

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

FILED *WJ*  
OCT 22 PM 4:02  
U.S. DISTRICT COURT  
N.D. OF ALABAMA

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

**GOVERNMENT’S MOTION FOR A SCHEDULING ORDER**

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 Michael W. Whisonant, Assistant United States Attorney and respectfully moves that this Honorable Court issue the Scheduling Order attached hereto as Exhibit A. In support of this motion, undersigned counsel submit the following:

**I. PROCEDURAL HISTORY**

Defendant is charged with using an explosive to damage a building affecting interstate commerce which resulted in the death of Robert Sanderson and personal injury to Emily Lyons in violation of 18 U.S.C. § 844(i). Defendant is also charged with using a destructive device during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1). The original indictment in this case was returned on November 11, 2000. Defendant could not be arraigned on the indictment, however, because he was a fugitive.<sup>1</sup> On May 31, 2003, defendant was arrested in Murphy, North Carolina. After making an initial appearance in the United States District Court for the Western District of North Carolina on June 2, 2003, defendant was transported to the Northern

---

<sup>1</sup> On January 30, 1998, the Court had issued a warrant for defendant’s arrest as a material witness to the bombing. Defendant immediately fled.

District of Alabama.

On June 3, 2003, defendant was arraigned in this Court on the original indictment. On June 26, 2003, a superseding indictment was returned which added “special findings” so that defendant would be eligible for a death sentence. No new charges were added. Defendant was arraigned on the superseding indictment on July 11, 2003. The Court originally scheduled the trial in this case for August 4, 2003; however, on July 28, 2003, an Order was issued continuing the trial date due to the large volume of discovery and overall complexity of the case. The Court stated that it would reschedule the trial at a later date by separate order.

Defendant also faces charges in the Northern District of Georgia, which arise from an indictment returned on November 15, 2000, which charges him with, among other things, committing three bombings in Atlanta between 1996 and 1997 which killed one person and injured numerous others. Defendant has not been arraigned on said indictment, but he has been appointed counsel.

## **II. STATUS OF DISCOVERY**

### **A. Discovery Already Produced**

The government produced, or made available to, defendant the majority of discoverable material in this case over three months ago.

On June 5, 2003, the government provided to defense a CD containing approximately 15,000 FBI interview memoranda (“302's”). On June 11, 2003, the government provided to defense counsel approximately 250 302's containing redactions of sources and protect identity witnesses. Those 302's included all interviews occurring between January 28, 1998 and May 31, 2003, relating to defendant regardless of whether they specifically related to the Birmingham bombing. As a result, the

production included many interview memoranda from the Atlanta investigation.

On June 30, 2003, counsel for the government met with defendant's attorneys and gave them a tour of the FBI facility where the Birmingham evidence is being maintained. The government showed defense counsel a room reserved for their exclusive use to examine original evidence. The government explained to defense counsel the procedure for examining evidence and advised them that the evidence relating to the Birmingham bomb and the various searches conducted in North Carolina which were conducted as part of the government's investigation was available for their review and inspection. Despite having the evidence available to them for over three months, the defense has not visited the facility to review any of the evidence available.

On August 19, 2003, the government provided defendant's attorneys with two sets of 40 notebooks containing photographs and memoranda organized and cataloged by items of evidence from the Birmingham crime scene and items of evidence from the various searches.

The above-described evidence and information constitutes the bulk of discovery relating to the indictment before this Court and it far exceeds the government's discovery obligations under Rule 16 or otherwise. Furthermore, to assist the defense in its review the government has taken additional steps to organize the discovery. All of the 302's that the government originally produced to the defense are being scanned, electronically bates numbered and will be produced in optical character recognition form (hereinafter referred to as "OCR form") to permit immediate electronic text searching of the material. Further, as a result of the Revised Protective Order entered on October 15, 2003, the 302's and all additional discovery will contain minimal redactions.<sup>2</sup>

---

<sup>2</sup> In light of the Revised Protective Order, the government is redacting only symbolized source information and sensitive investigative techniques.

## **B. Birmingham Discovery to be Produced**

The government will produce all of the remaining Birmingham discovery, most of which is not discoverable pursuant to Rule 16 but is being produced in light of the Court's requests for liberal discovery in this case, on or before October 31, 2003.<sup>3</sup> In addition, most of the remaining discovery related to Birmingham, including 302's, 1A's, and various reports will be produced in OCR form and organized by category of information. Items not produced in OCR form, such as telephone records, will be included on inventory lists and made available for defense review at the aforementioned FBI facility.

