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

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	Case No. CR-00-422-S
	)	
ERIC ROBERT RUDOLPH,	)	
	)	
Defendant.	)	

ENTERED
SEP 14 2004

ORDER

This cause is submitted to the court on the defendant's request for discovery relating to scientific testing of evidence connected to three bombing investigations in the Northern District of Georgia in which the defendant has been charged (Doc. 181). The Government has opposed the request as asserted in this case involving a single bombing that occurred in this district, the Northern District of Alabama (Doc. 229). The defendant argues that production of bench notes and other evidence dealing with the scientific testing of evidence in the Atlanta bombings is material to his defense of the indictment in this district charging him with the bombing of the New Woman All Women Health Clinic in Birmingham (Doc. 243).

The court is unpersuaded that discovery related to scientific testing of evidence in the Atlanta bombings has sufficient materiality to require production under either Rule 16 of the *Federal Rules of Criminal Evidence* or under the Brady/Giglio line of cases. In this case, related exclusively to the bombing of the Birmingham clinic, the Government contends that it will offer no evidence and make no argument whatsoever concerning the defendant's alleged involvement in bombings in Atlanta; the subject of the Atlanta bombings will not be placed before the jury in this case in anything the Government will do.

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Rule 16(a)(1)(F) provides to the discovery of scientific testing reports as follows:

> **(F) Reports of Examinations and Tests.**
> Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:
>
> (i) the item is within the government's possession, custody, or control;
> (ii) the attorney for the government knows—or through due diligence could know—that the item exists; and
> (iii) the item is *material to preparing the defense* or the *government intends to use the item in its case-in-chief at trial.* [Italics added for emphasis].

Certainly, in this case, evidence related to the Atlanta bombings is not subject to discovery under the theory that it will be used in the Government's case-in-chief; the Government has affirmatively disclaimed the use of such evidence. Consequently, discovery of documents related to scientific testing in the Atlanta bombings is available under Rule 16(a)(1)(E) or (F) only if such evidence is "material to preparing the defense."

The standard for assessing the materiality of requested discovery used in this circuit was first stated in the case of United States v. Ross, 511 F.2d 757, 762-63 (5th Cir.), cert. denied, 423 U.S. 836, 96 S. Ct. 62, 46 L. Ed. 2d 54 (1975), and subsequently reaffirmed in United States v. Buckley, 586 F.2d 498 (5th Cir. 1978), cert. denied, 440 U.S. 982, 99 S. Ct. 1792, 60 L. Ed. 2d 242 (1979).[1] In Buckley, dealing with similar language in Rule 16(a)(1)(C), the court of the appeals held:

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[1] In Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981)(*en banc*), the Eleventh Circuit adopted as binding precedent the decisions of the old Fifth Circuit Court of Appeals rendered before October 1, 1981.

[I]t is incumbent upon a defendant to make a *prima facie* showing of "materiality" in order to obtain discovery:

> Materiality means more than that the evidence in question bears some abstract logical relationship to the issues in the case. . . . There must be some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor.

United States v. Buckley, 586 F.2d 498, 506 (5th Cir. 1978), cert. denied, 440 U.S. 982, 99 S. Ct. 1792, 60 L. Ed. 2d 242 (1979) (quoting United States v. Ross, 511 F.2d 757, 762-63 (5th Cir.), cert. denied, 423 U.S. 836, 96 S. Ct. 62, 46 L. Ed. 2d 54 (1975)). Recently, the United States Court of Appeals for the Eleventh Circuit again referred to this holding in Buckley when describing the discovery limits imposed by the use of the term "material to the preparation of the defense" found in former Rule 16(a)(1)(C). The court said:

> An item in the first category need not be disclosed unless the defendant demonstrates that it is material to the preparation of his defense. A general description of the item will not suffice; neither will a conclusory argument that the requested item is material to the defense. See United States v. Carrasquillo-Plaza, 873 F.2d 10, 12-13 (1st Cir. 1989); United States v. Cadet, 727 F.2d 1453, 1466 (9th Cir. 1984). Rather, the defendant must make a specific request for the item together with an explanation of how it will be "helpful to the defense." See, e.g., United States v. Marshall, 132 F.3d 63, 67-68 (D.C. Cir. 1998) ("helpful" means relevant to preparation of the defense and not necessarily exculpatory); United States v. Olano, 62 F.3d 1180, 1203 (9th Cir. 1995). As the Fifth Circuit put it in United States v. Buckley, 586 F.2d 498, 506 (5th Cir. 1978) (quoting United States v. Ross, 511 F.2d 757, 762-63 (5th Cir. 1975)), the defendant must "show" "more than that the [item] bears some abstract logical relationship to the issues in the case.... There must be some indication that the pretrial disclosure of the [item] would ... enable [ ] the defendant significantly to alter the quantum of proof in his favor."

United States v. Jordan, 316 F.3d 1215, 1250-51 (11th Cir.), cert. denied, ___ U.S. ___, 124 S. Ct. 133, 157 L. Ed. 2d 40 (2003).

