

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

FILED

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

Case No. CR-00-S-422-S *YB*

ENTERED

JUL 28 2003

ORDER CONTINUING TRIAL SETTING  
AND MAKING FINDINGS UNDER  
THE SPEEDY TRIAL ACT

This matter comes before the court on the government's motion to continue, filed on July 3, 2003.<sup>1</sup> For the reasons stated below, the court finds that the motion is due to be granted, and the trial of this case continued from its present setting of August 4, 2003, until a later date to be announced by separate order.

Defendant originally was indicted on November 11, 2000. The initial charging instrument contained two counts: the first accusing defendant of using an explosive to damage a building affecting interstate commerce, resulting in a death and personal injury in violation of 18 U.S.C. § 844(i),<sup>2</sup> and the second charging that he used a destructive device

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<sup>1</sup> See doc. no. 21.

<sup>2</sup> 18 U.S.C. § 844(i) reads as follows:

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection,

(i.e., an explosive) during the crime of violence described in the first count, in violation of 18 U.S.C. § 924(c)(1).<sup>3</sup> Defendant was not arraigned on the original indictment in this court until June 3, 2003, following his arrest and initial appearance in the United States District Court for the Western District of North Carolina on June 2, 2003.

The government obtained a superseding indictment on June 26, 2003. That charging instrument repeated the two charges in the original indictment, but added allegations of “special findings” as prerequisites to application of the death penalty under the Federal Death Penalty Act, 18 U.S.C. § 3591 *et seq.* Defendant was arraigned on the superseding indictment on July 11, 2003.

The Speedy Trial Act, codified at 18 U.S.C. § 3161 *et seq.*, provides that a defendant must be brought to trial within seventy days after *either* the date on which he is indicted, *or* the date on which he first appears before a judicial officer in the charging court, “*whichever date last occurs.*” 18 U.S.C. § 3161(c)(1) (emphasis supplied).<sup>4</sup> Failure to bring a defendant

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shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

<sup>3</sup> As it existed in 1998, the text of 18 U.S.C. § 924(c)(1) read, in pertinent part, as follows:

(c)(1) Whoever, during and relation to any crime of violence. . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence . . . , be sentenced to imprisonment for five years, . . . and if the firearm is a . . . destructive device, . . . to imprisonment for thirty years.

<sup>4</sup> The cited statute provides:

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court

to trial within the seventy-day limit can result in dismissal of the indictment. *See* 18 U.S.C. § 3162(a).<sup>5</sup>

In this case, the speedy trial clock began to run on June 3, 2003: the date on which defendant was arraigned in this court on the original indictment. Certain time periods, triggered by various events, toll the running of the seventy-day trial deadline. *See* 18 U.S.C. § 3161(h). Section 3161(h) lists the so-called “excludable” time periods recognized by the Speedy Trial Act:

**(h)** The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

**(1)** Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

**(A)** delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

**(B)** delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

**(C)** delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

**(D)** delay resulting from trial with respect to other charges against the defendant;

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in which such charge is pending, whichever date last occurs.

18 U.S.C. § 3161(c)(1).

<sup>5</sup> “If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant.” 18 U.S.C. § 3162(a)(2).

**(E)** delay resulting from any interlocutory appeal;

**(F)** delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

**(G)** delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

**(H)** delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

**(I)** delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

**(J)** delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

**(2)** Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

**(3)(A)** Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

**(B)** For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

**(4)** Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

**(5)** Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

**(6)** If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

**(7)** A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

**(8)(A)** Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

**(B)** The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

**(i)** Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

**(ii)** Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

**(iii)** Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(9) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

18 U.S.C.A. § 3161(h).

The question of the postponement of trial is brought before the court by the government's motion; therefore, the provisions of § 3161(h)(8) above are particularly significant. Nonetheless, it must be noted that, even though the defendant has not filed a written waiver of his rights under the Speedy Trial Act, defense counsel stated during an on-the-record conference occurring on July 1, 2003, that defendant would not oppose the government's anticipated filing of a motion for continuance. Indeed, no opposition has been filed.

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.<sup>6</sup> 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."<sup>7</sup> 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 court concludes that each of these grounds warrant a finding under 18 U.S.C. § 1361(h)(8)(A) that continuance of the present trial setting beyond the seventy-day limit of the Speedy Trial Act is in the best interests of all parties concerned, and, is not detrimental to the interest of the public and the defendant in a speedy trial. The ends of justice will be best served by assuring that this matter is carefully considered, prepared, and tried in a deliberate manner.

