

nature and quantity of discovery materials provided, prior representations by counsel for the government, and even the dates set forth in the government's proposed scheduling order, that are simply inaccurate. Third, defendant's response strives to paint the government's effort to propose reasonable deadlines for completing pretrial matters in a sinister light, resulting in an antagonistic tone that is inconsistent with the Court's apparent objective in requesting these proposals.

The purpose of this reply is not to identify and address each statement in defendant's pleading that is inaccurate and thus devolve into a point-by-point rebuttal. As set forth below, there are several instances where defendant's pleading requires a response to correct the record on which the Court will base its ruling. Most importantly, the government stands by its prior representations about the nature and quantity of discovery materials that have been, and will be, provided to defendant. The government also emphasizes that it is not, as defendant claims, seeking to limit his opportunity or ability to review and digest these materials or conduct his own investigation. Rather, the reality is that experienced criminal litigators such as counsel for defendant possess the capability and resources to complete those tasks in a reasonable amount of time. The trial date proposed by the government, which falls seven months after discovery relating to the Birmingham bombing charged in the indictment is completed and more than four months after discovery relating to the uncharged Atlanta bombings is completed, is a reasonable estimation of the time required to do so.

Defendant makes certain statements that are inaccurate or misleading and therefore require brief clarification:

Production of 302's. Defendant claims that "a number" of the 15,000 FBI 302s provided

to him in June “were unreadable or could not be opened” and that “a significant number” of the 250 redacted 302s, also provided in June, were so redacted that they were “without meaning.” (Response at 1-2). Defendant’s lack of specificity makes it difficult for the government (and presumably the Court) to assess how much these alleged technical difficulties have hindered defendant’s review of the discovery materials. Moreover, if defendant’s counsel had simply notified the government of these alleged problems when they were discovered, the government could have attempted to fix them. Defendant’s counsel did not do so until now, however.¹

Defendant also expresses skepticism that the 15,250 302s provided in June include all government interviews conducted between January 28, 1998, and May 31, 2003, because most of the interviews indicate that they were conducted in 1998. (Response at 2). 1998 was the year when defendant was identified as a suspect in the Birmingham bombing (as well as the Atlanta bombings) and when the government largely completed its investigation of him. The years following were primarily devoted to trying to find defendant, who was a fugitive.

Finally, defendant claims that if the government reissues the 15,250 302s which were produced back in June with new Bates numbers, it will actually prolong his review of the discovery materials, because he will have to reexamine each 302. That is incorrect. Each 302 bears a unique identifying serial number. The reissued 302s will bear the same serial numbers they did when they were produced in June. The fact that the 302s may now have a different Bates number will thus not prevent the defense from identifying which 302s they have examined and which ones they have not. Moreover, now that the defense has the 302s in optical character

¹ Regardless, defendant has apparently now completed his review of the 15,250 302s. (Response at 3, fn. 1).

recognition (OCR) form, as they have requested, they can perform text searches of the material which will significantly expedite the review process.

Production of Physical Evidence. Defendant describes the 40 evidence binders provided to him in August as merely an “index” to the physical evidence maintained by the FBI. (Response at 3). The binders are in fact much more. They include photographs of each piece of physical evidence recovered from the various crime scenes in Birmingham and Atlanta and the locations searched in North Carolina, as well as related reports of scientific testing and interview memoranda.

Scope of Discovery. Defendant questions whether the government's actual and planned discovery productions in this case exceed its obligations under Rule 16. (Response at 3). Defendant also states that “the government has not yet provided the production to which the government believes the defense is **entitled**” (Response at 8) (emphasis added). There is a significant difference between what defendant is legally entitled to receive in the way of discovery and what the government is producing. Defendant cannot seriously contend that the discovery he received from the government in June (15,250 302's), August (40 evidence binders) and most recently on November 3 (20 compact discs containing scanned images in OCR form of FBI 302s, ECs, 1As, 1Bs, 1Cs, 1Ds, Inserts, FBI Rapid Start sheets (lead sheets), BATF lead sheets, Birmingham suspect files, other law enforcement agency reports, photographs, and FBI and BATF Laboratory Reports), and the additional Atlanta discovery the government plans to produce, fails to exceed Rule 16. Defendant should not be allowed to use the fact that the government is giving him the discovery he requested, rather than the discovery that Rule 16 requires, as a basis for delaying indefinitely the trial of this case. The government also wishes to

make clear that it has never proclaimed this case to involve “open file” discovery, as defendant states. (Response at 4). That term was used by the Court during an initial status conference and, after objection from the government, has not been used since.

