the same witness are separated by thousands of documents. The prosecution touts the fact that it has provided the discovery in sections and on a “rolling basis” instead of waiting until it was all in. While appreciated, even this has not been without problems for the defense. Much of the most important information and statements have been produced only late in the production process. Not all the statements of a witness have been

⁵ Prosecution's Response to Defendant's Motion for Preservation, *In Camera* Production and/or Discovery of Rough Notes, Doc. 228, p. 8 n. 2.

produced at the same time. The problem this has created for the defense is a practical one. In many cases the defense will have only one opportunity to interview a witness. Indeed, a number of witness approached by the defense have expressed that they were tired of being bothered by repeated questioning about this case. The defense must gather all the information about a witness before it conducts interviews or it may never get the opportunity to explore crucial facts brought to light in latter batches of discovery. This same principle holds true for the rough notes of witness interviews which the prosecution refuses to produce and which we are just now starting to litigate.⁶

15. While the prosecution represents that this is “a straight forward case” and “is complex only in the sense that there will be some scientific evidence presented” [Response at p. 7, 8], it also claims that it “expects to a [sic] call substantial number of witness [sic] at the trial of this case.” [Response at p. 6]

16. At the very least, the defense has an obligation to independently interview many of these same witnesses, as well as many other witnesses that the prosecution did not interview. This is not just a matter of delegating this task to an investigator. Counsel has a personal obligation to evaluate and assess the credibility of the witness. See eg., *Lord v. Wood*, 184 F. 3d 1083 (9th Cir. July 14, 1999) (In a capital case, counsel’s failure to personally interview and call three witnesses was prejudicial ineffective assistance of counsel.)

"We would nevertheless be inclined to defer to counsel's judgment if they

⁶ At the October 15, 2003, status conference, this Court recognized the problem the defense faced in this regard: “At the very least, it's going to be wasteful if you go and interview somebody based on what you have in one interview and, then a month later, you discover another interview, and you've got to go ask about that as well. You're going to have to make multiple trips.” [October 15, 2003; R. 13-14].

had made the decision not to present the three witnesses after interviewing them in person. Few decisions a lawyer makes draw so heavily on professional judgment as whether or not to proffer a witness at trial. A witness's testimony consists not only of the words he speaks or the story he tells, but of his demeanor and reputation. A witness who appears shifty or biased and testifies to X may persuade the jury that not-X is true, and along the way cast doubt on every other piece of evidence proffered by the lawyer who puts him on the stand. But counsel cannot make such judgments about a witness without looking him in the eye and hearing him tell his story. Here, counsel appear to have made their decision to exclude the three witnesses based on a vague impression - apparently a misimpression - that the police and investigators who spoke to the witnesses did not find them credible. We find no such suggestion in the various reports, and this impression may have been dispelled had counsel talked to the boys. Having now heard their story - from their affidavits and district court testimony - we believe a competent attorney would not have failed to put them on the stand."

Lord, 184 F.3d at 1093; cert. denied, *Lambert v. Lord*, 528 U.S. 1198, 120 S. Ct. 1262, 146 L. Ed. 2d 118 (2000). See also, *Mitchell v. Ayers*, 309 F. Supp. 2d 1146 (U.S. Dist. , 2004); *Riley v. Payne*, 352 F.3d 1313, 1318 (U.S. App. , 2003).

17. With regard to interviewing potential witnesses, defense counsel have definite **minimum** standards they must satisfy:

“As noted *supra* in the text accompanying notes 48-51, between 1976 and 2003 some 110 people were freed from death row in the United States on the grounds of innocence. Unfortunately, inadequate investigation by defense attorneys - as well as faulty eyewitness identification, coerced confessions, prosecutorial misconduct, false jailhouse informant testimony, flawed or false forensic evidence, and the special vulnerability of juvenile suspects - have contributed to wrongful convictions in both capital and non-capital cases. In capital cases, the mental vulnerabilities of a large portion of the client population compound the possibilities for error. This underscores the importance of defense counsel's duty to take seriously the possibility of the client's innocence, to scrutinize carefully the quality of the state's case, and to investigate and re-investigate all possible defenses.

“In this regard, the elements of an appropriate investigation include the following:

* * *

“2. Potential Witnesses:

a. Barring exceptional circumstances, counsel should seek out and interview potential witnesses, including, but not limited to:

(1) eyewitnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself;

(2) potential alibi witnesses;

(3) witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), and the degree of culpability for the offense, including:

(a) members of the client's immediate and extended family

(b) neighbors, friends and acquaintances who knew the client or his family

(c) former teachers, clergy, employers, co-workers, social service providers, and doctors

(d) correctional, probation, or parole officers;

(4) members of the victim's family.”

