

UNITED STATES OF AMERICA

AE306E(AAA)

v.

KHALID SHAIKH MOHAMMAD, WALID
 MUHAMMAD SALIH MUBARAK BIN
 'ATTASH, ALI ABDUL AZIZ ALI,
 MUSTAFA AHMED ADAM AL HAWSAWI

Mr. al Baluchi's Response to
 AE306D(GOV), Government Notice on Status
 of Discovery Requests within AE306(AAA),
 Defense Motion to Compel Discovery of
 Metadata from
 Electronically Stored Raid Discovery

18 May 2016

1. **Timeliness:** This response is timely filed.

2. **Overview:**

The government possesses evidence obtained from at least nine sites around the world which it asserts is relevant to the charges and which it intends to admit at trial.¹ These sites reflect areas of intelligence and law enforcement activity; they include the scenes of the arrest, capture, search and seizure of people and materials central to this case. That evidence has all² been photographed; those photographs were converted from actual photographs to portable document format (PDF) by the government and then provided to the defense in discovery. In July 2014, with the filing of AE306A (GOV), it became affirmatively known to the defense for the first time that at least some of those photographs³ were only taken in the last few years, and were taken in the Washington, D.C., area. In other words, the photos that depict evidence gathered from some of the most central sites in this case were not actually taken contemporaneously at those sites.

¹ See AE306A (GOV), Government Response to Defense Motion to Compel Discovery of Metadata from Electronically Stored Raid Discovery, at 1, par.4.

² See AE306A (GOV) at 4.

³ The government continues to provide vague information in response to specific requests about the photographs. In AE306A (GOV), the government noted that "the vast majority" of raid item photographs were taken in 2012-3 in the Washington, D.C., area. See AE306A at 5. The defense still does not know which photographs were taken in which locations at which time. This, of course, simply underscores the need for the production of metadata.

The defense has repeatedly requested, through discovery requests and now in a series of filings in support of a motion to compel, all of the photographs in question in native file format, so that their metadata is also produced. The government reported that it has “reviewed the metadata associated with these pictures, where available,” and “determined with respect to each set of pictures, none of the metadata is material” to the defense.⁴ There was one raid site for which the government indicated it was still seeking information; on 3 October 2014, after review of those photographs and their metadata, the government produced 103 photographs – from one raid site – in .jpg format to the defense. None of the other native file format photographs or metadata have been produced.

3. Law and Argument:

The government’s notice⁵ on the status of discovery requests in this series, filed in response to military commission order,⁶ is willfully blind as to the actual issues raised by its ongoing failure to provide the requested metadata. The need for production of all of the photographs in native file format, relating to all 9 sites and any additional sites that may be discovered, has never been properly addressed by the government. The government’s notice of 5 May 2016 ignores the military commission’s directive to provide an update as to the “status of discovery within AE306” – not just the status of what the government has unilaterally deemed worthy of disclosure, despite clear legal authority to the contrary. Given its refusal to address the substantive concerns raised by

⁴ AE306A (GOV) at 2. The government provides no explanation for its use of the phrase, “where available” and thus suggests that perhaps it has not reviewed all of the photographs.

⁵ AE306D (GOV) Government Notice of Status of the Discovery Requests within AE306 (AAA).

⁶ AE306C Order on Defense Motion to Compel Discovery of Metadata from Electronically Stored Raid Discovery.

Mr. al Baluchi,⁷ and its refusal to provide the actual evidence, the government has left the military commission with no choice but to compel production.

Metadata is data that provides information about other data.⁸ Metadata is, thus, in itself, evidence. The government either does not understand this fundamental proposition, or seeks to distract from it in order to avoid production of discoverable material. To suggest, as the government has done, that metadata is not material, discoverable evidence is analogous to saying that an X-ray image is evidence, but the medical records generated in connection with that scan are not. The metadata in this case provides necessary context and content to those who were not present at the time of the photography. Such information is particularly meaningful in this case, in which little to no evidence has been produced about the basis for the searches, the execution of the searches, the circumstances of the searches, or the chain of custody⁹ for the evidence seized during them. The government's position, as discussed in Mr. al Baluchi's reply, is unsupported by any recent or criminal legal authority. Nonetheless, an entire set of data that is embedded within each photograph is being purposefully withheld from the defense for no legitimate reason, and in violation of Mr. al Baluchi's fundamental discovery and constitutional rights.

