UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	**AE306B(AAA)** **Defense Reply to** Government Response to Defense Motion to Compel Discovery of Metadata from Electronically Stored Raid Discovery 25 July 2014

1. **Timeliness:** This reply is timely filed, pursuant to AE306-2 Ruling.

2. **Law and Argument:**

Information about the "raid" evidence is critically important for three reasons. First, the raid evidence is likely to form an important part of the prosecution case-in-chief. Second, on information and belief, the raid evidence was seized under circumstances which make it vulnerable to defense challenges both as to the legality of the search and to the chain of custody of the evidence. Third, the raid evidence forms the basis of much of the FBI interrogation of Mr. al Baluchi, creating a possible "fruit of the poisonous tree" issue. The metadata for the raid photographs not only is a part of the evidence the prosecution will seek to introduce, but is an important source of helpful and exculpatory information for the defense.

A. The raid metadata is evidence of the circumstances of the seizure and handling of important evidence against and for the defense.

Although the prosecution has not yet produced information about the seizure of much of the raid evidence, it is already clear that the raid evidence will form an important part of the evidence for and against the defendants at trial. The metadata, which the government already has in its possession attached to the .raw or .jpg files it converted to PDF, reveals important information about the raid evidence.

Two years ago, in July 2012, Mr. al Baluchi requested to examine both "photographs" and "tangible objects" discoverable under RMC 701(c)(1).[1] The government notes, as it must, that it will give the defense the "opportunity to view the actual physical evidence" from these raids.[2] This obligation to allow inspection of evidence, however, is no substitute for the production of other relevant evidence.

Tellingly, the government represents that the vast majority of the photographs were taken years later under the prosecution's supervision rather than contemporaneously with the raid seizure themselves.[3] Of the ten raids,[4] the government never distinguishes which photographs were taken (a) originally at the time of seizure versus (b) photographs taken 10 or more years later. The government cryptically characterizes the distinction as the "small number of certain pictures of the sites" to be put into evidence versus photographs of "all the evidence" seized which it "does not intend to use" as substantive evidence.[5] The government also states that it "is seeking additional information regarding photographs taken at one site and will provide the metadata for those photos in the event that investigation reveals metadata that is material to the preparation of the defense."[6]

The prosecution misses a critical point. The late photography of the raid evidence only increases the exculpatory nature of the metadata: that the persons who gathered the evidence did not engage in the routine practice of photographing the evidence before and as it was seized. The defense suspected as much, arguing in the original motion that, "There is an enormous

[1] *See* Attachment B (Discovery Request DR-002-AAA, 19 July 2012).
[2] *See* AE306A at 2-3; *see also* AE306(AAA) Attachments B & C.
[3] *See* AE306A at 2, 5 ("The Prosecution took the vast majority of raid item photographs in 2012-2013 in the DC Metropolitan area," some ten years later.)
[4] The prosecution counts nine raid sites, apparently tabulating the Spain raid differently. *See* AE 306A at 2.
[5] *See* AE 306A at 2, 5.
[6] *See* AE 306A at 2.

difference between the probative value of a photograph taken contemporaneously with a search and a photograph taken years later and thousands of miles away."[7] The prosecution possesses detailed and definitive documentation of which photographs were taken when and where in the metadata, but seeks to suppress this evidence because of its value to the defense.

The government misstates the standard for production. Again, *materiality*,[8] for discovery purposes, is normally "not a heavy burden."[9] Information is material "as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal."[10] In its present state, the discovery on the ten raid sites is inadequate, which this metadata can help Mr. al Baluchi at least partially understand. The government produced:

- Little or inadequate chain of custody documents;
- No documents regarding the 'search warrants' for these raids;[11]
- Scores of digital photographs of the raids, but unfortunately, no indication as to when, where, or who took the photographs;
- Incomplete indices (apparently prepared by the prosecution) which lists discovery produced but unfortunately, not the crucial underlying substantive information;
- No identification of parties present at the time of the raids;
- No identification of witnesses who can present raid-related information.

The government also never adequately addresses its *Brady* obligations. Beyond its standard discovery obligations under Rule 701(c), the government is obliged to disclose

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[7] AE306 at 8.

[8] The government also advances a relevancy argument which is not even permitted by the rule: under Rule 701(c)(1), materiality, not relevancy, is the standard for production.

[9] *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993)(quoting *United States v. George*, 786 F. Supp. 56, 58 (D.D.C.1992)); *see also United States v. NYNEX Corp.*, 781 F. Supp. 19, 25 n.8 (D.D.C. 1991).

[10] *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (internal quotations omitted); *see, also United States v. Caro*, 597 F.3d 609, 621 (4th Cir. 2010) (citing *Lloyd*); *see also United States v. Marshall*, 132 F.3d 63, 68 (D.C. Cir. 1998) (same).

