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

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| ERIC ROBERT RUDOLPH | : | |

GOVERNMENT'S RESPONSE TO COURT'S ORDER OF SEPTEMBER 29, 2004, AND INCORPORATED RESPONSE TO DEFENDANT'S MOTION TO EXTEND TIME FOR FILING RULE 16 SUMMARIES

Comes now the United States of America, by and through its counsel Alice H. Martin, United States Attorney for the Northern District of Alabama and William R. Chambers, Jr., Assistant United States Attorney, and respectfully files this Response as directed by the Court's Order of September 29, 2004, incorporating the government's Response to the defendant's Motion of September 3, 2004, seeking an extension of time in which to file Rule 16(b)(1)(C) expert summaries. The United States respectfully submits that it has in fact complied with the defense's requests for production of laboratory bench notes and related material to every extent possible. The United States would also respectfully submit the following:

34

## PROCEDURAL HISTORY AND BACKGROUND

As indicated in the defense's Motion to Extend Time for Filing Rule 16(b)(1)(C) Summaries, on January 9, 2004, the defense made an informal request by letter for materials and work papers relating to laboratory analysis and examination conducted on certain evidence in this case, broadly defined as "bench notes." See Attachment 1. Contrary to the defense's claims, the United States did not deny this informal request but, instead, requested that the defense formalize their requests in an appropriate motion before the Court. See Attachment 2. On April 8, 2004, the defense filed a Motion seeking this information and at a hearing held before United States Magistrate Judge T. Michael Putnam, the United States agreed to provide substantially all of the requested materials. Contrary to the claims and implications of the defense, the United States has substantially complied with their requests and the government's agreement to produce the materials outlined in their Motions and requests. The United States submits that its production of these materials more than sufficiently provides the defendant's experts with the ability to "finalize their opinions" (Def. Motion at 2) and provide the United States with reciprocal summaries of the expected testimony of their expert(s) as provided by Rule 16(b)(1)(C). The United States has produced all bench notes in its possession related to the laboratory examinations conducted in

this case and simply cannot produce what does not exist. The defendant's present claims amount to nothing more than dissatisfaction in what materials the government has produced or speculative arguments that certain documents should exist and have not been provided. Again, the United States has given the defendant what it has and cannot be held accountable if certain categories of documents do not exist or that the materials provided do not measure up to the defense's expectations.

In the present Motion, the defense cites numerous alleged and/or perceived deficiencies in the "bench notes" provided by the United States. The United States has endeavored herein below to address each of those claims.

CASE JACKETS

The case jackets provided in this case consist of the bench notes and work papers of those experts who performed laboratory analysis and/or examination of evidence in this case and for whom the United States filed written summaries of their expected testimony pursuant to Rule 16(a)(1)(G). These include Lloyd T. Erwin, Edward Bender, Peter Dreifuss, Carl McClary, and Larry Hankerson. Summaries were also filed for experts Robert Brissie, Carolyn Reck, Loring Rue, and Ray Neely. The work papers, case jackets, and bench notes of Erwin, Bender, Dreifuss, Hankerson, and McClary were all provided to the defendant. Based on

his Motion of April 8, 2004, the defendant sought these bench notes as "crucial to a fair assessment of the government's scientific evidence" as outlined in official reports and the previously filed expert summaries. These witnesses conducted laboratory testing, analysis and examination of evidence in this case. The government did not provide case jackets, work papers and/or bench notes of Carolyn Reck, Loring Rue, Robert Brissie nor Ray Neely as these individuals did not perform any laboratory or scientific testing in this case as plainly set forth in their summaries and reports and are, as such, outside of the scope of the defendant's Motion of April 8, 2004.

As set out fully in her report and summary of her testimony, Carolyn Reck is employed as an Explosives Enforcement Officer with the Bureau of Alcohol, Tobacco, Firearms and Explosives, Explosives Technology Branch. Her opinions are based on her work and observations at the crime scene as well as her prior experience and review of laboratory examination and analysis of debris and other evidence conducted by Lloyd Erwin. Ms. Reck reached her conclusion that the device detonated on January 29, 2998, at the New Woman All Women Health Care Clinic employed a manufactured radio remote control system to command detonate the device based on her work at the scene, her review of evidence located at the scene as well as a review of subsequent findings by Lloyd Erwin and

discussions with Mr. Erwin concerning his findings. The United States has requested that Ms. Reck forward any notes she may have on this case and will review and evaluate any notes for possible disclosure to the defense.

