

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

2/3 FILED  
03 NOV -3 PM 2:22  
U.S. DISTRICT COURT  
N.D. OF ALABAMA

UNITED STATES OF AMERICA, )  
 )  
 )  
 Plaintiff, )  
 )  
 V. ) CR00-S-422-S Superceding  
 )  
 ERIC ROBERT RUDOLPH, )  
 )  
 )  
 Defendant. )

---

**Defendant's Response  
to  
Government's Motion for a Scheduling Order**

---

COMES NOW defendant, Eric Robert Rudolph, by and through counsel, and responds to the Government's Motion for a Scheduling Order [Document #47] filed October 22, 2003. This response includes two parts:

- I. Defendant's Response to the Government's Proposed Scheduling Order
- II. Defendant's Proposed Schedule.

**I. Defendant's Response to the  
Government's Proposed Scheduling Order**

1. In June of 2003, the Government did provide defense counsel with one CD containing approximately 15,000 unredacted "302's" ("the Firsts CD") and a second CD containing around 250 redacted "302's" ("the Second CD") (collectively referred to as "the CD's"). A number of the 302's in the First CD were unreadable or could not be opened and a significant number of 302's in the Second CD had been redacted to the point where they

were literally without meaning,

2. The Defense is unable to admit or deny that those two CD's "include[] all interviews occurring between January 28, 1998 and May 31, 2003." Government's Motion at p. 2. By far, the overwhelming majority of interviews indicate they were conducted in 1998.

3. In August of 2003, The Government did provide the Defense with two sets of 40, three-inch, three-ring binder notebooks ("the Binders").

4. In summary, the Government has provided the Defense with a tremendous amount of material to review. That material must be reviewed even if a significant portion of the material provided turns out to be utterly useless. For example, most of the 302's on the First CD concern alleged and uncorroborated "sighting" of Mr. Rudolph during his alleged flight following the Birmingham bombing. The determination of what is and what is not significant is a time consuming task in and of itself.

5. Today, Mr. Rudolph's Birmingham defense team is composed of two defense counsel assisted by two staff attorneys. It is totally unrealistic to expect the four members of the defense team to review in the five months since their appointment what it has taken the Government five years, hundreds of federal and state law enforcement agents, countless scientific analysts, numerous experts in just as many different fields, and an untold number of government attorneys to collect, decipher, and interpret. Furthermore, the Government has actually been working on this case for seven years; since the bombing of the Centennial Olympic Park in Atlanta, Georgia, which occurred on July 27, 1996.

6. The defense has not yet revisited the "FBI evidence facility" (referenced in

the Government's Motion at p. 3) simply because it has not yet determined what evidence is significant and what information does not need to be pursued. It is the understanding of the defense that the Binders constitute the "index" to the evidence contained in the "FBI evidence facility." Defense counsel are in the process of reviewing both the CD's and the Binders for evidence and information which warrant further investigation.

7. The reissuance of "[a]ll the 302's ... originally produced" may or may not "assist the defense in its review" depending upon how the reissued 302's are numbered. See Government's Motion at p. 3. If the 302s are not numbered exactly as originally produced<sup>1</sup>, the defense will be placed back at the very beginning of its review of the 302's.

8. The defense is not prepared to concede, as the Government alleges, that "[t]he 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." While the government may be in the process of producing all the government asserts it is obligated to produce, that does not necessarily translate into the statement that the government has produced all it is legally and constitutionally required to produce. Just as in most other cases in which the undersigned have been involved, there probably will be disputes requiring court hearings over what the government is and is not required to produce. However, until the government has provided the defense with all the information and evidence to which the government claims the defense is entitled (which has

---

<sup>1</sup> All 302's have been provided on computer CD disk. Each individual 302 was identified with a computer file label with a sequential number in the following form: 000002.302, 000003.302, et seq. Consequently, if reissued file number 000002.302 does not contain the same 302 as contained in the original 000002.302 in the First CD, the Defense will be at a grievous loss and will have to review all 15,250+ 302's again.

not yet been done), and until the defense has had a reasonable opportunity to examine same (which it has not had), the defense will not be in any position to determine whether or not to file motions to produce and/or suppress. The defense is mindful that this case began with the government proclaiming that there was going to be “open file” discovery. Although the defense maintains that this case is and should remain “open file,” the government has subsequently termed its production as “almost open file” with some exceptions, and then “liberal” discovery.

9. The government has promised to provide the defense with the Atlanta discovery on a “rolling basis.” Since this material has not yet been produced and is not otherwise available to the defense, the defense cannot determine whether “there is significant duplication in the Atlanta and Birmingham discovery material.” Without challenging the credibility of any prosecutor, the defense would be startled to learn that “[m]ost of the 302’s relating to defendant have already been produced to the defense in the Birmingham case.” Government’s Motion at 4. However, even if there is significant duplication, every file and document produced will have to be examined in order to determine whether or not any duplication is present.