ABA Guideline 10.7, Commentary, 31 Hofstra L. Rev. 913, 1017-1020 (footnotes omitted).

18. The benchmark which defense counsel must satisfy in this case is set out in *The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*:

" With respect to the guilt/innocence phase, defense counsel must independently investigate the circumstances of the crime, and all evidence – whether testimonial, forensic, or otherwise – purporting to inculcate the client. To assume the accuracy of whatever information the client may initially offer or the prosecutor may choose or be compelled to disclose is to render ineffective assistance of counsel. The defense lawyer’s obligation includes not only finding, interviewing, and scrutinizing the backgrounds of potential prosecution witnesses, but also searching for any other potential witnesses who might challenge the prosecution’s version of events, and subjecting all forensic evidence to rigorous

independent scrutiny. Further, notwithstanding the prosecution's burden of proof on the capital charge, defense counsel may need to investigate possible affirmative defenses – ranging from absolute defenses to liability (*e.g.*, self-defense or insanity) to partial defenses that might bar a death sentence (*e.g.*, guilt of a lesser-included offense). In addition to investigating the alleged offense, counsel must also thoroughly investigate all events surrounding the arrest, particularly if the prosecution intends to introduce evidence obtained pursuant to alleged waivers by the defendant (*e.g.*, inculpatory statements or items recovered in searches of the accused's home).

“Moreover, trial counsel must coordinate and integrate the presentation during the guilt phase of the trial with the projected strategy for seeking a non-death sentence at the penalty phase.”

ABA Guidelines, Guideline 1.1, Commentary. *See, American Bar Association: Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 926 (2003) (footnotes omitted).

Problems Are Presented by the Forensic Evidence

19. Counsel's obligation to "subject all forensic evidence to rigorous independent scrutiny" is especially relevant here as the entire case hinges on complicated scientific evidence. The defense cannot subject the prosecution's forensic evidence to rigorous scrutiny because the defense does not yet know what that evidence is and how it came about. The expert witness summaries and expert reports provided by the prosecution does not even begin to answer these questions. For the reasons stated in defendant's motion for discovery of lab bench notes and other items crucial to a fair assessment of the government's forensic evidence (which the government conceded), the summaries and reports are too conclusory to provide defense experts with any meaningful basis upon which to assess the prosecution's forensic evidence. For example, the prosecution provided a report and an expert summary which indicates that an FBI fingerprint expert matched latent prints to Mr. Rudolph. However, nowhere in the discovery is

there a photograph or document showing the precise points of comparison being used. The same goes for the conclusory reports of the handwriting expert⁷. As the recent “Madrid bombing case” illustrates, we cannot simply take the prosecution's word that prints or handwriting “match.” We cannot test the prosecution's conclusions without access to the precise comparisons being made. Although traditionally, courts have determined fingerprint evidence is scientifically reliable, it has also been recognized that “the principles underlying fingerprint identification have not attained the status of scientific law. *United States v. Crisp*, 324 F.3d 261, 268 (4th Cir. 2003).

Furthermore, mistakes in the matching of fingerprints do occur:

“Offering a rare public apology, the FBI admitted mistakenly linking an American lawyer’s fingerprint to one found near the scene of a terrorist bombing in Spain, a blunder that led to his imprisonment for two weeks.

* * *

“FBI promises to review practices

“‘The FBI apologizes to Mr. Mayfield and his family for the hardships that this matter has caused,’ the bureau said in a statement. The agency also said it would review its practices on fingerprint analyses.

* * *

“The case began when FBI fingerprint examiners in Quantico, Va., searched for possible matches to a digital image of a fingerprint found on a bag of detonators the day of the Spanish bombings on March 11.

* * *

“Three separate FBI examiners narrowed the identification to Mayfield, according to Robert Jordan, the FBI agent in charge of Oregon. A court-appointed

⁷ “Among [federal] district courts, handwriting comparison testimony has fared unevenly since *Kumho Tire [v. Carmichael]*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).” *United States v. Prime*, 220 F. Supp. 2d 1203, 1208 (U.S. Dist. , 2002)

fingerprint expert agreed.

Spain doubted any connection

“The FBI maintained its certainty even as Spanish authorities said by mid-April that the original image of the fingerprint taken directly from the bag did not match Mayfield’s, Wax said.”