Dr. Loring Rue is the emergency room physician at the University of Alabama, Birmingham (UAB) Hospital who treated Emily Lyons upon her arrival at the hospital and conducted follow up treatment thereafter. As outlined in his summary, he will not be testifying concerning scientific or laboratory analysis he conducted, and, as such, disclosure of any "bench notes" would be outside of the scope of the defendant's Motion and the government's agreement. He will be testifying concerning Emily Lyons' medical condition when she arrived at the hospital on January 29, 1998, and during the days thereafter, her treatment and prognosis based on his experience, work and observations. The United States has recently received copies of Mrs. Lyons' medical records from UAB and will be providing those to the defendant within the next two weeks.

Dr. Robert Brissie, is Professor and the Director of the Division of Forensic Pathology for the UAB Hospital and Medical School and is the Chief Coroner/Medical Examiner of Jefferson County Alabama. Dr. Brissie conducted the autopsy on the body of Robert D. Sanderson and will offer testimony on the conduct of this autopsy and the cause of death. Brissie, as outlined in his report

and summary, did not conduct scientific or laboratory analysis on evidence that will form the basis for his testimony.

Lastly, Ray Neely is employed as a Special Agent Canine Handler with the BATFE. Through prior and separate request, the defendant sought and was provided with all records relating to Neely's canine, Garrett. Neely performed no scientific or other laboratory analysis on any evidence in this case. Rather, Neely along with his canine participated in several searches conducted in the course of this investigation.

WORK PAPERS OF NON-TESTIFYING WITNESSES

In his Motion the defendant has now requested the bench notes of all experts who may have performed laboratory or scientific analysis in this case even if those experts are not called to testify. The United States objects to this request as the work papers of non-testifying experts is irrelevant to that evidence the government intends to present at trial. As indicated, the United States has already produced all work papers and bench notes of those experts for whom the government has filed a summary pursuant to Rule 16(a)(1)(G) and who the government intends to call at trial. The defendant's request for bench notes was initially premised upon the fact that the defense required bench notes and work papers to fully understand and assess the scientific and/or laboratory analysis of

those witnesses for whom the government had filed summaries. The defendant also claimed that since the government indicated in its summaries that these witnesses would rely on their work papers, the defense was entitled to production of those papers to be in a position to fully assess these witnesses' opinions and work. Therefore, any scientific evidence or expert which the government will not present at trial and for which the government has not filed an expert summary under rule 16 would be irrelevant to an understanding of the government's scientific evidence at trial. The United States must point out that it has provided all reports of scientific analysis and/or examination conducted by all experts whether or not they will testify.

EDWARD BENDER

Many of the defendant's complaints are centered around Edward Bender and the production of his work papers and other materials related to him. The defendant complains that it has not been provided with the case jacket of Edward Bender. The United States must point out that Mr. Bender played a limited role in the analysis and review of evidence in this case. Mr. Bender's role in this case was to assist Lloyd Erwin and was limited to supporting Mr. Erwin's work. Specifically, due to equipment limitations in the Atlanta Laboratory in early 1998, the Rockville, Maryland lab, Edward Bender and Peter Dreifuss were called in to

assist and support the work of Lloyd Erwin, who retained primary responsibility for testing and analysis of evidence relating to explosives and components. As outlined in reports, memoranda and work papers produced to the defendant, Bender and Dreifuss performed limited work in this case to assist Lloyd Erwin. As such neither Bender nor Dreifuss maintained an extensive case jacket but, instead, forwarded their work and the results of the tests they performed to Lloyd Erwin. Again, all work papers of both Bender and Dreifuss have been provided to the defense.

In reference to the alleged *Giglio* materials related to Mr. Bender, the United States is certainly aware of and will fulfill its obligations to provide any *Brady*, *Giglio* or other favorable or impeaching information. Based on the defendant's own representations these materials concern solely allegations made against Mr. Bender. The United States has also been preliminarily informed that these materials do not relate to actual laboratory work performed by Mr. Bender but concern the state of his office while at the FBI Laboratory.[1] The United States

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[1] It is interesting to note that the defense has relied heavily on these materials in "defining" *Brady* material from the defense standpoint and alleging a perceived shortfall in government production of these items in recent Motions and Appeals regarding disclosure of agent rough notes. The United States would respectfully submit that it does not consider mere allegations, much less those for which someone is exonerated, to be *Brady* or *Giglio* materials. The United States is, however, working to obtain copies of these materials, review them and provide them to the defense out of an abundance of caution.

has also been informed to this point that Mr. Bender was exonerated after an investigation into these allegations. Since becoming aware of the existence of these materials, the United States has been in contact with the United States Department of Justice Office of Inspector General (OIG), where these materials are located. Specifically, these allegations revolve around numerous allegations and attacks made by Frederick Whitehurst against numerous employees of the Federal Bureau of Investigation (FBI) laboratory prior to the investigation of this case. At the time of these allegations, Mr. Bender was employed in the FBI laboratory. The United States has been advised that it may review these documents at the OIG in Washington, D.C. and has planned to do so in October. While these documents and the allegations themselves have nothing to do with the examination and analysis conducted by Bender in this case and in no way impact the defendant's ability to review Mr. Bender's work or have his expert(s) reach their own opinions based on his work, the United States hopes to have copies of these materials available for the defendant's review not later than November 1, 2004.