10. The defense is not adverse to this Court setting a reasonable deadline for the filing of motions purely legal in nature and which require no factual investigation. While a constitutional challenge to the federal death penalty falls within this classification, the defense can not even proceed with that as the Department of Justice has not yet authorized the government to seek the death penalty in this case. At present, a hearing is scheduled before the DOJ on November 17, 2003.

11. The defense can not determine whether to file a motion to suppress evidence until it has seen and reviewed the evidence.

12. The defense does anticipate filing a motion to suppress certain evidence obtained as a result of a search pursuant to a warrant. The defense further anticipates that the objection will be extensive and will be based on factual and not merely legal grounds.

13. Interestingly, the government would set the deadline for the filing of a motion to suppress evidence and a Rule 16 motion for discovery on December 15, 2003 (Government's Motion pp. 6-7) while also claiming that "the balance of most of the discovery relating to the Atlanta bombings will occur on or before December 31, 2203." Government's Motion at 5 (underlining added). Again, the defense will not know what to request until it knows what the government has produced. Like a jigsaw puzzle, one usually does not realize a piece is missing until the remaining pieces have been assembled. The defense cannot make any judgments on the evidence produced or not produced until the government has produced what evidence it will. An objection cannot be filed until the basis for the objection is known.

14. The defense will not be prepared for trial on the Birmingham case until it has reviewed all the evidence in the Atlanta case. Up until recently, the government repeatedly informed the defense that it would not introduce any evidence of the Atlanta bombings at Mr. Rudolph's trial on the Birmingham bombing. However, in its latest pleading, the government states that it "does not intend to introduce evidence of the Atlanta bombings in the Birmingham trial" - a subtle but perhaps significant distinction.

15. The defense can not file any motion to transfer venue until polling has been

conducted. While the defense understands that its request for funding of that project has been judicially approved, there has been no order issued.

16. The government's case is built entirely on circumstances and circumstantial evidence. No one ever saw anyone place or discharge any bomb in Birmingham. The defense asserts that there are many weak and even missing links in the government's chain of circumstances allegedly implicating Mr. Rudolph.

17. There appear to be three erroneous assumptions underlying the government's proposed deadlines. Those erroneous assumptions are: (a) All the defense has to do to prepare its case is review the investigative material already completed by the federal authorities and which has been or will be provided to the defense. (b) The defense should rely on the accuracy and veracity of everything the government has provided. (c) The defense need not conduct any further investigation. None of those statements is true. The defense is already engaged in its own investigation of the facts surrounding this case. The public has only heard the government's theory of what might have occurred. No one, outside the defense, has heard Mr. Rudolph's account.

18. There is a fourth assumption underlying the government's proposed schedule order. That assumption is that the government will be able to provide discovery and production as it has stated and anticipates it will. This date, defendant has filed a general motion to produce to facilitate that process.

19. The government is seeking to kill Mr. Rudolph<sup>2</sup>. Our investigation must be

---

<sup>2</sup> The local United States Attorney has sought authorization from the Department of Justice to seek the death penalty in this case. The hearing before the DOJ is presently scheduled for November 17, 2003.

exhaustive. In any criminal case, defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Strategic choices should be made only after thorough investigation of law and facts relevant to plausible options. Wiggins v. Smith, \_\_\_ U.S. \_\_\_, 123 S. Ct. 2527, 2535 (2003). “An attorney has a duty to investigate ‘the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.’ A.B.A. Standards for Criminal Justice 4-4.1 (3d ed. 1993).” Fortenberry v. Haley, 297 F.3d 1213, 1225 (11<sup>th</sup> 2002). This is especially true in a “death case” where our federal Constitution demands a “heightened need for reliability” in the death penalty process. Woodson v. North Carolina, 428 U.S. 280, 305; 96 S. Ct. 2978; 49 L. Ed. 2d 944 (1976). Time will be required for the defense to visit sites in Alabama and in other states which are related to the crime charged, to obtain funding, to identify and contract with numerous experts, to interview countless witnesses, and to probe factual allegations and follow potentially productive trails. The defense team must be afforded a reasonable time in which to investigate, explore, and prepare in order that Mr. Rudolph’s innocence may be established and the flaws in the government’s case may be exposed.

20. The above is just the “factual” portion of the defense. The defense also requires the time for legal research and legal investigation into the laws involved in this case. Even in this age where computer-accessible databases promise to facilitate research and learning, legal research still remains a laborious and time-consuming task.