In addition to the discovery obligations imposed by Rule 16, the defendant's constitutional right to due process of law may require the Government to turn over admissible evidence in its possession that is both exculpatory and "material." Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The touchstone of materiality under Brady is whether the requested evidence possesses "a 'reasonable probability' of [causing] a different outcome," in the proceeding. Kyles v. Whitley 514 U.S. 419, 434, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490 (1995). Whether this standard of materiality is essentially indistinguishable from that under Rule 16 is a matter of debate, so far left unanswered in this circuit. See United States v. Jordan, 316 F.3d 1215, 1250 note 74 (11th Cir.), cert. denied, ___ U.S. ___, 124 S. Ct. 133, 157 L. Ed. 2d 40 (2003).

Defendant offers two rationales for asserting that scientific testing evidence in the Atlanta bombings is material to the preparation of his defense to this Birmingham bombing: (1) that the Government has linked the two cases in public statements that make them relevant to one another, and (2) that the Government has alleged as a potential special finding on the death penalty that the defendant constitutes a future threat of violence so that defense efforts to show his non-involvement in the Atlanta bombings would undermine one ground of the Government's sentencing theory. Neither of these theories, however, presents sufficient materiality to meet the standards of Rule 16 and Brady to require the Government to produce discovery related to scientific testing of evidence in completely separate bombings not being prosecuted in this case. While the evidence from the Atlanta bombings may bear "some abstract logical relationship to the issues in the case," it would not "significantly... alter the quantum of proof in his favor" in this case.

Turning to the defendant's first contention, he argues that the Government has linked the two bombing cases in innumerable public statements, press conferences, and press releases, and that he not only must be given an opportunity to show his non-involvement in the Atlanta bombings to overcome the prejudice created by such statements, he also may be able to refute his involvement in the Birmingham bombing by showing his non-involvement in the Atlanta case linked to it. Thus, under defendant's theory, he would raise the issue of the accusations against him in Atlanta even though the Government would not do so in this case.

First, the issue whether the Government has prejudiced the potential jury pool against the defendant is a question to be resolved in *voir dire*. Whether the defendant can get a fair trial is largely dependant on the fairness of the jury-selection process and the ability of the court to find a jury that has not been influenced by the Government's media statements. Given that the Government will not refer at all to the Atlanta accusations, it seems unlikely that the defendant would risk raising such accusations simply to refute some perceived juror prejudice, particularly if the jury-selection process successfully seats an unbiased jury.

It also seems unlikely that the defendant could successfully attack the Government's Birmingham bombing evidence by attempting to refute an argument the Government will not make. The Government will *not* attempt to prove the defendant's guilt in Birmingham in part on the basis of similarities to the Atlanta bombings. The Government will not rely on any Atlanta bombing evidence or even make any reference to it at all. In the absence of such evidence or arguments by the Government, the defendant would have nothing to attack. The defense of the Birmingham bombing could not rest on refuting a similarity to the Atlanta bombings the Government never attempts to prove. Any attempt by the defendant to inject the Atlanta accusations would risk, at the

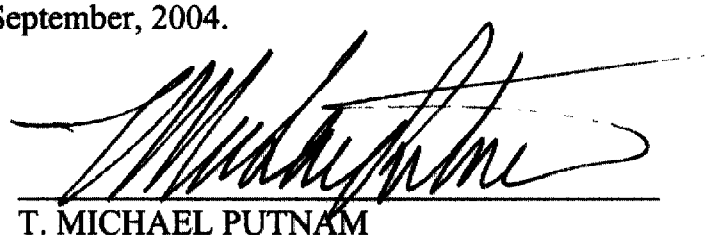
very least, jury confusion under FRE 403, if not outright evidentiary irrelevance. Given these evidentiary problems, it is not likely that discovery of information about scientific testing of evidence in the Atlanta bombings would ""significantly... alter the quantum of proof in his favor" with respect to the Birmingham bombing. Nor is there a "reasonable probability" that such evidence would result in a different outcome at trial. The issue to be tried is the quality and quantity of the evidence of defendant's involvement in the Birmingham bombing, not the Atlanta bombings. Even if the evidence against the defendant is paper thin in the Atlanta case, that says nothing about the evidence against him in the Birmingham case.

Defendant's second contention for obtaining the discovery is that it would be useful for him to prove his non-involvement in the Atlanta cases in order to refute the Government's allegation of his future dangerousness as a basis for capital sentencing. He argues that if he can prove he was not involved in the Atlanta bombings, he can refute the Government's allegation that his potential for future violence warrants capital sentencing. Again, however, the Government has represented that it will not rely at all on the Atlanta bombing evidence to prove future dangerousness. Given the Government's silence about Atlanta at sentencing, the defendant will have nothing to refute. His non-involvement in the Atlanta bombings would have no more evidentiary relevance than his non-involvement in the Kennedy Assassination or the Great Train Robbery or any of thousands of other crimes in which the Government will *not* attempt to implicate the defendant. As the Government will not attempt to link him the Atlanta bombings, his attempts to refute such a non-existent link have no "reasonable probability" of changing the outcome of the sentencing proceeding. Evidence of scientific testing connected to the Atlanta bombings, therefore, is not "material" to the preparation of the Birmingham defense.

The defendant's motion to compel the Government to produce as discovery information relating to its scientific testing of evidence associated with the Atlanta bombings, therefore, is DENIED.

The Clerk is DIRECTED to forward a copy of the foregoing to all counsel of record.

DONE this the 13th day of September, 2004.



T. MICHAEL PUTNAM
UNITED STATES MAGISTRATE JUDGE