

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
UNITED STATES OF AMERICA)	
)	
v.)	
)	Crim. No. CR-08-360 (RMU)
PAUL A. SLOUGH,)	
NICHOLAS A. SLATTEN,)	Judge Ricardo M. Urbina
EVAN S. LIBERTY,)	
DUSTIN L. HEARD,)	
DONALD W. BALL,)	
)	
Defendants.)	
_____)	

**REPLY TO GOVERNMENT’S OPPOSITION TO
DEFENDANTS’ MOTION TO COMPEL DISCOVERY UNDER RULE 16**

The Defendants, jointly and through undersigned counsel, submit this reply to the “*Government’s Omnibus Opposition to Defendant’s Motions to Compel Discovery Under Rule 16 and to Compel Production of Brady Material.*” The Defendants initially filed two separate motions – one related to Rule 16 discovery and a second related to *Brady* disclosures. This reply addresses only the Government’s Opposition as it relates to Rule 16 discovery.

ARGUMENT

I. THE GOVERNMENT HAS FAILED TO PRODUCE INFORMATION UNDER RULE 16.

As an initial matter, we reiterate some well-established principles regarding discovery in this Circuit: “Rule 16 establishes ‘the *minimum amount* of discovery to which the parties are entitled’ [and it] ‘is not intended to limit the judge’s discretion to order broader discovery in appropriate cases.’” *United States v. Karake*, 281 F. Supp. 2d 302, 306 (D.D.C. 2003) (*quoting* Advisory Committee Note to Fed. R. Crim. P. 16) (emphasis added). “[D]isputes should be resolved *in the defendants’ favor*, for ‘[t]he language and the spirit of the Rule are designed to

provide to a criminal defendant, in the interests of fairness, the *widest possible opportunity to inspect and receive such materials in the possession of the government as may aid him in presenting his side of the case.*” *Id.* (quoting *United States v. Poindexter*, 727 F. Supp. 1470, 1473 (D.D.C. 1989) (emphasis added)).

In its Opposition, the Government touts the volume of discovery that it has provided to date (“more than 9,580 pages of documents; 4,763 photographs; and 16 digital videos . . .,” Gov’t Opp. at 3). Those statistics are irrelevant to the issues now before the Court. Discovery is not a numerical quota that the Government satisfies; it is a continuing obligation that is fulfilled only when all information covered by Rule 16 (or ordered by the Court in its discretion to be produced) has been supplied to the defense. The Defendants contend that the Government has failed to fulfill particular discovery obligations. The Government’s assertion that it has fulfilled *other* discovery obligations fails to address that contention. We now address the Government’s arguments regarding the four categories of information for which the Defendants contend the Government has failed to provide all required discovery.

A. MATERIAL RELEVANT TO THE JURISDICTIONAL ISSUE

The Government has failed to provide sufficient discovery material pertaining to the critical and controversial issue of whether there is jurisdiction to charge the Defendants under MEJA. The majority of documents that the Government has identified as bearing on jurisdiction are, in fact, of marginal or no relevance. The Government’s discovery approach in this area has been to supply the defense with a large volume of useless documents, withhold other documents that could be highly material to the jurisdictional question, and then defend its discovery record by pointing to the sheer number of documents it has produced. Discovery is not a numbers game. It is about substance.

The Government concedes that this information is discoverable. In its Opposition, the Government indicates that it “does not dispute that *non-internal, non-deliberative* documents such as briefing papers or testimony given by government officials to Capitol Hill concerning the applicability of MEJA in this particular case are potentially discoverable, at least to the extent those briefings were given by representatives of federal agencies allied with the prosecution in this case.” Gov’t Opp. at 7. The Government contends that it has produced 360 pages of correspondence between DOD and DOS and various members of Congress that discuss MEJA jurisdiction generally and its application to this particular case and thus has fulfilled its discovery obligations. *Id.* The Government’s position does not withstand scrutiny.

Publicly-available information demonstrates that the issue of whether these Defendants could be prosecuted under MEJA received national attention and was the subject of high-level discussions within and between the Executive and Legislative branches of the Government. The Government must have generated thousands of pages of memoranda or analyses regarding this issue. The Defendants are entitled to all of those documents, not just a 360-page subset of them selected by the Government. The Government’s selection process itself demonstrates the inadequacy of its production. To date, the Government has produced jurisdictional documents generated only by DOD and DOS. Not a single document that has been produced was generated by the Department of Justice (“DOJ”), the agency responsible for the decision to prosecute this case and the agency that DOD, DOS, and Congress would have consulted on the question of whether jurisdiction exists over these Defendants under MEJA. The Government’s anemic production of documents relating to the jurisdictional issue has excluded the most probative materials on the question: documents generated by DOJ. Those documents must exist and are clearly within the possession or control of the prosecutors.