The government's position fails in at least two ways made clear by its response in

⁷ See AE306 (AAA) Defense Motion to Compel Discovery of Metadata from Electronically Stored Raid Discovery and AE306B (AAA) Defense Reply to Government Response to Defense Motion to Compel Discovery of Metadata from Electronically Stored Raid Discovery.

⁸ <http://www.merriam-webster.com/dictionary/metadata> (last checked 16 May 2016).

⁹ Over 500 items allegedly obtained as a result of the nine identified raids have been or will be provided to the defense. For these over 500 items, only about half are accompanied by chain of custody documentation, and even that information is largely incomplete. No chain of custody information whatsoever has been provided for the remaining items.

AE306A and by its notice in AE306D: (1) it misunderstands that the law requires discovery of material evidence, as well as the definition of materiality, and (2) it misunderstands the hugely exculpatory nature of metadata that reveals photos taken far from and far after the events in question.

Whatever actual objection is being lodged by the government against disclosure of this metadata is never really made clear throughout its filings. The various arguments raised include: (1) irrelevance,¹⁰ (2) a lack of materiality, (3) a lack of intent to affirmatively use the photographs, (4) availability of hard evidence for inspection, (5) availability of competent witnesses to authenticate photographs, (6) that metadata is not a genuine issue in the case, and (7) that the photographs were provided in a useable format. None of these arguments meaningfully address the concerns raised by the defense; some of them willfully ignore the concerns raised by the defense; and, when taken together, the specter of avoidance looms.¹¹

¹⁰ The government consistently refers to relevance in its reply. However, as the Commission knows, relevance is not the standard for disclosure of discovery under R.M.C. 701(c)(1) – materiality is.

¹¹ This would certainly not be a new approach. Just months ago, in open hearings before this military commission in February 2016, counsel were engaged in oral argument related to AE195. Counsel for Mr. al Baluchi, as well as counsel for other defendants, made extensive arguments about the failure of the government to disclose a certain document that is material as well as favorable. The government forcefully responded that it had carefully reviewed the document and that it would not provide it because it was “nonresponsive,” thus entirely distracting from and avoiding the questions of materiality and favorability. *See* Unofficial/Unauthenticated Transcript, 18 February 2016 at 10588. A few days later, during the same series of hearings before this Commission, the same prosecutor revealed that the government had not, in fact, actually *ever* reviewed the document in question prior to making all of those arguments and before taking a firm position on nondisclosure. He then stated that the document would be reviewed and materials may be provided “as appropriate” in the future. *See* Unofficial/Unauthenticated Transcript, 26 February 2016 at 11631. That document remains withheld.

Focusing on materiality, the government issues blanket assertions that the data is not material. However, in the same pleading – indeed, on the same page – it notes that at least some of the photos were not taken at the scenes of the raids, contemporaneous with the events central to this case, but rather in Washington, D.C., over a decade later. This juxtaposition highlights the government’s fundamental misunderstanding of materiality, and why it is problematic to blindly rely on prosecutors for a final determination of materiality. Prosecutors, by definition, do not engage in the investigation or preparation of a defense case; as a practical matter, they do not always understand what those tasks entail. Government counsel are advocates; no reasonable observer would consider them either impartial or independent. The military commission plays an important role in monitoring these determinations for just this reason. 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.”¹² The metadata here is also material – and exculpatory – because it raises questions about the quality of the investigation by law enforcement. Evidence that “raise[s] opportunities to attack . . . the thoroughness and even the good faith of the investigation” is material.¹³

¹² *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).

¹³ *Kyles v. Whitley*, 514 U.S. 419, 445 (1995); *see also, e.g., Bowen v. Maryland*, 799 F.2d 593, 613 (10th Cir. 1986) (“A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation”); *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (concluding that withheld *Brady* evidence “carried within it the potential . . . for the . . . discrediting . . . of the police methods employed in assembling the case”).

In this case, as previously noted in defense filings, the timing and location of the photographs are both material and likely exculpatory.¹⁴ Based on the government's representations as to the timing and location of at least many of the photographs, actual evidence appears to exist in the metadata that routine evidentiary protocols for the gathering and documenting of evidence were not followed. As a general matter, evidentiary scenes for law enforcement purposes – whether they be search warrant locations or crime or arrest scenes – are expected to be approached in a manner meant to document and preserve evidence for proceedings just like this. The protocols and routine practices governing crime scene investigation¹⁵ reflect the need to preserve and document evidence for reliable government prosecutions. These routine practices also serve to protect a criminal defendant's constitutional rights to confront the witnesses and evidence against him, to present a complete defense, and to have access to information otherwise unavailable to him that would allow him to test the government's evidence against him.