The Associated Press, 8:36 a.m., ET May 25, 2004, *FBI Apologizes to Lawyer Held in Madrid Bombings* [<http://www.msnbc.msn.com/id/5053007/>]⁸

20. A similar problem exists with respect to the explosives' residue evidence. The technology used to reach the conclusion that EGDN was present on certain items is incredibly complex and involves multiple protocols and opportunities for error, especially as it relates to contamination issues, which must be considered carefully in a technology such as the present one that measures invisible residues at the picogram level (one trillionth of a gram). The prosecution has conceded that "the defense needs the bench notes" and other crucial information to adequately address the explosives evidence, including lab protocols, lab accreditation and proficiency testing material, contamination studies, and identification of the role of any technicians who worked on the case. Even assuming the prosecution hands over this material as requested in the next four weeks and that there is no further litigation regarding compliance (an unreasonable assumption given the breadth of material promised and the tendency of the labs not to want to disclose embarrassing material), the amount of material is staggering, especially in light of the fact that there were hundreds of pieces of evidence analyzed. The defense cannot reasonably be expected to play catch up and rush through a complicated analysis of piles of

⁸ For the FBI's "Statement on the Brandon Mayfield Case" see http://www.fbi.gov/pressrel/pressrel04/mayfield_052404.htm.

evidence that it took the prosecution itself months if not years to test.

21. In addition, and in conjunction with the prosecution's failure to produce any material identified as "Brady material," (see paragraph 3 above), and the complexity of the explosive residue evidence analysis, the prosecution has failed to produce impeaching information in connection with one of its experts. Furthermore and in this regard, the prosecution has failed to respond to the assertions contained in defendant's Submission in Support of Motion for Discovery of Laboratory Bench Notes, Doc. #182, at ii and iii.⁹

The Atlanta Charges Must Be Investigated

22. The ABA Guidelines Standards also speak to counsel's obligations with respect to the charges in Atlanta:

"Counsel must also investigate prior convictions, adjudications, or unadjudicated offenses that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside. Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction, adjudication, or unadjudicated offense.

"Additional investigation may be required to provide evidentiary support for other legal issues in the case, such as challenging racial discrimination in the imposition of the death penalty or in the composition of juries. Whether within the criminal case or outside it, counsel has a duty to pursue appropriate remedies if the investigation reveals that such conditions exist."

ABA Guideline 10.7, Commentary, 31 Hofstra L. Rev. 913, 1027 (footnotes omitted).

23. Despite the prosecution's repeated and apparently adamant (but conditional) assertion that it will not "introduce any evidence regarding the Atlanta bombings in its case-in-

⁹ This court permitted the prosecution the opportunity to obtain a copy of this motion but otherwise maintained the document under seal. *See*, Discovery Order No. 1, May 19, 2004, Doc. # 225.

chief” and “does not anticipate introducing evidence from the Atlanta bombings in the punishment phase of the case,” [Response at p. 4] the defense must examine the so-called “Atlanta evidence.” That evidence may create a reasonable or lingering doubt regarding any possible Birmingham conviction by demonstrating that, contrary to the government's theory, others were responsible for some or all of the Atlanta offenses, or, in the alternative, the utter dissimilarity between the Birmingham and Atlanta offenses could demonstrate that the perpetrator of one is likely not the perpetrator of the others. The Atlanta evidence may rebut the allegation of future dangerousness by showing a lack of a history of violence. Finally, the Atlanta evidence may establish the independent mitigating circumstance of a lack of criminal history. *People v. Crandall* (1988) 46 Cal.3d 833, 884 (“The absence of . . . violent criminal activity . . . [is a] significant mitigating circumstanc[e] in a capital case, where the accused frequently has an extensive criminal past.”). Only after the defense knows what the “Atlanta evidence” is and has examined, analyzed, and studied that evidence can the defense determine its significance and value.

24. With respect to the Atlanta bombings, the prosecution’s continuous concessions that they do not intend to utilize the Atlanta evidence does not relieve the defense of its obligation to fully investigate the Atlanta charges. There is only one United States Government and it has charged Eric Rudolph in two different jurisdictions. Its theory is that one person - Eric Rudolph - committed all four bombings. Until the defense investigates fully the Atlanta charges and goes through literally hundreds of thousands of documents of interviews of countless witnesses, the defense has no way to evaluate what, if any, use it can make of the Atlanta evidence. Without reviewing the evidence thoroughly and completely, the defense cannot even

evaluate the admissibility of the Atlanta evidence itself.

25. By arguing that Mr. Rudolph is only facing trial in Alabama for one bombing, the prosecution erects a straw man. For over six years the prosecution has made no secret that it is holding Mr. Rudolph responsible for the bombings in Birmingham and in Atlanta. After the Birmingham bombing, all four bombings were investigated as one. Indeed, based on the production afforded defense counsel by the prosecution, it is often difficult to separate one investigation from another¹⁰. It may very well be that if the defense can prove that Mr. Rudolph did not commit any one of the four bombings the prosecution's case may topple like a sand castle in the incoming tide.