The Government complains that the Defendants refer in their discovery motion, *for the first time*, to a December 2007 DOJ briefing to Congress that was reported in the New York Times. Gov't Opp. at 7. The Government's complaint validates the Defendants' serious concerns about the manner in which the Government has approached its discovery obligations on the jurisdictional issue. It is not the responsibility of *the Defendants* to *identify* discoverable information in the Government's possession, custody, or control. Rule 16 only requires the Defendants to "*request*" discoverable information. The Defendants requested specific discovery on this issue *over 8 months ago*. It is *the Government* that bears the affirmative obligation to conduct a complete and thorough search for information covered by Rule 16, or *Brady*, or any other source of the its disclosure obligations. The Government has not met those obligations.

In this particular instance, the Defendants happened to learn, as did anyone else who read the New York Times, that "in a private briefing in mid-December, officials from the Justice and State Departments met with aides to the House Judiciary Committee and other Congressional staff members and warned them that there were major legal obstacles that might prevent any prosecution." January 16, 2008, *Blackwater Case Faces Obstacles, Justice Dept. Says*, N.Y. Times (James Risen and David Johnston). The Government's claim that it was unaware of the New York Times article and, more troubling, did not know of the briefing that DOJ officials gave to Congressional staff is surprising; however, it provides no excuse for the Government's failure to locate discoverable materials generated by DOJ for purposes of that briefing. The Government has represented to this Court that it has conducted a thorough search for discoverable material. That assertion loses considerable credibility when, in the case of a high-level DOJ briefing reported in a national newspaper, the Government appears to have overlooked materials that sit under its own nose. The Defendants cannot possibly know how many other

briefings, statements, memoranda, or documents made or prepared by DOJ on the jurisdictional issue exist that were not reported in the New York Times. The Government now claims that it “is in the process of collecting any other correspondence, briefing papers, or other materials from the Office of Legislative [sic] at the Department of Justice that relate to MEJA generally, or its application to Blackwater in Iraq, and will provide those to the defendants as soon as they become available.” Gov’t Opp. at 8. The Defendants have been requesting that information since January 2009. Their trial date is *less than six months away*. Briefing and argument on the Defendants’ Motion to Dismiss for Lack of Jurisdiction has already occurred. And only now has the Government begun the “process of collecting” discoverable material that resides within the halls of DOJ on the pivotal issue of whether there is jurisdiction to pursue this case. The Government’s tardy compliance reveals why the Court must order the Government to comply with its Rule 16 obligations by a date certain.

Relying on Rule 16(a)(2), the Government also argues that the Defendants are not entitled to internal memoranda, documents, notes or emails related to conclusions reached by a Department of State Ambassador (Eric Boswell) or other government officials that Blackwater State Department contractors did not support the mission of the Department of Defense. As the Government notes, Rule 16(a)(2) “does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent *in connection with investigating and prosecuting the case.*” Gov’t Opp. at 6, 7. (Emphasis added.) In at least three respects, the Government interprets the scope of this exclusion too broadly.

First, the Defendants are entitled to internal documents prepared by governmental agencies other than DOJ – such as the DOD, DOS, and other entities within the Executive and

Legislative branches – that were not prepared in connection with the investigation or prosecution of this case and pertain to the scope and application of MEJA. The Defendants have reason to believe that documents within this category exist in government files, because DOJ bears principal, if not exclusive, responsibility for investigating and prosecuting this case. Prosecuting crimes in civilian federal courts is not within the mission of DOD or DOS. Internal documents generated by those agencies and other non-DOJ entities related to the MEJA issue are discoverable because those documents were not prepared “in connection with the investigation or prosecution of the case” within the meaning of Rule 16. *See, e.g., United States v. Gatto*, 729 F. Supp 1478, 1481 (D.N.J. 1989) (Rule 16(a)(2) does not preclude the defendants from obtaining reports from third-party government agencies; where those reports were not the work product of the United States Attorney prosecuting the case, “there is no blanket exclusion of reports by government agents”); *United States v. Green*, 144 F.R.D. 631, 641 (W.D.N.Y 1992) (“to the extent that the government has in its possession reports or records from state or local law enforcement agencies . . . these items are discoverable unless they are the product of a joint investigation or unless they have become the work product of the federal investigators”).