[11] While the issue is likely the subject of a future motion, for background, in DR-176-AAA, 9 June 2014, Mr. al Baluchi requested the authorization for these raids (Attachment C). The government flatly refused to provide any authority for the conduct of these raids. *See* Gov't response to DR-176-AAA, 12 June 2014 (Attachment D).

information that may be exculpatory at both findings and sentencing phases under the 2009 MCA,[12] Rule 701(e),[13] and the Constitution.[14] Here, the metadata will enable defendant to test the government's evidence, cross-examine witnesses, and develop mitigation themes.

Producing the metadata at issue in the motion will not answer or address all of defendant's concerns. However, the metadata will enable Mr. al Baluchi to move forward on the investigation of the raid data.

B. The government's contention that metadata is presumptively protected from disclosure is wholly meritless.

The government blithely dismisses producing metadata because of the supposed general presumption against the production of metadata.[15] It also claims that federal courts have found that most metadata is of limited evidentiary value and reviewing it wastes litigation resources. These arguments are meritless with respect to the raid metadata.

First, the government relies on *stale* civil cases - all from 2007 or earlier and which rely on an outdated standard. The government's four cited cases argue for a presumption against producing metadata; the rationale is based on the earlier version of *The Sedona Principles.*[16] For background, the *Sedona* Conference is a "non-profit legal policy research and education organization . . . [with] a working group comprised of judges, attorneys, and electronic discovery

[12] 10 U.S.C. § 949j(b).
[13] RMC 701(e).
[14] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).
[15] AE306A at 4.
[16] *See Williams v. Sprint/United Management Co.*, 230 F.R.D. 640, 646 n.26 (D. Kan. 2005) (*citing The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age,* App. F (The Sedona Conference Working Group Series, Sept. 2005 Version), available generally at *http://www.thesedon aconference.org* and more specifically at *http: //www.thesedona conference.org/content /miscFiles/TSG9 05.pdf.)*

experts dedicated to resolving electronic document production issues."[17] However, the second edition of the *Sedona Principles* removed any presumption.[18]

Second, the *Sedona Principles* acknowledge that electronic information can be transmitted in many forms, and some are more useful than others depending on the circumstances.[19] PDF and TIFF files have a static format that can be advantageous, but they can also be time-consuming to create and lose searchable text and metadata that might enable the parties to more efficiently digest the information.[20]

Third, the government completely fails to argue any hardship from producing this metadata.[21] Nor could it: the government's effort came in removing the metadata from the photographs it produced in discovery, not in preserving it. As further noted by the district court in *Romero*, "metadata, as a general rule, must be affirmatively removed from a document."[22] That is what the government did here, converting the photographs from .raw or .jpg to PDF to strip off the EXIF data and provide the defense with less information than they possess.

Finally, the government fails to discuss criminal cases involving metadata, which address

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[17] *Aguilar v. Immigration and Customs Enforcement Div of the U.S. Dep't of Homeland Sec.*, 255 F.R.D. 350, 355 (S.D.N.Y. 2008).

[18] *See id.* at *356* (The foreword to the second edition of the *Sedona Principles* notes that in revising the principles, "[p]articular attention [was] given to updating the language and commentary . . . Significantly, Principle 12 and the commentaries accompanying it were revised to remove any presumption against the production of metadata.").

[19] *Osborne v. C.H. Robinson Co.,* 2011 WL 5076267, *7 (N.D.Ill. Oct. 25, 2011).

[20] *See id.* (holding that defendant's turning over thousands of pages of PDF files without first communicating with defendant was not presumptively reasonable.)

[21] *See Romero v. Allstate Ins. Co*., 271 F.R.D. 96, 107(E.D. Pa. 2010) (explaining that multiple courts have found that, in light of the emerging recognition of the benefits of producing metadata, the burden falls on the party objecting to its production to show undue hardship and expense).

[22] *Id. (*citing *Wyeth v. Impax Labs., Inc.,* 248 F.R.D. 169, 171 (D. Del. 2006) ("Removal of metadata from an electronic document usually requires an affirmative alteration of that document, through scrubbing or converting the file from its native format to an image file, for example.").

wholly different equities than civil cases. The government's failure to address the authorities in AE306 failure is further highlighted by *United States v. Cross,*[23] in which a district court granted a motion to suppress because the government mishandled discovery, including metadata.[24]

The military commission should not permit the prosecution to hide important information from its electronic documents, and should compel the production of the raid EXIF data.

3. Attachments:

A. Certificate of Service;

B. Discovery Request DR-002-AAA, 19 July 2012;

C. Discovery Request DR-176-AAA, 9 June 2014;

D. Prosecution Response to Discovery Request DR-176-AAA, 12 June 2014.

Very respectfully,

//s//
JAMES G. CONNELL, III
Learned Counsel

//s//
STERLING R. THOMAS
Lt Col, USAF
Defense Counsel

Counsel for Mr. al Baluchi

[23] 2009 WL 3233267 (E.D.N.Y., Oct. 2, 2009).
[24] *See* AE306 at 8-9.