The Material Produced by the Prosecution Must be Understood

26. The prosecution fails to take into account that an effective investigation cannot

¹⁰ At the status conference on October 15, 2003, Magistrate Judge Putman recognized:

“I mean, I could see, for example, where even on a motion to suppress a search involving Birmingham, that information from Atlanta that existed prior to that search could impact on whether or not the presentation of the affidavit or whatever, or if it was a nonwarrant search, affects the validity of the Birmingham search.

“So it may well be that even in looking at the Birmingham search situations, before they can effectively deal with it, they're got to look at what happened in Atlanta leading up to that.”

* * *

“.... [I]t's conceivable that some information in the Atlanta investigative material arguably could show that some information presented in a Birmingham search warrant was false. It may well be - - and I wouldn't be surprised in anything this big - - that there's contradictory information in different places.”

[October 15, 2003; R. 20-21, 33]. *See also*, [November 24, 2003; R. 40, 41-42].

occur until the defense understands the global significance of all the seemingly unrelated minute details present in this case. There are no eyewitnesses to the Birmingham bombing. No eyewitness places Mr. Rudolph at the scene of the crime. There is no direct evidence that the defendant built, placed, or detonated any bomb. All the prosecution's evidence against Mr. Rudolph is circumstantial. "Circumstantial evidence, strictly speaking, consists of a number of disconnected and independent facts, which converge towards the fact in issue as a common center." *United States v. Searcey*, 26 F. 435, 437 (U.S. Dist. , 1885). While "the use of indirect, circumstantial evidence, woven together in 'chains of inference,' is permissible and [even] commonplace," *United States v. Ahern*, 68 Fed. Appx. 209, 212 (U.S. App. , 2003), the defense must be permitted proper investigation to "ensure that each link in the chain of inferences leading to that conclusion [of the defendant's guilt] is sturdily supported." *United States v. Beahm*, 664 F.2d 414, 420 (4th Cir. 1981). Here, the prosecution's cases against this defendant consists of a long chain of inferences and presumptions. Yet, "[o]ne presumption cannot be built upon another." *Looney v. Metropolitan R. Co.*, 200 U.S. 480, 488 (U.S. , 1906). In this case in particular, the convergence of those disconnected and independent facts provides fertile ground for the sterile seeds of suspicion and conjecture as distinguished from legitimate presumption and inference. See, *Bracy v. Schomig*, 286 F.3d 406, 423 (U.S. App. , 2002)¹¹.

¹¹ *Bracy v. Schomig*, 286 F.3d 406, 423 (U.S. App. , 2002)

"This is naked conjecture, however, and so cannot be the basis of a valid fact finding. *Libman Co. v. Vining Industries, Inc.*, 69 F.3d 1360, 1363 (7th Cir. 1995); *United States v. Givens*, 88 F.3d 608, 613 (8th Cir. 1996); *Thompson v. Washington*, 266 F.2d 147, 148-49 (4th Cir. 1959) (*per curiam*); *In re Kuttler's Estate*, 185 Cal. App. 2d 189, 8 Cal. Rptr. 160, 169 (Cal. App. 1960) ('an inference may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. . . . A finding of fact must be an

Delay by the Prosecution

27. The prosecution asserts that it “has meet every deadline set out in the Amended Scheduling Order of December 30, 2003.” Response at p. 2. However, the prosecution missed a January deadline with respect to the expert summaries. In addition, the transcripts of the status conferences document the difficulties the prosecution experienced initially in locating a commercial vendor who would or could Bate-stamp, copy, and scan the vast number of documents produced. The prosecution has also experienced substantial and continuing difficulties with its commercial vendor in getting its material copied accurately and in the manner specified. *See*, [February 25, 2004; R. 3].

28. This Court recognized the problem with the delay in the production by the prosecution in September of 2003:

“I think that's part of the problem the defense team is facing is while there's been a lot of talk about how much voluminous material there is, much of it they have yet to see. And so it's hared for them to judge how much time it's going to take them to prepare, for example, pretrial motions.

* * *

How much time it's going to take them, once they see the discovery, to try to formulate an investigative angle for themselves; that is, to [determine] what part of this are we going to investigate, and then conduct that investigation, go out themselves and investigate it.”

[September 3, 2003; R. 40 - 41].

In October of 2003, the Court again recognized the problems caused by the prolonged production:

inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence’).”