21. In representing Mr. Rudolph, defense counsel have been required to make significant sacrifices involving both our law firms and our personal time. Our practice of law

has been interrupted to the extent that our time and efforts are being devoted almost exclusively to Mr. Rudolph. Only when this case is over will we be able to return to our normal practice of law. Until that time, we intend to provide Mr. Rudolph with only our very best professional efforts. Doing so will require time and study. None of us - the defense team, the government, or the Court - can afford to allow a "rush to judgment" in this case. As Justice Marshall noted in Dobbert v. Wainwright, 468 U.S. 1231, 1242 (1984) (Justice Marshall dissenting)<sup>3</sup>, swiftness may not equal justice. The defense team will move forward will all deliberate speed but will not skip a beat to attempt to meet a totally unworkable and unrealistic time schedule.

22. For all of these reasons, the government's suggested trial date of June 1, 2004, is unrealistic and **impossible** to achieve.

23. The government has not yet provided the production to which the government believes the defense is entitled. Given that undisputed fact, it is respectfully submitted that it is premature for this Court in this case to set a deadline for anything other than those

---

<sup>3</sup> Dobbert v. Wainwright, 468 U.S. 1231, 1242 (1984) (Justice Marshall dissenting):

"This is swift, but is it justice? \* \* \* The frenzied rush to execution that characterizes this case has become a common, if Kafkaesque, feature of the Court's capital cases. See, e. g., Wainwright v. Adams, 466 U.S. 964, 965 (1984) (MARSHALL, J., dissenting) (noting the Court's 'indecent desire to rush to judgment in capital cases'); Woodard v. Hutchins, 464 U.S. 377, 383 (1984) (BRENNAN, J., dissenting) (criticizing 'rush to judgment' in Court's decision to vacate stay of execution); Autry v. Estelle, 464 U.S. 1, 5 (1983) (STEVENS, J., dissenting) (criticizing decision to deny stay of execution); see also Autry v. McKaskle, 465 U.S. 1085 (1984) (MARSHALL, J., dissenting); Woodard v. Hutchins, 464 U.S., at 383 (WHITE and STEVENS, JJ., dissenting); id. at 383-384 (MARSHALL, J., dissenting); Barefoot v. Estelle, 463 U.S. 880, 906 (1983) (MARSHALL, J., dissenting)."

motions which are purely legal in nature, which attack, address, or concern statutes or constitutional provisions and which require no detailed factual investigation.

## II.

### **Defendant's Proposed Schedule**

For the convenience of the Court, the government's proposed schedule is in italics.

A. *Birmingham discovery to be produced by October 31, 2003.*

The defense has no control over this date. However, the government's proposed schedule is grounded and driven off of this date. Any delay in production will skew the government's entire schedule. The following is based on the assumption that the government is able to fulfill its own production deadlines.

B. *Motions under Rule 12(b)(3)(A), (B), (D), (E) due by December 31, 2003.*

These motions<sup>4</sup> include: (a) defenses and objections based on defects in the institution of the prosecution, (b) a motion alleging a defect in the indictment, (d) a Rule 14 motion to sever charges, and (e) a Rule 16 motion for discovery.

The defense has no objection to this deadline upon one condition. The defense will be prepared to file its initial motion for discovery by December 31, 2003, provided the Court grants the allowance of additional motions when and should the need arise. Providing that request is granted, defendant will be prepared to meet the December 31<sup>st</sup> deadline for motions under Rule 12(b)(3)(A), (B), (D), (E), Fed.R.Crim.P.

C. *Death Penalty-related motions should be filed within 30 days after notification, "if the government intends to seek the death penalty."*

---

<sup>4</sup> These motions would be made under the Federal Rules of Criminal Procedure, Rule 12, as amended, effective December 1, 2002.

The government is in the process of seeking approval to apply the death penalty in this case. The defense will be prepared to file any “death penalty related motions” within 60 days after it has received written notification by the government that (1) approval by the DOJ has been granted and (2) that the local United States Attorney is going to seek the death penalty against Mr. Rudolph in this case.

*D. Motions to suppress evidence under Rule 12(b)(3)(C) should be filed by December 15, 2003.*

The defense cannot agree with this proposal and cannot suggest an alternative date at this time. Until the government completes its production, it will be impossible for the defense to know what if anything should be suppressed. In addition, the defense will be in a position to determine whether to file a motion to suppress only after it has received funding for its own investigations/examinations and after it has had proper and reasonable time in which to conduct those investigations and examinations.

*E. Notice of Defenses pursuant to Rule 12.1 and 12.2 should be filed by December 15, 2003.*

Rule 12.1 requires the defense to give notice of any alibi by defendant ten days after written demand by the government. The government filed written demand on October 22, 2003 for notice of alibi defense. The defense is in no position to meet the ten day deadline imposed by Rule 12.1(a) or the December 15, 2003 proposed by the government. Again, the defense’s ability to give notice is dependent upon funding and investigation.