Second, Rule 16(a)(2) does not exempt all internal DOJ memoranda or reports from discovery. The exemption applies only to reports prepared in the investigation and prosecution of *this* case. And with respect to documents connected to this case, “[t]he exception in Rule 16(a)(2) applies to work product.” *Government of the Virgin Islands v. Fahie*, 419 F.3d 249, 257 (3d Cir. 2005). Accordingly, Rule 16(a)(2) does not exempt from discovery documents that do not contain ““mental impressions, conclusions, opinions, or legal theories concerning litigation of an attorney or representative of a party”” or that do not “reveal any confidential information pertaining to the Government’s prosecution strategy.” *Id.*

Third, even work-product documents prepared by DOJ or other Government agencies that would otherwise fall within the exception of Rule 16(a)(2) must be disclosed nonetheless if they constitute *Brady* material. “[T]he contours of Rule 16’s exceptions should be interpreted to minimize conflict with the government’s constitutional disclosure obligations under *Brady*.” *Fahie*, 419 F.3d at 257. In *Fahie*, the defendant was charged with possession of an unlicensed firearm. The court held that the Government violated Rule 16 and *Brady* by failing to disclose a report generated from an ATF database that indicated that the firearm at issue was registered to a person living in Virginia who had not reported it stolen. *Id.* The court rejected the Government’s claim that the report was covered by the exception at Rule 16(a)(2) because it was generated in the course of the investigation of the defendant. The court held that the “ATF Report was not government work product of a type exempted from discovery” because it did not contain mental impressions, conclusions, opinions, legal theories, or confidential information pertaining to the Government’s prosecution strategy. *Id.* The court further noted that the federal employees who maintained the database and generated the report were not agents of the Virgin Islands or its prosecutor and that the report was derived from a database that was maintained for broader purposes than the prosecution of *Fahie*. *Id.* Separate from its discoverability under Rule 16, the court found that the report constituted *Brady* material. In light of the Government’s constitutional *Brady* obligation “to share the kind of objective fact evidence contained in the ATF Report,” the Court held it would “not exempt the government from this obligation under Rule 16(a)(2) in the absence of language compelling a contrary result.” *Id.* Like the ATF Report in *Fahie*, documents bearing on the issue of jurisdiction under MEJA in this case are unlikely to constitute work product or prosecution strategy documents protected from disclosure under Rule 16(a)(2) and, in any event, likely would constitute *Brady* information that must be disclosed to

the Defendants on constitutional grounds distinct from Rule 16. As the Third Circuit correctly concluded, Rule 16(a)(2) “will not exempt the government from [its *Brady*] obligation.” *Id.*

Relying on *Williamson v. Moore*, 221 F.3d 1177 (11th Cir. 2000), the Government contends that attorney opinion work product is immune from disclosure in all circumstances. The court in *Williamson*, however, found that written notations of the prosecutor’s mental impressions constituted attorney work product and were not discoverable in circumstances where “the prosecutor’s notes of witness statements could not have led the defense to impeachment or *exculpatory evidence*.” *Id.* at 1183 (emphasis added). The court explained that “[w]hile opinion work product enjoys almost absolute immunity, extraordinary circumstances may exist that justify a departure from this protection.” *Id.*

The Defendants also submit that extraordinary circumstances are present here and that, in its discretion, the Court should order broad discovery relating to the jurisdictional issue in this case. The Defendants, who all face 30-year mandatory minimum sentences in this prosecution, have presented the Court with a substantial question of whether the Government even has jurisdiction to prosecute them. If the Government itself has internal documents that validate the Defendants’ position on jurisdiction, the Court should order disclosure of those materials in the interests of justice.

Separately, the Defendants also contend that such analyses are subject to disclosure as *Brady* material. Jurisdiction is an essential element of the offenses charged in the indictment. If the Government had produced an internal memorandum concluding that none of these Defendants fired a single weapon at Nisour Square on September 16, 2007, that document or the information contained within it would be *Brady* material. The same treatment applies to DOJ memoranda or documents that conclude that these Defendants cannot be prosecuted for the

crimes with which they are charged. The documents themselves, or the substance of the conclusions contained within them, constitute material exculpatory evidence that must be disclosed to the Defendants under *Brady* and the Sixth Amendment.