“But beyond that, I'm having a difficult time seeing what other kind of deadline I can impose until the discovery is produced, there's some reasonable investigation of it, and then at that point, we can see what experts we may have to deal with, what other discovery-based motions we have to deal with.”

[October 15, 2003; R. 11-12].

29. Finally, in regard to the delay in production, the prosecution has faced its own share of financial problems. [January 14, 2004; R. 13] (“The big problem everybody's under right now is we don't have a budget and a continuing resolution.”).

The Bench Notes Have Not Yet Been Produced

30. As the prosecution recognizes, “[t]he defense originally asked for copies of the bench notes in a letter ... on January 9, 2004.” At that time, the prosecution's position was that the defense was not legally entitled to any bench notes. The defense did not file a formal motion requesting bench notes until April 8, 2004, because the prosecution kept indicating that it might produce the notes. The prosecution has indicated that these notes will be made available “within four weeks” of May 28, 2004.” Response at p. 3. Regarding the production of lab bench notes, the prosecution makes it appear as if they innocently withheld discovery of this material and then suddenly had a change of heart when the defense belatedly moved for discovery in April and the prosecution only then realized that “the defendant needed the bench notes.” Actually, as the defense made clear in its motion, the law was clear from the beginning that the defense was entitled to this material, as the prosecution conceded in its response and at the hearing of the motion. The defense asked for this material in January. The prosecution waited until April to concede the defense was entitled to this material. The prosecution is contradicting itself in conceding that “the defendant needed the bench notes” and at the same time claiming that the

notes are unlikely to provide any additional information relevant to a Daubert¹² challenge. The prosecution also says that it will take up to four weeks to produce this material. This again assumes that the whole issue will be disposed of the moment the prosecution produces what it thinks is responsive. The reality is that there will be additional discovery litigation and once discovery is completed, the material must be organized, reviewed, and analyzed. Then the appropriate motions must be filed and litigated. This simply cannot be done by August.

31. The prosecution erroneously attempts to blame the defense for the delay in the production of the laboratory bench notes. The fact is that the defense asked for these bench notes in January of 2004 and discussed them at various times in court status conferences. It was only after the prosecution's initial equivocations solidified into a negative response in April, that the defense was forced to file a formal motion. Finally, at the "bench note" hearing in May of 2004, the prosecution virtually conceded its legal obligation to produce the lab notes. The prosecution cannot blame the defense for the prosecution's own failure to recognize its clear legal obligations to turn over these lab notes. Had the prosecution recognized its legal obligation to produce when the defense made its initial written request in January, there would have been no need for a formal motion, a court hearing, and the delay entailed thereby. Lastly, the defense was not tardy in its filing of the motion given the multitude of other necessary tasks that needed to be completed and the fact that counsel primarily responsible for litigation of the scientific evidence

¹² *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), set forth a framework for analyzing the evidentiary reliability of scientific evidence and its admissibility under Fed. R. Evid. 702, and held that pursuant to the trial judge's "gatekeeping responsibility," the judge "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable". See also, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

issues in the case was not appointed until March 12, 2004.

32. To a large degree, the defendant's ability to adequately prepare its case is conditioned on and determined by the production by the prosecution. The defense cannot utilize its experts effectively and fully until its forensics experts obtain all of the information, including the essential lab notes heretofore mentioned. Until the defendant's experts analyze all of the information, the defense cannot file its Daubert motions, and until the Daubert motions are filed and heard, this Court cannot rule on the admissibility of the scientific evidence. Moreover, certain suppression motions may have to be filed as a result of what the defense experts report.

Concerns and Considerations of the Victims

33. Like the prosecution, the defense is concerned about the well-being of the victims and witnesses. However, while the defendant has a constitutional right to a fair and impartial trial, the constitution makes no provision for the "needs of the victims and the community to have this case tried in a fair and expeditious manner." [Response at p. 5].

34. The prosecution's argument that the case must be tried in order to insure "closure" for the victims ignores the fact that if this case is reversed for any reason, the case will in all likelihood have to be retried. In that case, the victims will never achieve closure and in fact may even be further traumatized. Some victims (at least Emily Lyons and her husband) have acknowledged in the press that they realize the process will be long and slow¹³. It will be to no one's advantage to drag this case through a lengthy appellate process, reversal, and retrial simply

¹³ From the web site of Emily Lyons: "Others have asked if the trial or his eventual sentence will bring closure. Nobody knows the outcome of the trial yet. It may be months or years before the legal proceedings including any appeals are over."
<http://www.emilylyons.com/ohhappyday.htm>.

because the prosecution was in a rush to execute Mr. Rudolph.

