

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

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

SOUTHERN DIVISION

UNITED STATES OF AMERICA :

-v- :

CR 00-S-422-S

ERIC ROBERT RUDOLPH, :
Defendant :

SUR-REPLY OF THE UNITED STATES TO DEFENDANT’S REPLY TO
GOVERNMENT’S RESPONSE TO MOTION TO RECONSIDER TRIAL DATE

Comes Now the United States of America, by and through its counsel, Alice H. Martin, United States Attorney and Michael W. Whisonant, Robert Joe McLean and William R. Chambers, Jr., Assistant United States Attorneys and files this Sur-Reply to the defendant’s Reply to the United States’ Response to the defendant’s Motion to Reconsider Trial Date. While the United States will not endeavor to address each and every issue raised by the defendant in his Reply and stands by its Response to the defendant’s Motion to Reconsider Trial Date, there are certain inaccuracies in his Reply that must be addressed. The United States, therefore respectfully submits the following:

DISCOVERY

The defense generally characterizes discovery in this case as too voluminous, overly burdensome, untimely and incomplete, all in support of their

claim that they have had insufficient time in which to prepare. The fact, however, is that the defense has been provided with exactly the level and degree of discovery they sought. It is interesting to note that the defense claims on one hand that discovery has been too voluminous and they have not been able to adequately organize and assimilate the materials provided, and on the other, they speculate that they have not received everything to which they are entitled. The defense has mis-characterized discovery in this case as well as the government's burden and representations as to discovery and disclosure.

"OPEN FILE" DISCOVERY

While the United States has consistently agreed that discovery in this case would be liberal and broad, at no time did the government represent that discovery would be "open file" discovery. The United States has maintained at all times that it would permit liberal and extensive discovery in this case and has, in fact, conducted very liberal discovery, providing the defense with materials far and above that envisioned by Rule 16 and controlling precedent. At the status conference referenced by the defense, the Court, not the United States, indicated its preference for open discovery, while recognizing it could not order the United States to conduct open file discovery in this case. The manner in which discovery has been provided in this case and nature of the materials produced to the defense

is unprecedented.

STATUS OF DISCOVERY

Contrary to the defense's belief, discovery in this case is complete and has been complete for several months. The only remaining items to be provided to the defendant are laboratory bench notes and other related items, additional photographs and the Birmingham chain of custody notebook, which the defense asked the government to create. Laboratory bench notes were provided to the defense earlier this date. It should also be noted that several of the items remaining to be provided to the defense were only recently requested.

NOTEBOOKS

The notebooks referred to by the defense have indeed been copied and provided, both in hard copy form and digitally. The "Brady" binder referred to by the defense was prepared by the government in anticipation and preparation for trial, and, as such, is work product. This notebook was discussed in a prior status conference where the defense again sought production of this notebook and for the government to identify specific Brady material on video and audio tapes. Recognizing that any such notebook prepared by the government in anticipation of trial would not be subject to disclosure and/or production as it would constitute a clear example of work product material, the Court noted that the government is not

required to prepare the defense. Contrary to the defense's belief, the United States is not required to identify any material as Brady. The determination of what may constitute Brady material, rather, in a particular case, depends in large part on the defense being advanced. As the defense has chosen not to enlighten the prosecution as to its theory of defense, the United States is not in a position to know what might or might not be Brady material. The United States has, however, engaged in a very liberal and broad practice of discovery in this case to ensure the defense has as much information as possible to make their own determination of what material might be useful. See United States v. Jordan, 316 F.3d 1215, 1252, n. 81, 1254 (11th Cir. 2003).

INDICES

The defense also claims that the government has not produced an index of telephone records. The defense was, in fact, provided with two telephone indices each outlining telephone records and information obtained during the course of this investigation organized by subscriber and telephone number. (BH-1C-00001 through BH-1C-000275 and BH-1C-000276 through BH-1C-000550). The defense was also informed that they could review the telephone records at any time. The defense has made no such request.

ORGANIZATION OF MATERIALS

The defense also claims that the discovery materials provided had to be organized and indexed in order for the defense to make use of the material. The defense implies that the United States dumped 500,000 documents in their lap in no particular order. The United States must point out that the defense was provided with the discovery materials in digital format, categorized by both document type and case (Birmingham or Atlanta). The discovery materials were provided in both scanned and optical character recognition formats, which enabled the defense to perform text searches on the material produced. Each page of material provided bears a distinct Bates number, identifying the case, Birmingham or Atlanta, the category of document and the document number. The defense was also provided with a series of notebooks outlining and organizing the physical evidence in this case. These notebooks contain photographs of the evidence accompanied by source and chain of custody documentation and the results of any laboratory analysis conducted on a particular piece of evidence. At the defense's request, both Birmingham and Atlanta created a chain of custody notebook to track each item of physical evidence. The Atlanta book was provided to the defense in May and the Birmingham book is in the final stages of completion.

DELAY IN DISCOVERY

In support of their claim that the government has delayed discovery, the defense cites the delay in the filing of expert summaries. The United States must point out that these summaries were delayed because the defense filed no specific request for information relating to experts under Rule 16(a)(1)(G) until January 30, 2004, the very day these summaries were due to be filed. The United States stated in its Notice of Discovery of Material Relating to Experts, filed on January 30, 2004, that it had yet to receive any specific motion seeking disclosure of information relating to experts and would respond to any such motion in a reasonable period of time. Any delay in obtaining information pertaining to expert witnesses is attributable to the defense.