The government's reliance on *United States v. Fort*, 472 F.3d 1106 (9th Cir. 2007), also is misplaced. In *Fort*, the court found that local law enforcement investigative reports, which were similar to FBI 302 investigative reports, that were provided to federal prosecutors to assist in the prosecution of criminal acts by the defendants were encompassed by the exclusion in Rule 16(a)(2) and were not discoverable. The court emphasized, however, that "it is important to note that this appeal does not involve the government's disclosure obligations under [*Brady*], or other disclosure rules" and that the information at issue "pertains to inculpatory, not exculpatory, evidence, *and nothing in this opinion should be interpreted to diminish or dilute the government's Brady obligations.*" *Id.* at 1110 (emphasis added). Unlike *Fort*, the Defendants do not seek discovery of government-generated documents related to the circumstances of the crimes they are alleged to have committed. The Defendants seek government documents relating to the distinct issue of the Government's jurisdiction to prosecute this case. In particular, the class of documents that the Defendants seek are those that are exculpatory in that they support the conclusion that the United States Government lacks jurisdiction to prosecute them. This case thus involves the very *Brady*-related issues that the Ninth Circuit in *Fort* explicitly *declined* to address because they were not presented there.

B. DISCOVERY RELEVANT TO THE SUBSTANTIVE CHARGES AND THE DEFENSE

With respect to the substantive charges in the indictment, the Defendants raise two specific categories of information that the Government is required to disclose under Rule 16, but has not.

1. Computer-Generated Evidence.

The Court should order the Government to disclose any computer-generated evidence (CGE) that the Government may seek to use at trial, particularly any computer-generated animations or demonstrations related to ballistics evidence or trajectories of shots fired. The Government inaccurately asserts that the Defendants have claimed the Government has “refused to provide” this information. Gov’t Opp. at 9. To the contrary, the Defendants argued that “[w]hile the Government has indicated that it intends to use such evidence in its case-in-chief at trial, it has not disclosed that evidence to the Defendants.” Def. Rule 16 Mot. at 15. The Government then complains that the Defendants requested this information for the first time on July 1, 2009. That is also inaccurate. In December 2008, within weeks of the indictment in this case, the Defendants asked for all material to which they were entitled under Rule 16. Those requests encompassed any CGE that the Government intends to use in its case-in-chief at trial, because such materials are clearly covered by Rule 16. Even without a more specific request from the Defendants, the Government has known of its obligation to disclose CGE for over 7 months. The Government has an affirmative burden to produce Rule 16 discovery. It cannot ignore that obligation until the Defendants make specific requests for materials that are covered by the Rule.

The Government states that it has produced “93 pages of FBI laboratory reports for trajectory, ballistics, metallurgy, and other forensic testing.” Gov’t Opp. at 15. The disclosures

that the Government has made to date cannot fairly be characterized as “reports.” The so-called trajectory “reports” that the government has produced are simply pictures. They contain no foundation or analysis. The Defendants do not know whether these so-called trajectory lines were drawn based on witness accounts or expert analysis. No measurements have been provided. No data has been provided to support the angles of the shots alleged to have been fired by the Blackwater guards. All of this information is clearly discoverable, but the Government has not disclosed it.

The Government then claims that it intends to comply with this defense request at some unspecified date in the future. It explains that “much of the specific technical data requested in Mr. McCool’s letter cannot be identified and turned over to the defense until the computer-generated evidence is finalized by the FBI lab, and the United States has had an opportunity to examine the display and select which parts of the final product will be offered at trial.” Gov’t Opp. at 10. As the Court is aware, on January 6, 2009, the lead prosecutor in this case, Kenneth Kohl, accused the Defendants of attempting to delay the trial of this matter for tactical advantage and asserted that the Government could be ready for trial this Fall. Jan. 6, 2009 Hearing Tr. at 23-24. Now, at a time when the Government said it could be ready for trial, the prosecutors have yet to produce critical laboratory reports on firearms analysis and computer-generated trajectory evidence. Gov’t Opp. at 9-10; 15-18. Trial is now just five months away. Many issues must be resolved by that time, and the trial preparation required for this complex case is substantial. It is unacceptable for the Government to set an indeterminate and leisurely schedule for disclosing computer-generated trajectory evidence (which we suspect will be a complex computer animation of the Government’s one-sided version about what transpired in Nisur Square), ballistics evidence, and metallurgy evidence. The Defendants have retained a consultant,

Eugence Liscio, to advise them on the breadth and scope of computer generated evidence. Considerable manpower, financial resources, and technology is necessary to analyze and challenge the propriety of such evidence. As Mr. Liscio states in his declaration:

Based on my own personal experience, approximately 70% of the effort in a 3D reconstruction is getting to the point where all the data has been collected, reviewed, analyzed and then organized such that an opinion can then be formulated. A simple homicide case can often take several weeks of work to complete. Considering the number of participants and complexity of this particular incident, the estimated time to review the evidence and subsequently develop an accurate reconstruction of the events is easily several months of activity. Currently, the material provided to me do not appear to have the breadth of foundation and analysis required by an incident of this nature.