TECHNICAL REVIEW POLICY

The defense asserts that they also requested a copy of the "technical review policy maintained by the BATFE and any and all documentation of how such

policy was followed in this case." In support of this request, the defense refers to Section 1.4 of the ASCLD Laboratory Management and Operations Manual. The United States must assume this is a reference to the current ASCLD Manual and not to the Manual that was in effect at the time of the tests and analysis conducted in this case. The laboratory examinations in this case were conducted in 1998 and 1999. The only technical review policy in the possession of the BATFE Laboratory is the current policy, which has no relevance on the examinations performed in this case. The United States has contacted BATFE Laboratory quality assurance personnel in Maryland to determine if a copy of the manual applicable to the tests performed in this case is still in existence. Should the United States locate this manual it will be provided to the defense.

Both technical and administrative review was conducted within the BATFE laboratories on all laboratory examinations and analysis conducted in this case. The administrative review conducted by supervisors is reflected on the official reports provided to the defense and is indicated by the signature of the particular supervisor on the particular report. Administrative review involves a review of adherence to administrative requirements of the expert who prepared the report. Peer or technical review of the actual analysis, examinations, tests and/or experiments performed by each particular expert was also conducted in this case.

The BATFE and experts who conducted technical review do not maintain case jackets, work papers or bench notes of that review process. In the case of Carl McClary, Nancy Davis, who at the time of the examinations conducted by Mr. McClary was chief of the Questioned Documents Section of the BATFE Atlanta Laboratory, conducted both administrative and technical review of Mr. McClary's work. Andrew McIntire of the Latent Fingerprint Section of the BATFE Atlanta Laboratory conducted the technical review of Mr. Hakerson's examinations and analysis. John McOwen and Robert Reed both conducted technical or peer review of Lloyd Erwin's work. Those individual supervisors who conducted administrative review of Mr. Erwin's work are noted by their signatures on Mr. Erwin's official reports.

The United States will request copies of the qualifications for any personnel still employed at the BATFE laboratories who conducted peer or technical reviews of the work actually performed by those experts who will be called to testify by the government.

MACHINE OR EQUIPMENT MANUALS

The defense has requested copies of manuals and maintenance logs of each machine or piece of equipment in the BATFE laboratories used to conduct scientific analysis and/or testing on evidence in this case. The BATFE has

provided the United States with a detailed list of the equipment used in this case as to testing, analysis or examination for explosives, but has indicated that due to copyright and proprietary restrictions it cannot provide copies of manuals. The United States will make the manuals and any pertinent maintenance and/or control logs for the applicable machines or equipment available for inspection and review at the BATFE Laboratories at any time that is convenient to the defense.

The equipment used to conduct laboratory examination, analysis and/or testing of evidence in this case relevant to explosives are:

Atlanta Laboratory

1. GC/TEA (Gas Chromatograph/Thermal Energy Analyzer)

    a. GC - Hewlett Packard Model 5840 (surplused)

    b. TEA - Thermo Electron Corporation, TEA Model 510, Nitrogen Analyzer, Serial Number E0293637

2. EGIS Explosives Detector, Therdics Detection, Inc.

    a. Hand-held Sampler Version, serial number 1115

    b. Desorb Filter Interface Version, serial number 1113

3. XRF (X-Ray Fluorescence Spectrometry)

    a. Phillips Model 9500, Phillips Electronics Instruments Co. (surplused)

    b. EDAX Eagle μ-Probe, EDAX, Inc.

4. FTIR (Fourier-Transform Infrared Spectroscopy)

   a. BIO-RAD, Model FTS 40, Bio-Rad Laboratories, Digilab Division (surplused)

   b. NICOLET, Model Magna-IR 560 with Nic-Plan IR Microscope, Thermo Electron Corporation

Washington (Maryland) Laboratory

1. Thermal Energy Analyzer

   a. TEA Model 510, Thermo Electron Corp. Nitrogen Analyzer Serial number EO584302

2. High Performance Liquid Chromatograph

   a. Water Associates, Model 6000A HPLC pump (surplused)

   b. Rheodyne Model 7125 HPLC injector (surplused)

3. Gas Chromatograph

   a. Hewlett Packard Model 5890 (surplused)

4. Gas Chromatograph/Mass Spectrometer

   a. Hewlett Packard Model 5890 GC (surplused)

   b. Hewlett Packard Model 5988 MS (surplused)

As indicated above, several pieces of equipment have been surplused or are no longer in use by nor in the possession of the BATFE laboratories. The BATFE

laboratories, therefore, have no manuals, maintenance or other logs or any other accompanying paperwork or documentation relating to these pieces of equipment.