35. Finally, the prosecution requests an early trial setting so that it can fulfill its “duty to the victims and to the witnesses to give them ample opportunity to make any necessary arrangements to attend the trial, while at the same time maintaining their daily routine with as little inconvenience to them as possible.” [Response at p. 8] With all due respect to those victims and witnesses and with due concern for their daily routines and conveniences, the prosecution is doing its very best to execute Mr. Rudolph. Any “weighing” [Response at p. 5] or balancing of interests in this regard must be decided in favor of Mr. Rudolph.

Substantial Prejudice

36. The prosecution claims that the defendant has not made a showing of “substantial prejudice” to warrant the granting of a continuance. [Response at p. 7] This simply ignores the reality of the situation. Moreover, the prosecution fails to take into account the fact that the mitigation investigation alone, which must be undertaken by the defendant from scratch, will require thousands of hours and numerous investigators to create the social history and understand the life of Eric Rudolph. See Exhibit 1, Affidavit of Chief Mitigation Investigator **filed under seal** with this motion¹⁴.

Richard Jewell

37. It should be remembered that the government originally contended that Richard Jewell was the Olympic bomber, only later to concede its mistake. Within days of the Birmingham bombing and with the glow of public embarrassment still lingering over the Jewell

¹⁴ Exhibit 1 is an unexecuted affidavit due to the present unavailability of the defense expert. The defense requests permission to be allowed to substitute the same affidavit but verified within the next seven days.

fiasco, the government declared Mr. Rudolph responsible for the bombings in Atlanta and in Birmingham. The defense would be foolish not to consider and explore the possibility that the prosecution's investigation is once again fatally flawed, and that the government, eager to redeem itself, has once again jumped the gun.

Mr. Rudolph is Entitled to the Effective Assistance of Counsel.

38. Defense counsel cannot provide Mr. Rudolph with the effective assistance of counsel in a trial just months away. In the most recent case on ineffective assistance, *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471, decided June 26, 2003, the Court held by a 7-2 vote that defense counsel's investigation and presentation "fell short of the standards for capital defense work articulated by the American Bar Association ... standards to which we have long referred as 'guides to determining what is reasonable.'" 539 U.S. at ___, 123 S.Ct. at 2536-37. In its discussion of the 1989 ABA Guidelines for counsel in capital cases, the Court held that the Guidelines set the applicable standards of performance for counsel:

"[I]nvestigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.' ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. Cf. *id.*, 11.8.6, p 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, **family and social history**, prior adult and juvenile correctional experience, and religious and cultural influences) (emphasis added); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p 4-55 ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. . . . Investigation is essential to fulfillment of these functions").

539 U.S. at ___, 123 S.Ct. at 2537 (bold added, italics present in *Wiggins*). Thus, "the *Wiggins*

case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases." *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th. Cir. 2003). As pointed out in *Hamblin*, "New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 Guidelines the obligations of counsel to investigate mitigating evidence."

The Penalty Phase Investigation

39. The 2003 ABA Death Penalty Guidelines at section 10.7 contain ten pages of discussion about counsel's "obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." The description of counsel's obligation to investigate mitigating evidence for the sentencing phase of the case is as follows (omitting quotation marks and the lengthy footnotes attached to the text):

"Counsel's duty to investigate and present mitigating evidence is now well established. The duty to investigate exists regardless of the expressed desires of a client. Nor may counsel sit idly by, thinking that investigation would be futile. Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions unless counsel has first conducted a thorough investigation with respect to both phases of the case.

"Because the sentences in a capital case must consider in mitigation, anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant, **penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history**. In the case of the client, this begins with the moment of conception [i.e., investigating defendant's entire life]. Counsel needs to explore:

- (1) Medical history, (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage).

- (2) Family and social history, (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of prosecution or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);
- (3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;
- (4) Military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services);
- (5) Employment and training history (including skills and performance, and barriers to employability);
- (6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services);

“The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defense (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluation (including competency, mental retardation, or insanity), motion practice, and plea negotiations.

* * *

“It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others. Records - from courts, prosecution agencies, the military, employers, etc. - can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness, and

corroborating witnesses' recollections. Records should be requested concerning not only the client, but also his parents, grandparents, siblings, and children. A multi-generational investigation frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment. The collection of corroborating information from multiple sources - **a time-consuming task** - is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence.”

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ¶ 10.7 (2003) at pp. 80-83 (emphasis added).