See Decl. of Eugene Liscio at ¶ 6, attached as *Exhibit A*. The Government, however, claims that it is still “finaliz[ing]” its computer generated evidence eight months after the arraignment. Gov’t Opp. at 10. As Mr. Liscio makes clear, it will take several months for the Defendants’ to analyze this evidence once it is disclosed. It is imperative that the Defendants receive the information requested regarding the computer generated trajectory evidence *now* so that they can adequately investigate the data and methodology underlying such evidence and either challenge its admission at trial or develop their own computer generated models.¹

2. Intelligence Information Related to Terrorism or Insurgent Actions Aimed at Americans in Iraq.

The Government has refused to adequately comply with the Defendants’ requests for:

- Documents related to intelligence reports, predictions, or analyses related to efforts by the Iraqi government (including its ministries, agencies, security forces, and military) or any insurgent, insurgent group, terrorist, terrorist group or organization, or other individual(s) to initiate, cause, encourage, aid, assist, or facilitate a confrontation with U.S. military or security forces; and

¹ The Defendants believe that there is a substantial basis to exclude any use of CGE pseudo-technology in this case based on a number of different grounds. Obviously, preparing that motion must await the Government’s disclosure of the proposed exhibit, the technology underlying it, and its “cherry-picked” version of “facts” used to prepare the CGE. In the event the Court does not exclude the CGE, the Defendants must retain their own experts to challenge the Government’s analysis and potentially present their own CGE exhibit, an extraordinarily expensive and time-consuming project. Given that we cannot advance this effort without the requested discovery materials, this extraordinary delay should be unacceptable as we all strive to adhere to the deadlines set by this Court.

- Documents related to efforts by any insurgent, insurgent groups, terrorist, terrorist group or organizations, or other individual(s) to kill, kidnap, or otherwise harm Government personnel, including U.S. military personnel and Department of State employees, agents, diplomats, and officials, or security contractors.

We will refer to these categories of information collectively as “intelligence reports.”

In its Opposition, the Government claims that the Defendants “have been provided ample intelligence information relating to the precise kind of insurgent threats outlined in the defendants’ discovery request . . .” Gov’t Opp. at 10. It then discusses *five* items that have been disclosed to the Defendants, namely:

1. Briefing notes of Blackwater analyst Mieszka Laczek-Johnson summarizing specific threat information available to Blackwater PSD teams for several months before and after the incident;
2. Personal Security Detail (“PSD”) Intelligence Update reports for the period from September 1-16, 2007;
3. An August 2005 Report prepared by the United States Army National Ground Intelligence Center report entitled “Iraq: Insurgency Tactics, Techniques and Procedures;
4. A December 2005 Report prepared by the Bureau of Diplomatic Security;
5. A “massive” database known as the “Iraq Body Count.”

Gov’t Opp. at 11. The Government argues that these five items are adequate to permit the Defendants to prepare a defense based on how insurgent and terrorist forces planned and executed attacks against American military and security forces in Iraq and that the burden that would be imposed upon the Government by requiring it to provide additional intelligence reports

on this subject outweighs any additional relevance such reports might have to the defense.² The Government is incorrect in both respects.

As an initial matter, the Government's position that it has now produced "enough" intelligence reports to satisfy Rule 16 concedes that those reports are material to the defense in this case and are discoverable under Rule 16. That concession is warranted. Intelligence reports that describe the uniquely dangerous conditions for Americans in Iraq are central to the defense in this case. As we pointed out in our original motion, these intelligence reports bear directly on the legal principle upon which the defense in this case hinges, *i.e.*, the Defendants will claim that they acted in self-defense and held an objectively "reasonable" belief that they were in immediate peril of death or serious bodily injury in the circumstances that they faced.

The United States had been at war in Iraq for four years before the incident at Nisur Square on September 16, 2007. Based on published reports alone, it is clear that the war has presented challenges to American military forces who, while aligned with the current Iraqi government, have had to engage in daily battles with insurgent and terrorist forces present in the country. It is common knowledge that analyzing and combating the tactics and techniques of those insurgent and terrorist forces has been a central objective of the Department of Defense and the intelligence community, including the Central Intelligence Agency and the National Security Agency. Volumes of information on the subject must exist in government files. When the events of September 16, 2007, unfolded, the Defendants were protecting State Department employees in the uniquely dangerous conditions present in Iraq.