CERTIFICATE OF SERVICE

I certify that on the 25th day of July, 2014, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//
JAMES G. CONNELL, III
Learned Counsel

Attachment B

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

19 July 2012

MEMORANDUM FOR Trial Counsel

FROM: Sterling R. Thomas, Lt Col, USAF, Military Defense Counsel for Mr. al Baluchi

SUBJECT: DEFENSE REQUEST FOR DISCOVERY

Pursuant to Rules for Military Commission (R.M.C.) 701, Mr. al Baluchi through counsel requests the government furnish all documents or information in its possession, or known or discoverable by the government, which directly or indirectly mentions or pertains to Mr. al Baluchi or any government witnesses or which is otherwise relevant to this case.

In addition, the defense requests the following:

1. Any paper which accompanied the charges when they were referred to military commission including papers sent with charges upon a rehearing or new trial. To include but not limited to the referral binder and/or any documents /evidence produced to the Convening Authority in support of the charges or of a capital referral.

2. The convening order and any amending orders.

3. Any sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel.

4. The names of any witnesses trial counsel intends to call in the case-in-chief and any witness trial counsel intends to call to rebut a defense of alibi or lack of mental responsibility.

5. Any records of prior criminal convictions for Mr. al Baluchi of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including but not limited to impeachment related information.

6. Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

7. The contents of all relevant statements—oral, written or recorded—made or adopted by Mr. al Baluchi, that are within the possession, custody or control of the Government, the existence of which is know or by the exercise of due diligence may become known to trial counsel, and are material to the preparation of the defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief at trial.

8. All documentation related to Mr. al Baluchi that may be presented by the prosecution at the presentencing proceedings.

9. The names of any witnesses that trial counsel intends to call at the presentencing proceedings.

10. All evidence which reasonably tends to negate the guilt of Mr. al Baluchi, reduce the degree of his guilt or reduce the punishment for any of the alleged charges.

11. Any evidence that reasonably tends to impeach the credibility of a witness whom the government intends to call at trial.

12. Any evidence on behalf of Mr. al Baluchi that may be viewed as mitigation evidence at sentencing.

The government's disclosure obligations under R.M.C. 701 encompass evidence that is known or reasonably should be known to any government official who participated in the investigation and prosecution of the case against Mr. al Baluchi.

Thank you for your attention in this matter. If you have any questions on this request or would like to discuss further, please feel free to contact me.

Respectfully Submitted,

//s//
Sterling R. Thomas,
Lieutenant Colonel, USAF
Military Defense Counsel for Mr. al Baluchi

Attachment C

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

9 June 2014

MEMORANDUM FOR Trial Counsel

FROM: Sterling R. Thomas, Lt Col, USAF, Defense Counsel for Mr. al Baluchi

SUBJECT: DEFENSE REQUEST FOR DISCOVERY
(Authorization for Foreign Searches)

Defendant, by and through undersigned counsel pursuant to RMC 701, 10 U.S.C. § 949p-4, Common Article III to Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, the Due Process Clause of the Fifth Amendment, the Confrontation Clause to the Sixth Amendment, and the Compulsory Process Clause of the Sixth Amendment to the United States Constitution, hereby requests that the government produce the following discovery:

Discovery Request

Please produce all documents issued by any government purporting to authorize or govern any raid, surveillance, search, and/or seizure conducted outside the United States which produced any evidence the government has produced or will produce during the discovery process, including but not limited to trigrams TRQ, RAW, ABS, H138, KAC, SPN, TTP, HAW, and AHH.

Thank you for your attention to this matter. If you have any questions about this request or would like to discuss further, please feel free to contact me.

Respectfully Submitted,

//s//
Sterling R. Thomas
Lt Col, USAF
Counsel for Mr. al Baluchi

Attachment D

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

OFFICE OF THE
CHIEF PROSECUTOR

12 June 2014

MEMORANDUM FOR Defense Counsel for Ali Abdul Aziz Ali

SUBJECT: Prosecution Response to 9 June 2014 Request for Discovery (DR-176-AAA)

1. The Prosecution received the Defense request for discovery on 9 June 2014. The Prosecution hereby responds to the Defense request.

2. The Defense requests production of "all documents issued by any government purporting to authorize or govern any raid, surveillance, search, and/or seizure conducted outside the United States which produced any evidence the government has produced or will produce during the discovery process, including but not limited to trigrams TRQ, RAW, ABS, H138, KAC, SPN, TTP, HAW and AHH." The Prosecution responds as follows, in bold:

The Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701.

The Fourth Amendment does not apply to the search and seizure by United States agents of property that was owned by a nonresident alien and located in a foreign country, regardless of judicial forum. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990).

Further, the Prosecution is not aware of any other source of right that would require the Prosecution to produce any authorization to raid, conduct surveillance, search, or seize evidence overseas during active hostilities.

As such, the Prosecution respectfully declines to produce the requested material.

Respectfully submitted,

//s//
Nicole A. Tate
Assistant Trial Counsel