SEIZING AGENTS

The defense has now for the first time requested production of case jackets or field notes of all agents involved in the seizing of evidence whether that be at the crime scene or the search of the defendant's residence and vehicle. Contrary to the defense's claims, these items have not to the knowledge of the United States been heretofore requested. In this same vein, the defense has also now requested production of any documentation of what decontamination procedures these agents employed or underwent before beginning the searches as well as any documentation of what exposure these agents had to EGDN prior to the searches. The defense now also seeks any information regarding prior exposure of the National Guard Armory in Murphy, North Carolina to EGDN. The United States is presently making an inquiry as to whether any documentation exists indicating what, if any, exposure searching agents may have had to EGDN prior to conducting the particular searches and what decontamination procedures may have been employed by these agents. The United States has been informed preliminarily that a very small amount of notes (possibly less than one page) exist that pertain to the search of the defendant's residence. The United States has

requested these notes and expects to have them within two weeks and will provide them to the defense as soon as possible thereafter. As for other field notes of agents made in connection with searches, or documentation of any prior exposure to EGDN by agents conducting searches or locations used to conduct searches or decontamination documentation, while the United States is attempting to determine whether such information exists, it has been preliminarily informed that no such documentation or information exists. The United States has been advised that agents responsible for carrying out searches in this case, including those conducted at the crime scene, the defendant residence, storage facility, and vehicle, did observe, follow and implement protocols and procedures to protect against contamination of these sites. The United States has further been advised that these are not written or documented protocols or standards but are those recognized as necessary by the BATFE.

The United States must also point out that based on the reasons set forth in the government's Response to the defendant's Motion for Preservation, *IN CAMERA* Production and/or Discovery of Rough Notes and the court's subsequent ruling, any notes made by agents during the course of any searches would not be

subject to disclosure. [2]

LARRY HANKERSON

The defense now complains that the United States has not provided the basis for Larry Hankerson's conclusions regarding fingerprints and, specifically, has not provided the defense with the precise points of comparison relied upon. Mr. Hankerson has advised that his examination of fingerprints and latent prints does not consist of a "start to finish" or "point by point" examination. The process of analysis and comparison used by Mr. Hankerson is set out in detail in the summary of testimony previously filed with the Court. [3] The United States has provided the defense with all reports, notes, work papers and photographs of prints

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[2] As discussed herein below, the United States is unable to contemplate how either a failure to provide or any delay in providing this material, which is wholly unrelated to the scientific analysis and examination conducted on evidence in this case, is in any way pertinent to the defense's experts ability to assess the government's evidence and/or formulate their own opinions and conclusions as to the government's scientific evidence or amounts to anything beyond cross examination material.

[3] The defendant also now cites error with the previously filed summaries of all government expert witnesses, claiming the United States, in its summaries, fail to provide a point-by-point identification process used by each witness. The defense also complains that the summaries do not include description of the analytical techniques used, the quantitative or qualitative results with any appropriate qualifications concerning degree of certainty surrounding them, nor am explanation of any necessary presumptions or inferences necessary to reach the conclusions. The defendant seeks to transform the summary required by Rule 16 into providing the defense with the exact and complete testimony the government would seek to elicit from the particular witness. The summaries provided the defense with the witnesses' qualifications, opinions, conclusions and the basis for those opinions and conclusions. Coupled with the work papers that have now been provided to the defense, they have a more than adequate summary of the expected testimony of these witnesses, the witnesses' conclusions and opinions, actual test results and the basis for the witnesses' conclusions and opinions.

and latents used by Mr. Hankerson in the conduct of his analysis and comparison. While the defense now for the first time complains the copies provided are poor, the United States will gladly allow the defense to inspect the original latent lift cards as well as photographs from which defense copies were made upon request.

The defense next argues that the United States has not provided the defense with what "objective standard" Mr. Hankerson used to reach his conclusions that certain latent prints were made by the defendant. The United States must point out that there is no "cookbook" used in the analysis or examination of fingerprints or latent prints. There is no "numerical standard" as referred to by the defense.

The defense also seeks copies of the Operating Manual and Procedures Manual referred to in the Standard Approach for Fingerprint Examinations. The manual applicable to the fingerprint and latent print examinations conducted by Mr. Hankerson in this case was the 1998 manual. This manual no longer exists in its form as used in 1998 as it has been changed and has evolved over the past six years. The government has not provided the current manual(s) as they have no bearing or impact on the fingerprint and/or latent print examinations conducted by Mr. Hankerson in 1998.