² The Government also claims that it has provided the Defendants with information not known to them at the time of the Nisur Square incident. While the Government has provided a very limited amount of such information to the Defendants, the Government's representation is inconsistent with Mr. Kohl's letter of April 30, 2009, in which he said that the Government would refuse to disclose information relating to insurgent or terrorist threats aimed at U.S. persons in Iraq that "were never communicated to Blackwater, and of which your clients had no knowledge on September 16, 2007." See. Def. Rule 16 Mot. at Ex. E.

Against this undisputed factual backdrop, the Government has produced to the Defendants only *five* documents or resources on insurgent and terrorist tactics utilized against Americans in Iraq. The Government defends its minimalist production on the ground that “the sliding scale of materiality tilts strongly against the defendants because the document they seek are, at best, only tangentially relevant to any issues in this case, and are clearly outweighed by the unreasonable burden that would be imposed on the Government if it were required to comply with the defendants’ over broad discovery demands.” Gov’t Opp. at 13. The Government’s argument turns discovery on its head. The Government concedes the Defendants have made a valid demand for materials in the Government’s possession and control that are relevant to issues presented in this criminal case, but it seeks unilaterally to select only five documents for production, in part because the universe of responsive documents is “staggering.” The purpose of discovery is to permit the Defendants to review materials in the Government’s possession that are relevant to their defense and to decide *for themselves* which of those documents to use at trial and how. Moreover, the Government’s complaint that full discovery in this area would require production of a “staggering” volume of material hardly justifies its self selection of only *five* documents.

The Government not only acknowledges that intelligence reports are material to the defense, but also that:

Since the commencement of Operation Iraqi Freedom, DoD components have tracked and reported on attacks on Coalition and Iraqi security forces. Reported events include attacks involving explosive devices (bombs, IEDs, VBIEDs, mines), attacks involving small arms fire (sniper, ambush, grenade), attacks involving indirect fire (mortars and rockets), and surface-to-air attacks. . . . According to publically-reported data, there have been more than 150,000 such reported insurgent attacks in Iraq since the beginning of Coalition military operations there.

Gov't Opp. at 13. We could not have said it better ourselves. The Government's description of the unpredictable and uniquely dangerous war-zone environment that the Defendants faced in Baghdad on September 16 simply highlights why the intelligence reports are critical to the defense.

The Government complains that responding to the defense request would (1) "potentially generate several hundred thousands pages of documents" (2) "require the expenditure of tens of thousands hours of DoD manpower," and (3) require "DoD security classification/declassification personnel and legal personnel . . . to review and approve release of these materials for use in litigation." Gov't Opp. at 14. Yet nowhere does the Government recognize that when it seeks to jail individuals for most of their lives, there may be a burden associated with the process.

In any event, the difficulties asserted by the Government, which appear exaggerated, do not relieve it from its legal obligations under Rule 16. The Government has elected to pursue serious criminal charges against these five Defendants arising from their actions in a dangerous war zone in Iraq. One consequence of that decision is that the Government must provide the Defendants with information in its possession – specifically the intelligence reports we have requested – that is material to preparation of the Defendants' defense. The stakes in this case could not be higher for these Defendants. It is the Government's responsibility under Rule 16 to commit whatever resources are required to fulfill its discovery obligations. Moreover, the Government overstates the logistical obstacles to providing complete discovery in this case. Each of the defense counsel in this case has been involved in cases where millions of documents were produced in discovery. We are confident that the DOD and the other intelligence agencies have databases that would allow them to access many, if not all, responsive documents rather

easily, and that they have personnel in place to handle the appropriate security review of such documents. In any event, intelligence reports within the possession, custody or control of the Government (as that phrase is broadly interpreted) that would provide information on how insurgent and terrorist forces planned and executed attacks against American military and security forces is critical to the Defendants' preparation of their defense and must be disclosed under Rule 16.

C. REPORTS OF EXAMINATIONS AND TESTS

As explained in our initial motion, the Government has provided the Defendants with a number of standard and conclusory "reports" issued by FBI Laboratories concerning ballistics and metallurgical analyses performed on weapons, shell casings, and bullets (or bullet fragments) seized by the Government in connection with this case. The contested issue is whether Rule 16 requires the Government also to produce information and material underlying the conclusory reports (or any tests or analyses conducted by the Government).³ In its Opposition, the Government maintains that it is not required to disclose this information under Rule 16(a)(1)(F). We disagree. The Government is required to disclose this information under *both* Rule 16(a)(1)(F) as a scientific report or result or, in the alternative, under Rule 16(a)(1)(E), as material to the preparation of the defense. Moreover, the same U.S. Attorney's Office that claims in this case that it is not required to disclose the underlying data has routinely done so in other prosecutions. (*See* Decl. of Christopher McKee, attached as *Exhibit B.*)

The Government's restrictive interpretation of Rule 16 would deny the defense and defense experts the opportunity to assess the adequacy of the methodology used by the

³ The Defendants have made specific requests for: (1) The "bench notes" of the person performing the tests or analyses; (2) The underlying "raw" data that was generated in connection with the tests; (3) Data generated by machines or instruments used in connection with the tests; (4) Computer entries, plots and graphs used in connection with the tests; and (5) Photographs used or made by any examiner in connection with the tests.