Rule 12.2 concerns notice of an insanity defense or expert testimony of defendant’s mental condition. At this time the defense is no position satisfy any deadline for this

notification. As of this date, the defense has received no funding for any expert<sup>5</sup> and compliance with this rule will be impossible until after the defendant has been observed and examined by properly qualified experts.

F. *Motions to transfer venue pursuant to Rule 21 should be filed by January 1, 2004.*

As stated in footnote number five, no funds have been release to authorize and enable the defense to hire the necessary experts to assist in the polling of various communities to determine whether a request for a change of venue will be filed. At this time the defense is no position to satisfy any deadline for the filing of a motion for change of venue. The defense will be prepared to file a motion for change of venue, should one be necessary, within 45 days after the completion of the polling by the experts.

G. *Reciprocal discovery pursuant to Rule 16(b)(1) should be provided by February 15, 2004.*

At this time the defense is no position to satisfy any deadline for providing any reciprocal discovery to the government under Rule 16(b)(1) for several reasons. Reciprocal discovery is conditioned on the government having complied with defendant's discovery request under Rule 16(a)(1)(E) and having completed its production. In addition, at this time the defense lacks the funding necessary for the production and obtaining of the various documents and objects, reports of examinations and tests, and expert testimony anticipated by Rule 16.

H. *Expert summaries pursuant to Rule 16(a)(1)(G) and 16(b)(1)(c) should be filed by February 15, 2005.*

---

<sup>5</sup> The defense has received verbal notice that its request for the approval of funds to allow the defense to retain experts to assist in polling in connection with venue has been granted. However, those funds have not been released.

At this time the defense is no position to satisfy any deadline for providing any expert summaries to the government. The government has not disclosed its list of experts and a written summary of any testimony the government intends to use as required by Rule 16(a)(1)(G). At this time the defense lacks the funding necessary to retain any expert.

- I. *Motions to exclude expert testimony should be filed 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).*

At this time the defense is no position to satisfy any deadline for filing any motions to exclude expert testimony. Once the government's experts and their reports are disclosed, the defense will have to retain experts in similar fields to examine and analyze the reports of the government's experts. Again, at this time the defense lacks the funding necessary to retain any expert.

- J. *Government's disclosure under Rule 12.1(b) should be filed by May 1, 2004.*

The government has proposed that the defense give notice of any alibi by December 15, 2002. Under Rule 12.1(b), the government then has ten days ("but in no event less than ten days before trial, unless the court otherwise directs") to provide the defense with the "witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses." Rule 12.1(b). The government gives itself almost five months to provide what the rule requires to be provided in ten days.

- K. *Trial should begin on June 1, 2004.*

As stated in Part I of this reply, it will be **impossible** for the defense to be prepared to adequately and effectively represent Mr. Rudolph at a trial beginning on June 1, 2004.

## Conclusion

The defense is diligently and conscientiously engaged in providing Mr. Rudolph the legal representation demanded by our Constitution. However, the defense must have the tools necessary to accomplish that task.

Where possible, the defense has proposed a schedule it believes is reasonable and workable. The defense respectfully requests this Court to recognize the extraordinary complexity of this case and to establish a schedule accordingly.

Respectfully submitted,

Richard S. Jaffe (JAF004)  
Richard S. Jaffe (JAF004)

OF COUNSEL:

JAFFE, STRICKLAND & DRENNAN, P.C.  
The Alexander House  
2320 Arlington Avenue  
Birmingham, Alabama 35205  
Telephone: (205) 930-9800  
Facsimile: (205) 930-9809

William M. Bowen, Jr. (BOW012)  
William M. Bowen, Jr. (BOW012)

OF COUNSEL:

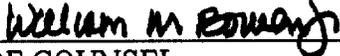
WHITE, ARNOLD, ANDREWS & DOWD PC  
2902 21st Street North  
Suite 600  
Birmingham, Alabama 35203  
Telephone: (205) 323-1888  
Facsimile: (205) 323-8907

ATTORNEYS FOR DEFENDANT  
ERIC ROBERT RUDOLPH

## CERTIFICATE OF SERVICE

I hereby certify that on this the 3<sup>rd</sup> day of October 2003, a copy of the foregoing was served upon the following by hand delivery.

Michael W. Whisonant  
Robert J. McLean  
Will Chambers  
Assistants United States Attorney  
U. S. Department of Justice  
Office of United States Attorney  
Northern District of Alabama  
1801 Fourth Avenue North  
Birmingham, Alabama 35203-2101

  
OF COUNSEL