The defense has also requested clarification on Mr. Hankerson's examinations of certain exhibits. Specifically, the defense now requests

clarification as to the latent lifts made from the driver's side seat belt buckle of the defendant's vehicle, labeled as Exhibits 57 and 58. A review of Mr. Hankerson's official report reveals that Mr. Hankerson obtained three (3) latent lifts of value from exhibits 55 through 59. Of those lifts, Mr. Hankerson has concluded that the defendant made the latent prints on exhibits 57 and 58, leaving one latent print unidentified. With respect to Exhibit 7, all latent prints made on that exhibit (7a, 7b, and 7c) were identified by Mr. Hankerson as being made by the defendant. See BH-ABL-000121 through BH-ABL-000122.

Lastly, the defense has now inquired as to the microscopic procedure used by Mr. Hankerson in the conduct of his examinations and analysis. Contrary to the defense assumptions, this process merely involved examining the latents and other prints through a standard microscope. This has nothing whatsoever to do with the procedure outlined in the defense's Motion relating to the microscopic review and analysis conducted by Lloyd Erwin.

CARL McCLARY

The defense also complains that the United States has not provided the basis for Mr. McClary's conclusions regarding authorship of certain documents. To the contrary, however, the summary of Mr. McClary's testimony previously filed with the Court and provided to the defense adequately provides the basis for Mr.

McClary's opinions and conclusions. Mr. McClary did in fact make written notes on the photocopies of representative samples of the significant characteristics of the evidence documenting the similarities and differences of each item. While Mr. McClary's notes and the photocopies of representative samples noted by Mr. McClary have been provided to the defense in scanned digital format, the United States has been advised that these notes and other highlighting of certain characteristics may not show up well on copies. The United States will make the original exhibits, as it has done before, available to the defense for their inspection and review at any time. It should also be noted that Mr. McClary's summary also sets forth certain specific areas of distinction and similarity upon which his conclusions and opinions are based.

The defense seeks information relating to any objective standard of comparison to be used in forming opinions as to authorship of writings or documents. According to Mr. McClary there are no quantitative procedures or processes used to arrive at his conclusion. The basis for Mr. McClary's opinions is adequately set out in the summary filed with this Court and provided to the defense.

Lastly, the defense complains that Mr. McClary used a microscope in making comparisons of handwriting. As indicated above with respect to other

equipment and/or machinery used, the United States will make manuals and any pertinent logs available at the BATFE laboratory at any time convenient to the defense.

UNRESTRICTED ACCESS BY DEFENSE EXPERTS

The defense has requested unrestricted and confidential access to certain items of evidence used by Mr. Hankerson and Mr. McClary in the process of their laboratory analysis and examinations. The defense has specifically requested that their experts be permitted to examine this evidence without government personnel present to protect the confidentiality of their experts at this time. The United States is presently working with the FBI, who is maintaining custody of these items of evidence, to provide defense experts confidential access to this evidence while at the same time protecting the integrity of that evidence.

PETER DREIFUS

Here again the defense cites error in the production of the bench notes of Peter Dreifus. Dr. Driefus', as with Mr. Bender's, role was to assist Lloyd Erwin and the BATFE Atlanta Laboratory in certain tests and analysis. The defense claims that the United States has not provided it with any user or method manuals for the techniques used by Dr. Dreifus. As indicated above, the United States will make any manuals available for inspection and review by the defense at any time.

PHOTOGRAPHS

All photographs made or used by all BATFE laboratories in the course of their analysis, examination(s), and/or tests have been copied and provided to the defense in scanned digital format. Hard copies of the photographs that were scanned and provided to the defense will made available for inspection at any time.

EXTRACTION PROCEDURES, SOLVENTS, QUALITY CONTROL

The defense cites error in the fact that no information has been provided relating to the extraction procedures, solvents or chemicals used, nor quality control/assurance testing of solvents used by Mr. Erwin, Mr. Bender or Dr. Dreifus. The United States has provided with the defense with all documents, notes, runs, tests, blanks, printouts and other documentation in the possession of the BATFE laboratories relating to the work of Lloyd Erwin, Edward Bender, and Peter Dreifus and their examination, analysis and testing for explosives and explosive residue. The United States is presently inquiring of the BATFE laboratories whether any additional documentation exists which outlines or documents the extraction procedures, solvents or chemicals used by these experts as well as any documentation of quality control or assurance testing of these solvents. Should these materials be found, they will be provided to the defense

not later than November 1, 2004.

CHAIN OF CUSTODY LOGS

All chain of custody logs in the possession of the FBI and BATFE have been provided to the defense.