Government's experts to conduct tests, analyze the accuracy of the underlying data collection, or even detect errors in the underlying calculations. The Government's approach would frustrate the central purpose of Rule 16, which is (as noted at the outset of this Reply), "to provide to a criminal defendant, in the interests of fairness, the *widest possible opportunity to inspect and receive such materials in the possession of the government as may aid him in presenting his side of the case.*" *Karake*, 281 F. Supp. 2d at 306 (D.D.C. 2003) (internal quotation marks and citation omitted; emphasis added).

None of the cases cited by the Government offer meaningful support to its position. *United States v. Iglesias*, 881 F.2d 1519 (9th Cir. 1989), shows that the question presented to the Court here is far from settled, even in the Ninth Circuit. In a well-reasoned and compelling dissent, Judge Boochever argued that documents generated in connection with a chemical test were discoverable under Rule 16. He noted that the advisory committee notes to the 1975 Amendment to Rule 16 "indicate[d] that the term 'any results or reports' is to be given a liberal, not a restricted construction." *Id.* at 1525. As Judge Boochever explained:

[T]here is admittedly scant authority construing Rule 16's use of the phrase "any results or reports." It is clear, however, that each amendment of the rule was for the purpose of expanding discovery rights. The goal of the amended rule is to enable counsel, prior to trial, to become familiar with the relevant tests and test procedures and to determine whether the tests performed were appropriate. *See* ABA, Standards for Criminal Justice, Commentary to Standard 11-2.1(a)(iv)(1986 Supp. Vol. 2).

Id. at 1526. The dissenting judge would have held that "Iglesias was entitled to inspect and copy 'all documents of whatever sort generated in connection with' the tests, including the notes of the examiner. They are 'results' of the testing." *Id.* at 1527. Furthermore, one federal judge in the Ninth Circuit has rejected the factual assumptions underlying the majority's analysis in

Iglesias. In assessing a defense discovery request for documentation underlying scientific test results, that district court judge wrote:

[T]his court may note that the *Iglesias* court's rationale that a party will not need the underlying information about scientific tests prior to trial is not persuasive. For the reasons explained at length below, it is not consonant with good trial preparation to await analyzing scientific foundational information, at times quite complex, until such time as the government expert is relating the foundation at trial for the first time.

United States v. Liquid Sugars, Inc., 158 F.R.D. 466, 470 (E.D. Ca 1994). We submit that the reasoning of Judge Boochever and of the district court in *Liquid Sugars* is more persuasive and realistic than the approach of the majority in *Iglesias*. When the fate of five young men facing 30-year mandatory sentences is hanging in the balance, any dispute on issues regarding the scope of discovery, should be resolved in favor of the Defendants. *See Karake*, 281 F. Supp. 2d at 306.

The other cases cited by the Government offer no support for its position. *United States v. Uzenski*, 434 F.3d 690 (4th Cir. 2006), concerned a defendant's request for the laboratory notes of one of the Government's experts. In response to a Government motion, the trial court ordered the expert to give his notes to the Government attorneys. The defendant then failed to take any additional steps to secure the notes from the government, but he objected to the expert testifying at trial based on the Government's failure to produce the notes. The Fourth Circuit held that it could not "say that the district court abused its discretion by permitting [the expert] to testify where [the defendant] failed to follow up on his discovery request with the district court, subpoena the records from the Government, request a continuance, or establish any prejudice" *Id.* at 710. That holding provides no support for the Government's position that Rule 16 does not require it to disclose the information underlying its cursory expert reports. To the contrary, the Fourth Circuit clearly implies that the defendant would have been entitled to the laboratory

notes had he moved to compel their production in the lower court. That is precisely the motion the Defendants in this case have filed.