## **C. Atlanta Discovery to be Produced**

The discovery materials in Atlanta consist of the government's investigation of the Atlanta bombings, the investigation of suspects prior to the identification of the defendant as a suspect, and the subsequent investigation of defendant. Most of the 302's relating to defendant have already been produced to the defense in the Birmingham case. Thus, there is significant duplication in the Atlanta and Birmingham discovery material.

The government intends to produce the Atlanta discovery on a rolling basis. The initial production will consist of files relating to other suspects, files containing sketches of suspects, lab reports, the recording of the 911 call made prior to the Centennial Olympic Park bombing and a videotape of defendant's garage. The government will produce copies of the two electronic recordings on or before November 30, 2003. All other items in this initial production will be

---

<sup>3</sup> The government recently finished scanning the Birmingham discovery material. There were a total of 155,489 pages of material. Included in that total, however are the approximately 15,000 302's produced to defendant on June 5, 2003, as well as the 40 notebooks of crime scene evidence and search material also produced in June, which are being produced again by the government now bearing bates numbers and in OCR form.

produced in OCR form on the same date.

The second production will consist of all other 302's related to the Atlanta bombings, the file on defendant (most of which has already been produced with the 302's from the Birmingham discovery material), crime scene evidence notebooks for each of the Atlanta bombings containing photographs and memoranda organized and cataloged by each piece of Atlanta crime scene evidence, and photographs of evidence from the campsites where defendant hid as a fugitive. This production, which includes the balance of most of the discovery relating to the Atlanta bombings, will occur on or before December 31, 2003.

A final production of miscellaneous material (most of which is not discoverable pursuant to Rule 16), including electronic communications, miscellaneous memoranda and inserts, lead sheets, electronic recordings, and various inventories, will occur on or before January 31, 2004. Therefore, as of that date, the government anticipates substantial completion of the production of discoverable materials related to the Atlanta case.

### **III. ARGUMENT AND CITATIONS OF AUTHORITY**

The government submits that the proposed Scheduling Order attached hereto as Exhibit A, which imposes deadlines for filing pretrial motions and for making other disclosures and which sets a trial date of June 1, 2004, is fair and reasonable and should be issued by the Court.

#### **A. Rule 12(b)(3) Pretrial Motions**

Rule 12 of the Federal Rules of Criminal Procedure governs the filing of pretrial motions in criminal proceedings. Rule 12(b)(3) provides that there are five general types of motions which must be filed before trial:

- (A) a motion alleging a defect in instituting the prosecution;
- (B) a motion alleging a defect in the indictment or information... ;
- (C) a motion to suppress evidence;
- (D) a Rule 14 motion to sever charges or defendants; and
- (E) a Rule 16 motion for discovery.

Rule 12 does not set any specific deadlines for the parties to file pretrial motions. It does, however, encourage courts to impose such deadlines “at the arraignment or as soon afterward as practicable...” Rule 12(c).

Under the proposed Scheduling Order, all motions covered under Rule 12(b)(3)(A), (B), (D) and (E), excluding any death penalty-related motions, would be due on or before December 1, 2003. Such motions are purely legal in nature and are not impacted by the timing of the government’s production of discovery. Defendant was arraigned on the original indictment on June 3, 2003. Six months is ample time for defendant to have formulated any legal challenges he has to the indictment or to have drafted basic discovery requests to the government or moved for a bill of particulars.

Also under the proposed Scheduling Order, all motions to suppress evidence under Rule 12(b)(3)(C) would be due on or before December 15, 2003. The only evidence in this case the government is aware of that is arguably subject to suppression is the evidence obtained from the various searches conducted in North Carolina, an identification of defendant made by a lay witness in Birmingham, and the post-arrest evidence consisting of statements made by defendant and items recovered from the campsites in North Carolina where he hid as a fugitive. The information relating to the identification was provided to defendant on the original CD of 302's in June 2003. The post-

arrest evidence will be provided to defendant in OCR form on or before October 31, 2003. As for the searches, some were conducted pursuant to a search warrant, while others were conducted with the consent of the current owners or occupants. The affidavits submitted in support of the search warrants included only information about the Birmingham bombing and the evidence connecting defendant to it. There was no reference at all to the earlier Atlanta bombings or the evidence connecting defendant to them. Defendant has had access to the search warrants and the evidence obtained from them (as well as from the consent searches) since June 30, 2003, and will be receiving them in OCR form by October 31, 2003. Under these circumstances, it is reasonable and appropriate to require defendant to file any motions to suppress by December 15, 2003.<sup>4</sup>