LABORATORY PROTOCOLS

The BATF laboratories has advised the United States that the relevant laboratory protocols in effect at the time of the laboratory testing, analysis and examinations conducted in this case no longer exist as they did when the tests were actually being conducted. The United States has contacted Quality Control/Assurance personnel with BATFE to determine whether any of these protocols, in effect at the time of testing of evidence in this case, are being maintained by the BATFE. Laboratory protocols and other laboratory requirements or guidelines imposed either by the BATFE itself or ASCLD have been changed and revised since testing was performed on evidence in this case. While the BATFE laboratories adhere to both self imposed policies and protocols, as well as those imposed by ASCLD, during annual self evaluations or complete re-certifications by ASCLD older protocols and like material are purged by BATFE and are not maintained.

TRAINING AND EXPERIENCE OF TECHNICIANS

The BATFE laboratories employ no technicians who performed laboratory or other scientific testing, examination or analysis of evidence in this case. As previously communicated to the defense, the respective experts performed all testing done on evidence in this case.

ASCLD ACCREDITATION INFORMATION

As indicated above, the BATFE laboratories do not maintain annual interim laboratory reviews or audits from 1998 or 1999, when the majority of the tests were performed in this case. Once ASCLD conducts a full review of a particular laboratory, all annual review and/or audit materials are purged and are not maintained. Furthermore, materials generated during previous years' review and re-certification by ASCLD are not maintained by the BATFE laboratories as they have no bearing on the present certification or accreditation. The laboratory director for the BATFE Laboratory in Atlanta, Mr. Donal McClammroch, who also participates as an ASCLD inspector, has advised that ASCLD also purges all documents and materials from prior reviews and/or inspections and only maintains paperwork relevant to the current or most recent year in which a laboratory was accredited.

As indicated above, the United States is presently reviewing material in the BATFE laboratory archived files to determine if any documents or other materials

relating to the labs' inspection(s), audit, and/or certification(s) at or around the time of the tests performed in this case and will certainly provide these to the defense as soon as possible. However, materials or protocols relating to the labs present accreditation status would, the government submits, be irrelevant to any issue or question that may arise from the labs work some six years ago. Obviously questions as to the labs practices, procedures, protocols and/or adherence to ASCLD policies is relevant only to the extent they touch on the tests actually performed in this case. Present protocols, procedures and/or policies which were not in effect when the tests at issue in this case were performed have no relevance.[4]

The defense, for example, directs the Court's attention to correspondence between BATFE Quality Assurance personnel and ASCLD personnel regarding the maintenance of records. The correspondence indicates that the accredited

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[4] The United States cannot conceive how laboratory protocols or materials relating to audit, review, certification or accreditation of a laboratory by any entity, internal or external, or any other such administrative material is determinative of the defense's experts being able to "finalize" their opinions for disclosure in a summary to the government. What the defense appears to be actually seeking here is information to used for cross examination of the laboratory and its personnel rather than an honest inquiry into the methods of the scientific testing undertaken by the experts. The purpose of the defense's request and the government's agreement to provide "bench notes" was to aid in an understanding and assessment of the scientific evidence, outlined in the government's summaries and reports, to be offered at trial, not to have the government prepare the defense's cross examination of laboratory personnel on administrative issues. What has been provided to the defense is all materials prepared and used by experts during the course of their testing and analyses, which forms the basis for their opinions and conclusions as outlined in their reports.

laboratory should maintain records pertaining to their current inspection period. The correspondence also indicates that ASCLD maintains records for a period of five years and once a lab has been re-accredited, previous inspection records are purged. These standards or protocols regarding retention of records are current regulations of ASCLD and were not in place in this form in 1998, the applicable time frame here. As stated, the United States has not provided the defense with documentation regarding current certification or accreditation as this has no bearing on what was being done in the lab when the tests in this case were performed.

CORRESPONDENCE

The defense in their Motion has renewed their request for all correspondence relating to laboratory work done in this case. In compliance with Judge Putnam's Order entered at the April 8, 2004, hearing on production of bench notes, the United States has provided the defense with a communication log outlining all communications in the possession of the government between examiners and lawyers and between examiners and crime scene personnel. The United States continues to maintain that each item listed on the log provided to defense counsel is not subject to discovery as such material constitutes attorney work product and communications made during the course of this investigation.

Federal Rule of Criminal Procedure 16(a)(2) specifically exempts from discovery all such memoranda and internal government documents made by an attorney for the government or other government agent in connection with the investigation or prosecution of the case. See United States v. Jordan, 316 F.3d 1215, 1227-28 (11th Cir. 2003). See also United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973).[5]

The United States understood from Judge Putnam's Order that once the log had been produced to defense counsel, counsel was free to seek production of any specific pieces of communication through appropriate Motion. To date, defense counsel has filed no such motion seeking further production or discovery of communications or correspondence but now blames the government for failing to turn over materials it was never required to produce.