The defense also claims that “most important information and statements have been produced only late in the production process.” (Reply p. 6), which hindered their ability to investigate the case. This is simply not the case. Shortly after the defendant’s arraignment, defense counsel was provided with copies of all Birmingham 302s, which are reports of all interviews conducted in the Birmingham case. Thereafter, the defense was provided with laboratory reports, military records and evidence notebooks. Once the United States obtained a suitable vendor to scan and Bates number documents, formal discovery

commenced with the defense being provided material from Birmingham and Atlanta on a rolling basis. It is also worth noting that the defense was advised shortly after the arraignment that they could review and inspect documents at the offices of the Birmingham FBI at any time upon request. The defense made no such request until March 2004, when they requested to review FBI 1As.

VOLUME OF DISCOVERY

Related to their claim that the United States provided the defense with a voluminous amount of material in discovery, which required it to be indexed and organized, is their assertion that the sheer volume of material provided required an inordinate amount of time and resources. However, the United States must point out that the defense sought every item provided in discovery and more. Specifically, the defense requested discovery of material related to bombings in Atlanta, all of which occurred prior to the Birmingham bombing. A significant portion, therefore, of the materials provided in discovery were those relating to the Atlanta bombings. The United States agreed to produce that evidence even though it was not obligated to do so. The United States has maintained and continues to maintain that the evidence from the Atlanta bombings is not relevant as it will not be introduced in the government's case-in-chief nor as an aggravating factor during any penalty phase. The United States cannot make its intentions

with regard to this evidence any clearer, yet the defense continues to insist that it must investigate this irrelevant evidence. Here again, the defense was provided with discovery it specifically requested and now complains that discovery was too voluminous.

The defense cannot justify a continuance of the trial in this case based on the manner in which discovery was conducted nor the nature and amount of materials provided. Discovery in this case has been very liberal, has been conducted in an organized fashion, and has adhered to the dates established by the Court's Scheduling Order.

DEFENSE INVESTIGATION

In further support of their Motion to Reconsider Trial Date, the defense claims that it must conduct its own independent investigation before being fully prepared for trial and notes that the United States pointed this fact out in its July 2003, Motion to Continue. The United States filed its Motion for Continuance to continue the trial from its original setting of August 2003. Nearly a year has passed since that Motion and the Court's ruling thereon. Thereafter, the Court set the trial for August 2, 2004, one year later than the original setting.

FORENSIC EVIDENCE

The defendant next mistakenly claims that this case rests entirely on

complex scientific evidence, requiring additional time and resources to adequately prepare for trial.¹ While forensic and scientific evidence will play a role in the trial of this case, the case does not hinge on such evidence. Also in this vein, the defendant alleges that the United States has not responded to the defendant's submission filed in support of his Motion for Discovery of Laboratory Bench Notes. The defendant conveniently forgets, however, that this submission was filed *ex parte* and under seal with the Court and was not made available to the government until recently, over defense objections.

BENCH NOTES

The defense also points to a perceived delay in receiving laboratory bench notes as justifying further continuance. The defendant claims that bench notes were initially requested by letter on January 9, 2004, and that the United States took the position that the defendant was not legally entitled to these notes, prompting the defendant's formal Motion of April 8, 2004. The facts, however, are otherwise. On January 15, 2004, the United States responded to the

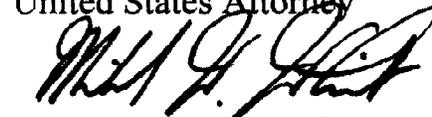
¹ The defense also states on page 16 that the entire case against Eric Rudolph rests on a long chain of inferences and presumptions. While the United States cannot understand what relevance the issue of the nature of evidence to be presented against Rudolph has to do with the pending Motion to Reconsider Trial Date, the United States feels obligated to note that the defense has inaccurately characterized the evidence in this case and is engaging in pure speculation and wishful thinking.

defendant's initial request by letter informing the defendant that the proper course of action with regard to disclosure of bench notes would be for the defendant to file a motion seeking production. The United States informed the defendant that upon the filing of such a motion, it would make a determination as to whether it felt such notes were properly discoverable. The defendant did file such a motion, but filed it almost three months later. Any delay in obtaining the bench notes is attributable solely to the defendant.

The United States again submits that the defense has had more than adequate time in which to prepare this case for trial and opposes any change to the presently scheduled trial date of August 2, 2004. The defense team is comprised of seven experienced attorneys, several of whom have extensive federal capital case experience, as well as numerous investigators, paralegals, assistants, and experts. The defense's claims misrepresent the process, timing, organization, nature and extent of discovery conducted in this case. Aside from the fact that their assertions are specious, the defense's claims do not establish a need for a further continuance.

Respectfully submitted this the 14th day of June, 2004.

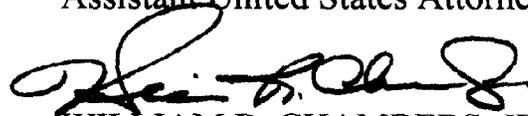
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served on the defendant by mailing a copy of same this date, June 14, 2004, by First Class, United States mail, postage prepaid, to his attorneys of record,

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