The lack of contemporaneous documentation of the scenes of raids and arrests central to this case, including hundreds of items of evidence supposedly seized during such events, casts enormous doubt on the reliability of the government's proffered evidence, the legality of the searches and seizures themselves, the handling of such evidence after seizure, and the training,

¹⁴ Various other data gleaned through native file format would also be material and likely exculpatory, including, but not limited to, the types and number of cameras.

¹⁵ See, e.g., *Crime Scene Investigation: A Guide for Law Enforcement*, U.S. Dept. of Justice, January 2000 (<https://www.ncjrs.gov/pdffiles1/nij/178280.pdf>) (outlining the need for on-site photographic documentation of any scene, and providing guidelines as to what to photograph, which angles to use, the use of evidence identifiers with items of evidence, etc.); *General Order 702.03: Search Warrants*, Metropolitan Police Department, District of Columbia, updated December 2013 (https://go.mpdonline.com/GO/GO_702_03.pdf) (providing detailed protocols for the execution of search warrants, including the photographing of evidentiary items in their locations at the scene).

motives and expertise of those personnel¹⁶ involved in the seizures. The information contained in the metadata is thus unquestionably material and likely exculpatory. Disclosure of that metadata is mandated by the U.S. Constitution, the rules of this Commission, and fundamental principles of fairness. Moreover, the government has articulated no comprehensible objection to disclosure, and has demonstrated no hardship, as the material is in its possession and has apparently already been reviewed.

Finally, counsel for Mr. al Baluchi have diligently reviewed the one set of native file format photographs produced by the government. That production includes 103 photographs in .jpg format, which reveals the existence of some metadata. For the 103 photographs produced, the metadata includes: (1) the date the photographs were taken; (2) the time each photograph was taken; and (3) the dimensions of the photographs.¹⁷ While this is far more information than anything received in connection with the other photographs, and while it is useful and essential information, it still falls far short of what is typically included in metadata. “In digital photos, metadata typically includes ‘the date and time the photo was taken; camera settings, such as aperture and shutter speed; manufacturer make and model...and – in the case of smartphones – the GPS

¹⁶ See, e.g., *Jackson v. United States*, 768 A.2d 580, 587 (D.C. 2001) (reasoning that the testimony of an expert on the failure of police to attempt to lift fingerprints from a plastic bag at a crime scene would be relevant, as it was “something [he] would say was commonly done with success, [and thus] might plant a reasonable doubt in jurors' minds about the motives of the police -- or at least their indifference to their legal obligations -- in arresting him.”)

¹⁷ The data also notes, “Camera: SmartCapture” for all 103 photos. SmartCapture is a software program found on computers that allows for the download or capture of external photographs. The metadata provided by the government thus does not reflect the type of camera or device, camera settings, number of cameras, manufacture make and model, or any other information relating to the origin of the photographs. Instead, it merely reflects the step, on an unknown date, in an unknown location, by an unknown person, at which the photos were transferred from a camera or cameras (or other device(s)) onto a computer, sometime prior to being provided to the defense.

photo was taken.”¹⁸ Indeed, “In most cases, this information is automatically embedded in digital pictures unless the user opts out of the features that capture the information.”¹⁹

Counsel for Mr. al Baluchi are working diligently to review and obtain further information about the raid discovery.²⁰ Counsel continues to have very limited information about how the government obtained the raid discovery. In some cases, the defense does not even know in what country the evidence was seized. The military commission should not indulge the government’s various attempted distractions, and should, as a first step toward satisfying Mr. al Baluchi’s statutory and constitutional entitlements in this regard, compel production of the metadata in its native file format for all photographs relating to the raids conducted in connection with this case.

3. Attachments:

A. Certificate of Service.

Very respectfully,

//s//

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//s//

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¹⁸ *United States v. Post*, 997 F. Supp. 2d 602, 603 (S.D.Tex. Jan. 30, 2014) (internal citations omitted).

¹⁹ *Id.*

²⁰ Separate from the raid metadata request, Mr. al Baluchi has made nine other discovery requests seeking information about the raid discovery.

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 18th day of May, 2016, 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