**B. Death Penalty-related Motions**

Should the Department of Justice make the determination to seek the death penalty in this case, the government expects to file its notice by no earlier than December 15, 2003.<sup>5</sup> If the government elects to seek the death penalty, the proposed Scheduling Order would require all death penalty-related motions to be filed within 30 days after the government files notice of its intent to seek the death penalty. Defendant has known at least since his arraignment on the superseding indictment, which included “special findings,” that he is eligible for a death sentence and that certain statutory aggravating factors allegedly apply. Under the proposed Scheduling Order, defendant’s

---

<sup>4</sup> In the event the Atlanta discovery (the vast majority of which is expected to be produced by December 31, 2003) reveals information that is relevant to the legality of the searches, defendant make seek leave of the Court to amend his motions. The government believes this is highly unlikely, however, and should therefore not delay the initial filing of any motions to suppress.

<sup>5</sup> As the Court is aware, defense counsel is scheduled to present any mitigating information pertaining to defendant or this case to the Department on November 17, 2003. At some point shortly thereafter, the decision will be made whether to seek the death penalty in this case.

death penalty-related motions would therefore not be due until January 15, 2004, more than six months after his arraignment on the superseding indictment.

**C. Motion to Transfer Venue Pursuant to Rule 21**

According to Rule 21(d), a motion to transfer the proceedings to another district “may be made at or before arraignment or at any other time the court or these rules prescribe.” Here, defendant was arraigned on the original indictment on June 3, 2003, and on the superseding indictment on July 11, 2003. The proposed Scheduling Order would require the defendant to file any motion to transfer these proceedings to another district pursuant to Rule 21 by January 1, 2004. While the government acknowledges that retaining an expert in this field and obtaining evidence on the issue can be time consuming, six months should be more than sufficient. However, if additional time is needed, the Court may extend the filing deadline upon a showing of good cause by defendant or simply allow defendant a reasonable time within which to perfect his motion with additional evidence.

**D. Notice of Defenses Pursuant to Rule 12.1 and 12.2**

Rule 12.1(a) provides that the government may request in writing that the defendant notify counsel for the government of any intended alibi defense. Within 10 days thereafter, or at such other time as the court sets, the defendant must serve written notice on an attorney for the government stating (1) each specific place where the defendant claims to have been at the time of the alleged offense and (2) the identity and contact information for each alibi witness. The government intends to file its Rule 12.1(a) request by October 24, 2003. The government’s request will relate only to the Birmingham bombing, as that is the only bombing charged in the superseding indictment. Under the proposed Scheduling Order, defendant’s written notice would not be due until December 15,

2003, more than seven weeks later (as opposed to the standard 10 days). This date is more than nine months after defendant was arraigned on the original indictment, which informed him of the date on which he is alleged to have committed the charged offenses (the superseding indictment added no new charges). If defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), the government proposes its disclosure under Rule 12.1(b) would be due within 30 days of trial.

Rule 12.2 provides that a defendant who intends to assert a defense of insanity at the time of the alleged offense or intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either the issue of guilt or the issue of punishment in a capital case must so notify counsel for the government in writing of this intention and file a copy of the notice with the clerk. Such notices are due “within the time provided for filing a pretrial motion, or at any later time the court sets.” Rule 12.2(a) and (b). The proposed Scheduling Order would require defendant to serve and file any such notices on or before February 1, 2004. This date is almost seven months after defendant’s arraignment on the superseding indictment, at which point defense counsel must have become aware that this was potentially a capital case. Seven months is more than enough time for defense counsel to have had defendant examined by their own mental health experts and to have decided whether or not they intend to pursue an insanity defense or present expert evidence of a mental condition at trial. Moreover, this deadline would allow the government sufficient time before trial within which to have defendant examined by its experts pursuant to Rule 12.2(c)(1).

**E. Reciprocal Discovery Pursuant to Rule 16(b)(1)**

If a defendant requests discovery from the government pursuant to Rule 16(a)(1)(E) and the government complies, then he must provide reciprocal discovery pursuant to Rule 16(b)(1). The

Rule does not set a specific deadline for a defendant to provide reciprocal discovery, stating only that it must be made “upon request.” Rule 16(b)(1)(A) and (B). Here, while the defendant has not yet made a formal written request for discovery from the government, his counsel has verbally indicated on numerous occasions (including status conferences) that he intends to do so. The proposed Scheduling Order would require defendant to fulfill his reciprocal discovery obligations on or before February 15, 2003. This is three and a half months after the government will have produced to defendant all Birmingham discovery in OCR form (and seven and a half months after defendant received the majority of the discovery or was granted access to it). The February 15 deadline fairly balances the defendant’s need for sufficient time to investigate the case and develop his own evidence with the government’s need to receive the evidence sufficiently in advance of trial for it to be useful.