40. The ABA Death Penalty Guidelines, adopted as "prevailing norms" in *Wiggins*, reinforce and support Eleventh Circuit case law applying similar norms to cases tried before *Wiggins*. See, *Fortenberry v. Haley*, 297 F.3d 1213, 1230-1231 (11th Cir.2002) ("Absent any viable strategic reason ... the failure to present available mitigating evidence renders assistance constitutionally ineffective.") (counsel not prepared at sentencing because they had "not had sufficient time to prepare"); *Stevens v. Zant*, 968 F.2d 1076, 1083 (11th Cir.1992) ("[T]he mere incantation of 'strategy' does not insulate attorney behavior from review; an attorney must have chosen not to present mitigating evidence after having investigated the defendant's background, and that choice must have been reasonable under the circumstances.").

41. Courts have found counsel ineffective when mitigation evidence was not pursued or presented based on alleged time considerations:

“The court finds that McNair's counsel's failure to offer the mitigating evidence was not a tactical decision. Unlike cases in which the decision not to introduce such evidence was based on tactical reasons, Decker disavowed making any of these decisions based on strategy; rather, he claims they were based on perceived constraints of time and money. ...

* * *

“It remains undisputed that Decker based his decisions not to get experts or additional character evidence on perceived constraints of time and money. While it is reasonable for counsel to decide, upon consideration of time and money constraints, to pursue one strategy and not another, it is not reasonable to claim time and money necessitated particular decisions where there is evidence that funds were available and that the constraints were more perceived than real.”

McNair v. Campbell, 307 F. Supp. 2d 1277, 1312-1313 (M. D. Ala. 2004). In this case, defense counsels' time considerations and limitations are real. The defense must be given adequate time to conduct that "extensive and generally unparalleled investigation" mandated by *Wiggins* and the ABA Standards.

The Venue Investigation and Challenge

42. At least for the past two months, defense counsels' time and efforts have been (and are) centered around the challenge to venue and attempts to obtain an impartial jury venire for Mr. Rudolph. The hearing on this matter is set for June 22, 2004.

Progress

43. While the defense had begun the "mitigation" work and background investigation in late summer of 2003, it did not have any investigators focused on the "guilt phase" of the case until January 2004. Much difficulty was had in locating an investigator with the skills (both administrative and investigative) required to lead and conduct an investigation of the size and type required. A lead investigator was identified in early December, and the remaining investigators had been hired by the end of January 2004. The investigative team has interviewed approximately 130 fact witnesses and contacted a number of others. The defense has (to date) identified approximately 250 witnesses to interview of the several thousand witnesses interviewed by the FBI. In the mitigation portion of the case, 25 of the 150 military witnesses

have been interviewed in addition to certain family members and others. In all, the defense has identified some 400 witness that will have to be interviewed. Given that the production is not complete and that the defense has not examined every document that has been produced, it is likely that the defense will identify another 100-150 witnesses that need to be interviewed.

44. With regard to the mitigation investigation, the defense has identified 130 potential lay witnesses, 18 of whom have already been interviewed. A substantial amount of preparation work is necessary in this area that slows the work in the beginning. Life history records must be collected which assist in the identification of relevant witnesses.

45. Delays have been encountered for all investigation by a slow discovery review required by the nature and quantity of the discovery. An initial review of the Birmingham discovery has not even been completed. Only this month did the defense complete a review of the interviews of the people who had something to say about the one or two week period surrounding January 29, 1998.

46. Delays have been created by the time it takes to locate witnesses most of whom are not where they were six to eight years ago. Witnesses relevant to the defense case are scattered throughout the United States. The vast majority of people work, and we have to find them on evenings or weekends. The defense does not have a federal badge that causes most people to drop what they are doing to accommodate us. Witnesses have been witness is in Alabama, Florida, Georgia, Illinois, Maryland, Missouri, North Carolina, Oregon, Texas, Tennessee, Wisconsin, and Washington, D.C. The records show that the FBI was still interviewing witnesses in Birmingham in April 1999 - some 14 months after the "crime."

47. Assuming the defense can do "fact" and "mitigation" investigations concurrently,

we are looking at a minimum pool of 450 witnesses. Assuming the defense can interview 25 a month, it will take sixteen months to interview 400 witnesses. Even interviewing the unrealistic figure of 40 witnesses a month will take ten months.

48. The defense has retained 10 experts, has identified but not retained 14 more, and has identified 14 additional areas that may require expert testimony where the experts have not yet been identified.

49. There are 1800 video tapes and 200 audio tapes to be reviewed. The defense has sought funding for that review but have not yet received approval.