IN HOUSE TESTING OR STUDIES AND DETAILS OF MONITORING LABORATORIES AND/OR PERSONNEL FOR EXPLOSIVE TRACES

The defense has renewed their request for the results of any in-house testing or studies conducted in the BATFE laboratories. Contrary to the defense's claims, the United States has provided the defense with all such information in the possession of the BATFE. While the materials provided may not live up to the

[5] Correspondence that related to the movement of items of evidence to or from the BATFE laboratories was provided to defense counsel in discovery as part of disclosure of chain of custody materials.

expectations of the defense, the United States can only provide what it has in its possession and is not in a position to create documents or provide materials that do not exist.

The defense also claims that the government has failed to provide them with documentation as to laboratory policies for decontamination that were in place in the laboratories performing explosive residue analysis, documentation as to whether these procedures were actually followed, and documentation of any pre-existing exposure to EGDN by lab personnel, lab space or other locations where evidence was examined. The United States has been informed by the BATFE laboratories that these materials simply do not exist.

As noted previously, even if these materials did exist and could be provided to the defense, the United States must note that they have no bearing on defense experts' ability to assess, review and/or assess the government's scientific evidence. These are matters in the nature of cross examination materials not matters crucial to any assessment of the actual tests performed by scientists on evidence in this case. As such, any delay in production of these materials would have no impact on the defense's experts ability to formulate their own opinions as to the government's scientific evidence.

LABORATORY LAYOUT

The defense also complains that the government has failed to provide them with a layout of both the Atlanta, Georgia and Rockville, Maryland laboratories where tests and examinations were conducted on evidence in this case. While the defense correctly notes that the layout of the Atlanta laboratory has been provided, they incorrectly assume that the other layout is that of the new Ammendale, Maryland laboratory. The laboratory layout provided to the defense under Bates number BH-ABL-005128 is in fact a layout or diagram of the National Laboratory in Rockville, Maryland, where tests and examinations were conducted by Edward Bender and Peter Dreifus on certain evidence in this case. The United States, contrary to the claim of the defense, has fully complied with this production request.

IDENTIFICATION OF WHO DID WHAT

As previously indicated to the defense, all tests, experiments, analyses, comparisons, and other laboratory examination(s) conducted on evidence in this case was performed by the experts who signed their respective reports and whose work is outlined in the previously filed summaries of expert testimony.

DETAILS OF OTHER EXPLOSIVE CASES

The United States has provided the defense with the information it

possessed regarding other explosive cases being handled or processed by the BATFE laboratories in Rockville, Maryland and Atlanta, Georgia at or around the time when evidence from this case was being examined in those laboratories. The United States was provided with limited information on this issue and provided the defense with exactly what was received. The United States is presently attempting to determine if additional and more case specific data exists to pinpoint the exact time frame when these cases were processed by the laboratories, the nature of the explosive(s) involved, the amounts of explosive(s) processed or involved, and whether any documentation of decontamination procedures used in conjunction with these cases exists. Should the additional specifics of these cases be found to exist, the information will be provided to the defense not later than November 1, 2004.

Premised on the foregoing, the United States respectfully submits that it is in substantial compliance with its agreement to provide laboratory "bench notes" and other related documents "crucial to a fair assessment of the government's scientific evidence" as sought by the defense. Where particular categories of materials were found to exist and found to be within the defense's request, they were provided. The United States must reiterate that it cannot provide those categories of documents that no longer exist. Furthermore, the United States can

only provide those documents relevant to an understanding and assessment of the scientific testing and analysis conducted in this case. The degree and depth of the government's discovery of bench notes and related materials has been extensive and exhaustive. Where possible, all available documents have been provided to the defense to meet with the spirit of their request to gain a fair assessment of the government's scientific evidence. With respect to those few areas where materials cannot be re-produced, the United States is willing to make materials available for inspection and review. With respect to those few categories of documents the United States has been unable to produce thus far as outlined above, the United States is working to provide those materials to the defense not later than November 1, 2004.

Respectfully submitted this the 5th day of October, 2004.