**F. Motions to Exclude Expert Testimony**

Motions to exclude expert testimony pursuant to Fed. R. Evid. 702 may be required to be filed before trial in order for an evidentiary hearing to be conducted pursuant to Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993). The proposed Scheduling Order would require the parties to file a motion to exclude expert testimony under Fed. R. Evid. 702 within 30 days after a summary of the testimony of the expert is filed pursuant to either Fed. R. Crim. P. 16(a)(1)(G) or 16(b)(1)(C), provided that the party filing the summary has also complied with Fed. R. Crim. P. 16(a)(1)(F) or 16(b)(1)(B) (requiring that access be granted to the results or reports of any physical or mental examination and of any scientific test or experiment). The parties would be required to file their

Rule 16 expert summaries, however, by no later than February 15, 2003.<sup>6</sup> Under such a schedule, all motions to exclude expert testimony will be filed by March 15, 2003. With a trial date of June 1, 2003, this would leave two and a half months for the parties to brief the issues and for the Court to conduct any Daubert hearings that are necessary.<sup>7</sup>

The February 15 deadline for expert summaries is more than reasonable given that defendant has had access to the official reports prepared by the government's experts in the Birmingham case since June 30, 2003 (eight months before the proposed deadline), and will be receiving all such reports in OCR form on or before October 31 (three and a half months before the deadline). Moreover, defendant will receive reports prepared by the government's experts relating to the Atlanta bombings by November 30th (two and a half months before the deadline), even though the government does not intend to introduce evidence of the Atlanta bombings in the Birmingham trial.

#### **G. Trial Date**

Finally, the proposed Scheduling Order sets a trial date of June 1, 2004, eleven months after his arraignment on the superseding indictment and receipt of (or access to) the majority of discovery in this case. The superseding indictment contains only two counts relating exclusively to the bombing in Birmingham. The government does not intend to introduce any evidence, in either the guilt-innocence or penalty phases of the trial (should there be a penalty phase), of the Atlanta bombings. Accordingly, the government submits that a June 1, 2004, trial date is reasonable and fair.

---

<sup>6</sup> Obviously, the government will not be required to file summaries of expert testimony it intends to offer only in the case pending in the Northern District of Georgia.

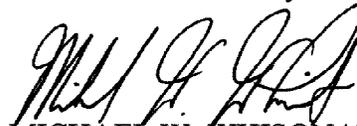
<sup>7</sup> Of course, the parties may file some expert summaries before the February 15, 2004, deadline, which would accelerate the due date for motions to exclude that testimony.

#### IV. CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court grant its request and issue the Scheduling Order attached hereto as Exhibit A.

Respectfully submitted this 22nd day of October, 2003.

ALICE H. MARTIN  
United States Attorney



MICHAEL W. WHISONANT  
Assistant United States Attorney



Motion to transfer venue pursuant to Rule 21	January 1, 2004
Reciprocal discovery pursuant to Rule 16(b)(1)	February 15, 2004
Expert summaries pursuant to Rule 16(a)(1)(G) and 16(b)(1)(C)	February 15, 2004
Motions to exclude expert testimony	Within 30 days after a summary of the testimony of an expert is filed pursuant to Rule 16(a)(1)(G) or 16(b)(1)(C), provided that the party filing the summary has also complied with Rule 16(a)(1)(F) or 16(b)(1)(B)
Government's disclosure under Rule 12.1(b)	May 1, 2004
Trial	June 1, 2004

This Scheduling Order may be amended by the Court as necessary in the interest of fairness and shall not prohibit either party from seeking leave to file additional motions at any time if good cause is shown.

**DONE** this \_\_\_\_ day of October, 2003.

---

T. MICHAEL PUTNAM  
CHIEF MAGISTRATE JUDGE

**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 by First Class, United States mail, postage prepaid, to his attorneys of record, Mr. Richard Jaffe, Jaffe, Strickland & Drennan, 2320 Arlington Avenue, Birmingham, Alabama 35205 and Mr. William Bowen, White, Dunn & Booker, 2025 3<sup>rd</sup> Avenue North, Suite 600, Birmingham, Alabama 35203.



MICHAEL W. WHISONANT  
Assistant United States Attorney