Timing of Discovery. Defendant asks the Court not to adopt the government's proposed schedule because it depends too heavily upon the “assumption” that the government can meet certain self-imposed discovery deadlines. (Response at 6). The first such deadline was October 31, 2003. As stated in the government's discovery notice filed with the Court on that date, the government was prepared to produce all of the Birmingham discovery in electronic form just as it had promised to do in the proposed schedule. The production could not occur, however, because defendant had failed to file a basic discovery request (despite numerous requests from the government that such a request be filed and numerous assurances from defendant's counsel that it would be). Defendant did not file his two-page request until November 3, at which time the government immediately produced the discovery. This episode is telling. While the government showed that it could live up to its commitments under the proposed schedule -- and that therefore no leap of faith will be required by the Court in adopting the schedule -- the defense showed that rather than “facilitat[ing] the process” (Response 6), as they claim to want to do, they seem intent on thwarting it.

Dates Proposed by the Government. Defendant incorrectly lists certain dates as having been suggested by the government in its proposed scheduling order. For example, defendant identifies the government's proposed deadline for filing discovery motions under Rule 12(b)(3)(E) as December 15, 2003, and the government's proposed deadline for filing Rule 12(b)(3)(A), (B) and (D) motions as December 31, 2003. (Response at 6, 9). The government's

proposed schedule, however, identifies **December 1, 2003**, as the deadline for the filing of motions under Rule 12(b)(3)(A), (B), (D) and (E). While defendant does not oppose a December 31 deadline for these motions, the government does. There is no apparent reason, nor does defendant offer one, for why seven months from the date of his arraignment is required to prepare motions that are purely legal in nature. The government's proposed December 1 deadline is fair and reasonable and should be adopted by the Court.

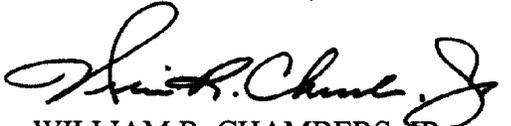
Defendant also rejects the government's proposal that death penalty-related motions be filed within 30 days after defendant receives notice that the government intends to seek the death penalty against him. He asks for 60 days instead. Defendant offers no explanation for why two months are necessary to prepare motions challenging the constitutionality of the federal death penalty act -- motions that are purely legal in nature and wholly unrelated to the discovery in this case. The two month period is particularly unnecessary because defendant has known since the superseding indictment was returned in July (more than four months ago) that this was possibly a capital case. Finally, if the Court agrees with defendant's proposal that motions to suppress not be due until some unidentified date after the government completes all discovery at the end of January, it is likely that the litigation of the suppression motions and death penalty-related motions will occur at the same time. It would make far more sense for the Court and the parties to use these next few months to, at a minimum, address any challenges the defendant has to the death penalty. Under these circumstances, the government's proposed 30-day deadline should be adopted by the Court.

In asking the parties to submit proposed scheduling orders, the Court recognized the ability of advocates and judges to make reasonable assessments of the work required to overcome

logistical hurdles, address legal problems, and ultimately resolve a case. Based on his response to the government's proposed order, defendant appears unwilling to make such an effort. Defendant's refusal to participate in the planning process, however, should not deter the Court from keeping this case moving forward at a reasonable pace towards trial. Accordingly, the government respectfully requests that the Court adopt the schedule it has proposed.

Respectfully submitted this 14th day of November, 2003.

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 by First Class, United States mail, postage prepaid, to his attorneys of record:

Mr. Richard Jaffe
Jaffe, Strickland & Drennan
The Alexander House
2320 Arlington Avenue
Birmingham, Alabama 35205

Mr. William M. Bowen, Jr.
White, Arnold, Andrews & Dowd
2902 21st Street North, Suite 600
Birmingham, Alabama 35203

A handwritten signature in black ink, appearing to read "W. R. Chambers, Jr.", written in a cursive style.

WILLIAM R. CHAMBERS, JR.
Assistant United States Attorney