50. The defense has reviewed 6000+ document 1As from Birmingham, and are in the process of arranging to review an estimated 30,000 from Atlanta. We then have to request copies of what is determined to be relevant and useful, wait for the prosecution to produce the copies (if they choose). It took a defense team approximately one week to review the Birmingham 1-As. The Atlanta review will take at least a month. Then after obtaining the copies, these pieces have to be fit into the larger jigsaw puzzle.

51. Most recently, the efforts of the defense have been focused on litigating complicated and time consuming legal issues, such as the change of venue motion, funding motions, the death penalty constitutionality motion, the death notice motion and the possibility of immediate judicial review of an adverse ruling, the bench notes motion, and the Rule 17 litigation. Aside from the venue motion, the bench notes motion, and the Rule 17 litigation, no dates have been set for resolution of these matters. All of them have been incredibly time consuming and have detracted from our investigative and fact-finding responsibilities.

Government Resources

During the review period from October 1, 1995, to June 1, 2002, in terms of combined FBI agent and support personnel worked¹⁵, the FBI logged a total of 213,145 hours on the SANDBOMB case¹⁶. In the CENTBOMB case¹⁷, a total of 179,265 hours were logged. By the FBI's own statistics, these two cases ranked eighth and ninth in the top 15 FBI Major Cases including the terrorist attacks of September 11, 2002 (PENTBOMB). *See, Federal Bureau of Investigation Casework and Human Resource Allocation*, Report No. 03-37, September 2003, Office of the Inspector General, Chapter 7, "Trends in Resource Utilization of Major Cases" located at <http://www.usdoj.gov/oig/audit/FBI/0337/chap7.htm#50>. Those numbers convert to 5,328.6 weeks (one agent, 40 hours per week) in SANDBOMB and 4,481.6 weeks in CENTBOMB, for a total of 9,810.2 weeks (or 188.65 years). The defense has nowhere near the

¹⁵ The report does not mention and apparently include other law enforcement agencies as "FBI support personnel." The case against Mr. Rudolph involved not only the FBI but also the ATF, and state, county, and municipal law enforcement agencies. For example, see the ATF's Atlanta Bomb Task Force. <http://www.atf.gov/explarson/111700bomb.htm>.

¹⁶ The FBI describes the SANBOMB case as follows:

"In February 1998, an explosive device detonated outside the New Woman and All Women Health Care Clinic in Birmingham, Alabama, fatally injuring an off-duty policeman and severely injuring a nurse employed at the facility. According to the FBI, the investigation indicates that this bombing may be related to two other bombings claimed by the Army of God, which occurred in Atlanta, Georgia during 1997."

<http://www.usdoj.gov/oig/audit/FBI/0337/app2.htm>.

¹⁷ "CENTBOM refers to the investigation of the bombing in Centennial Park during the 1996 Summer Olympic Games in Atlanta, Georgia, which killed one individual." <http://www.usdoj.gov/oig/audit/FBI/0337/app2.htm>.

man/woman power and the resources of the FBI.

Scheduling Conflicts

52. Federal Defender Judy Clarke was appointed to this case on November 24, 2003. Doc. #64. At that time, Ms. Clarke was already counsel of record in a federal capital case in Los Angeles, California, involving the death of a corrections officer at a federal maximum security prison on April 3, 1997. *See, USA v. Roy C. Green*, CR98-337-A-CBM, United States District Court for the Central District of California. In October of 2003, *USA v. Green* was set for trial beginning on February 1, 2005. It is anticipate that trial will take three to four months. Ms. Clarke's assistance in this case and at trial are absolutely essential.

Suggested Trial Date

53. It is true that, in the original motion, the defense suggested no new trial date. Frankly and without any criticism of any party except for our own erroneous expectations, the defense was anticipating that the Court would want a candid discussion of this matter at the next regularly scheduled monthly status conference. Since the filing of the request for continuance, the defense has learned that the request will be submitted on the pleadings without argument.

54. The trial date of August 2, 2004¹⁸, was set over the vigorous objection of the defense. The defense position then and now is that we are not even close to being ready to try this case. The entire defense team has discussed this matter and painstakingly examined the alternatives. The defense team has concluded that it can state with confidence that it can be prepared to go to trial in June of 2005.

¹⁸ The trial date was set by order issued 12/30/03, Doc. #87.

Conclusion

For any or all of these reasons, defendant respectfully requests this Court to continue the trial until June of 2005.

Respectfully submitted,

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Date: June 8, 2004

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CERTIFICATE OF SERVICE

I do hereby certify that I have served upon the attorney for the prosecution the above pleading WITHOUT EXHIBIT 1 by facsimile and by placing a copy of same in the United States Mail, first class postage prepaid, and properly addressed to:

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