ALICE H. MARTIN
United States Attorney

WILLIAM R. CHAMBERS, JR.
Assistant United States Attorney

## 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, October 5, 2004, by First Class, United States mail, postage prepaid, to his attorneys of record:

Mr. William Bowen
Ms. Judy Clarke &
Ms. Nancy Pemberton
White, Arnold, Andrews & Dowd
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& Ms. Nancy Pemberton
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Mr. Michael Burt
& Mr. Michael Sganga
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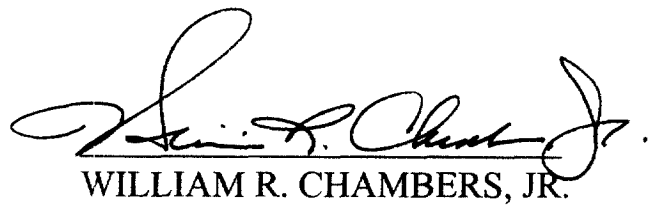

WILLIAM R. CHAMBERS, JR.
Assistant United States Attorney

ATTACHMENT 1

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January 9, 2004

HAND DELIVERY

AUSA Will Chambers
United States Attorney's Office
1801 4th Avenue North
Birmingham, AL 35203

RE: Eric Robert Rudolph

Dear Will:

Pursuant to our conversation this afternoon, I have listed below the information we would like to receive regarding all testing done by both the FBI and ATF labs, and any other scientific testing done in connection with this case. Give me a call after you've had a chance to review this list and we can discuss those items on the list that you would prefer not to disclose. I'm glad you had a happy holiday, and look forward to speaking with you.

General requests:

1) Any photos, including those used to confirm or document results, of items and test runs which are used to confirm results - in this case, that may include print-outs of the chemical analysis charts/runs

2) Bench notes - so called because they sit with the examiner at the lab bench and are a running log of everything that the person does and everything observed (including time marks for when a test begins and ends, temperature logs for testing, notes of what process used, how the blanks and control results turned out, etc) - these are handwritten, should show the order in which things are tested. Also, we need to the bench notes for all testing, not just the test runs where they wrote a report. Including but not limited to:

a) Procedure of chemical preparation of evidence items to be analyzed, such as extraction procedure, solvents used.

b) Gas chromatograms, liquid chromatograms and mass spectra should also include background runs (carried out before analysis of evidence items for calibration/quality control and assurance).

3) Chain of custody logs

4) Lab protocols

5) Equipment calibration data, equipment specifications and manuals for all equipment used. Including but not limited to:

a) Parameters and conditions of analytical instruments used:

-In gas chromatography (GC): type of column, temperature program, carrier gas, type of detector.

-In liquid chromatography (HPLC): type of column, mobile phase, flow rate, type of detector.

-In gas chromatography/mass spectrometry (GC/MS): type of ionization (electron ionization (EI) or chemical ionization (CI)).

-In liquid chromatography/mass spectrometry (LC/MS): type of ionization (elelectrospray ionization (ESI) or atmospheric pressure chemical ionization (APCI), ion source temperatures and voltages).

6) Training and experience of technicians who participated in the testing.

7) ASCLD accreditation information: the proficiency data, testing results and assessment

8) Any correspondence or phone records of calls between examiners, between examiners and lawyers, between examiners and crime scene people

9) Any in-house testing or studies that relate to testing done in the labs

10) Details and results of monitoring the laboratory for explosives traces and results. Similarly, results from monitoring any personnel or sites that may have any connection with relevant exhibits.

11) Laboratory layout, with reference to what is done where and by whom.

12) Specifically identify who did what.

13) Details of storing and routing of exhibits through the laboratory.

14) Details of any other explosives cases conducted by the laboratory around the time of and before the Rudolph case.

Very truly yours,

H. Hube Dodd, II

HHDII/mg

ATTACHMENT 2

**U.S. Department of Justice**

*Alice H. Martin*
*United States Attorney*
*Northern District of Alabama*

***William R. Chambers, Jr.***
*Assistant United States Attorney*
*(205) 244-2189*
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***Criminal Division***
*1801 Fourth Avenue North*
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*(205) 244-2001*
*FAX (205) 244-2182*

January 15, 2004

Mr. H. Hube Dodd, II
Jaffe, Strickland & Drennan, P.C.
The Alexander House
2320 Arlington Avenue
Birmingham, Alabama 35205

RE: United States v. Eric Robert Rudolph CR 00-S-422-S
Discovery

Dear Mr. Dodd,

We have reviewed your letter of January 9, 2004, requesting additional disclosure of detailed information relating to laboratory testing and analysis in the above-styled and numbered case by both the FBI and BATF laboratories. We feel it appropriate for you to request disclosure of these items through the filing of a motion for disclosure under Federal Rule of Criminal Procedure 16(a)(1)(G). When such a motion is filed, the United States will be in a position to respond to your requests and provide you with that information discoverable pursuant to Rule 16 and prevailing law. If you have any questions, please do not hesitate to contact me.

Sincerely,

ALICE H. MARTIN
United States Attorney

WILLIAM R. CHAMBERS, JR.
Assistant United States Attorney