With regard to the government's first assertion, all counsel agree, and the court finds, that discovery will be a laborious and time-consuming process. During the conference of counsel on July 1, 2003, the parties reported that discovery is on-going, but it involves

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<sup>6</sup> The court takes judicial notice that United States Attorney General John Ashcroft has been quoted as saying: "We expect that trial [*i.e.*, the case pending in this court] to be relatively short and straightforward. When that trial is completed, Rudolph will be transferred to the Northern District of Georgia to face the more complicated trial involving the three bombings there." Michael A. Fletcher, *Judge Rules Rudolph Must Be Tried in Alabama First; Alleged Perpetrator of Bombings at Abortion Clinics, 1996 Olympics Will Then Face Charges in Atlanta*, *The Washington Post* (June 3, 2003), at A2; *see also, e.g.*, *Attorney General Ashcroft Issues Statement Regarding Eric Robert Rudolph*, [www.usdoj.gov](http://www.usdoj.gov) homepage. The court finds that counsel for the government directly involved in prosecuting this case are in a better position to assess the complexity of the matter, and, how quickly the case can be prepared and tried. The court further finds the representations by counsel for the government regarding the complexity and time necessary to adequately prepare to try the case to be credible.

<sup>7</sup> Doc. no. 21, at 1-2.

massive amounts of documents and investigative materials. The government estimated that the Birmingham bombing investigation alone involves some 100,000 *files*, each containing multiple documents. The separate, but related investigation of three bombings that occurred in Atlanta, Georgia, may entail as many as 600,000 files. The parties are exploring ways to exchange this information efficiently, perhaps digitally scanned onto CD-ROMs, and the government already has produced to defense counsel some 15,000 documents scanned to a disk. In many instances, these are complex documents, such as witness statements and investigative memoranda, which require careful and time-consuming study. In any event, it is clear that neither the government nor the defendant can review, assimilate, and organize this data prior to August 4th. Fair, reasonable, and adequate preparation for the trial of this case requires much more time than the seventy days anticipated by the Speedy Trial Act. The court therefore finds that the ends of justice served by a continuance of trial “outweigh the best interest of the public and the defendant in a speedy trial.” 18 U.S.C. § 1361(h)(8)(A). Plainly, under § 1361(h)(8)(B)(i), 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. Likewise, the case is “so unusual [and] so complex, due to . . . the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.” 18 U.S.C. § 1361(h)(8)(B)(ii).<sup>8</sup>

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<sup>8</sup> The amount of discovery, the extent to which expert witnesses will be involved, and the death-penalty implications of the case make it “unusual” and “complex” within the meaning of 18 U.S.C.

With regard to the government's second assertion — that time is needed to submit this matter “to the Department of Justice for death penalty review and authorization”<sup>9</sup> — defense counsel very clearly refused to join this part of the motion, as such most certainly is not in the defendant's interest. Nevertheless, the “ends of justice” contemplate not only what is fair for the defendant, but also what is just for the government and the victims and citizens it represents.

Finally, the complexity of the case stems from the voluminous discovery and the anticipated necessity of extensive pretrial motion practice. Numerous issues are 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 the 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 trial for in August, much less during calendar year 2003.

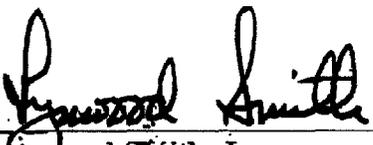
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§ 3161(h)(8)(B)(ii).

<sup>9</sup> See *supra* note 7. Under the United States Attorneys' Manual, the discretion to seek the death penalty is vested in the Attorney General of the United States, and a procedure has been established by which Government prosecutors seek the Attorney General's authorization for the death penalty. See generally, United States Attorneys' Manual, Title 9-10.00, *Capital Crimes*, available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/title9.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm). In this procedure, the Government must file an application, to which the defendant is entitled to respond. Presentations are made to the Attorney General's designated committee by both the prosecution and the defense, each addressing whether a particular case is one that merits the death penalty. Orderly completion of this review process is consistent with the ends of justice so that failure to grant a continuance, thereby truncating this process, could lead to a miscarriage of justice, regardless of whether the death penalty is authorized. See 18 U.S.C. § 3161(h)(8)(b)(i).

In summary, the court finds that the ends of justice served by a continuance of the trial far outweigh the interests of the public and defendant in a speedy trial. Therefore, it is ORDERED, pursuant to 18 U.S.C. § 3161(h)(8)(A) that the government's motion to continue the present trial setting is GRANTED, and the trial of this matter is CONTINUED generally, to be rescheduled by separate order entered hereafter.

DONE this 28<sup>th</sup> day of July, 2003.

  
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C. Lynwood Smith, Jr.  
United States District Judge