Similarly, the court in *United States v. Price*, 75 F.3d 1440 (10th Cir. 1996), did not hold that notes and materials underlying an expert's conclusions are not discoverable, but rather concluded the trial court *did not abuse its discretion* in denying the defense request when the defense motions to compel "were entirely without detail, and the argument before the district court provided no further basis for a ruling." *Id.* at 1445. *Uzenski* and *Price* thus establish only that defense attorneys have an obligation to make specific requests for the underlying materials in the trial court and to follow through on those requests. That is what the Defendants are doing in this case.

Even assuming, *arguendo*, that the documentation underlying the Government's test results was not discoverable under Rule 16(a)(1)(F), that information is clearly discoverable under Rule 16(a)(1)(E). In *Liquid Sugars, supra*, the district court held:

[T]he dissent in *Iglesias* specifically reminded the majority that its ruling did nothing to preclude the defendant from successfully bringing the same motion under [Rule 16(a)(1)(E)]. [Rule 16(a)(1)(E)] provides that the government shall, upon request, permit the defendant "to inspect and copy or photograph books, papers, or documents . . . which are [in the government's] possession and material to the preparation of the defendant's defense." The dissent reasoned that such log notes, if they could not be discovered pursuant to [Rule 16(a)(1)(F)], could be discovered as documents under [Rule 16(a)(1)(E)].

158 F.R.D. at 470. The Government concedes that the district court in *Liquid Sugars* concluded that the majority in *Iglesias* did not bar discovery of underlying testing documents through Rule 16(a)(1)(E). Gov't Opp. at 17 n.5. Noting that the Government would be required to establish a foundation for certain test results when it put its expert on the stand at trial, the court ordered the government to produce "documents directly pertinent to the meaningful understanding of, or foundation for, the test results." *Id.* at 471, 473. The district court's order encompassed chain of

custody documents, laboratory bench sheets, testing procedures utilized, calibration standards utilized, and other methodologies employed in the course of the testing. *Id.* at 473.

The Government dismisses *Liquid Sugars* by suggesting that it is an aberration and asserting that the district court “appears to have misread *Iglesias*.” Gov’t Opp. at 17 n.5. The Government fails to mention that 11 years after *Liquid Sugars*, another district court in the Ninth Circuit confronted the same issue and rejected the proposition that *Liquid Sugars* was a departure from Ninth Circuit jurisprudence on discovery. *See United States v. W.R. Grace*, 233 F.R.D. 586 (D. Mont. 2005). In *W.R. Grace*, the defendants moved to compel the “production . . . of documents underlying asbestos sampling tests performed by the government or its experts.” *Id.* at 587, 588. The government in that case, like the prosecutors here, objected to producing these materials and relied on *Iglesias*. *Id.* at 589. The district court acknowledged that the *Iglesias* majority had held that the materials requested were not discoverable under Rule 16(a)(1)(F).⁴ But it also recognized that the dissent in *Iglesias* had observed that the same documentation would be discoverable if it met the requirements of Rule 16(a)(1)(E), which was a point that the *Iglesias* majority did not dispute. *Id.* The district court then discussed *Liquid Sugars* and quoted the following excerpt from that case with approval:

[T]he majority in *Iglesias* clearly had the opportunity to read the dissent before publication. The fact that the majority still chose to premise its decision specifically, exclusively and repeatedly on the provisions of [Rule 16(a)(1)(F)] without referencing the dissent’s comments with regard to [Rule 16(a)(1)(E)] leads the court to believe that the Ninth Circuit intended either to leave the door open to such discovery, or leave the deciding of the precise issue to another day.

W.R. Grace, 233 F.R.D. at 589-90 (quoting *Liquid Sugars, Inc.*, 158 F.R.D. at 470). The district court in *W.R. Grace* concluded that the reasoning of *Liquid Sugars* was persuasive and ordered

⁴“Although it is possible that the requested log notes would allow [the defendant] to provide a more effective defense, the government is under no legal duty under [Rule 16(a)(1)(F)] to turn over such informal internal documents.” *Id.* at 589 (quoting *Iglesias*, 881 F.2d 1523).

the government to produce the underlying asbestos sampling data under Rule 16(a)(1)(E)(i). *Id.* at 590.

The Government acknowledges in this case that the materiality standard under Rule 16 is not a heavy one. Gov't Opp. at 12. The Defendants' requests for data underlying the scientific tests conducted in this case seeks information that is not merely material, but essential to preparation of the defense. Only with such information can defense experts assess the reliability and accuracy of the Government's scientific tests and prepare to testify about those tests at trial and about the forensic evidence that will be presented in this case. The attached declarations of two expert witnesses confirm those conclusions. *See* Decl. of William Tobin, attached as *Exhibit C* and Decl. of William Conrad, attached as *Exhibit D*.

The Government brushes aside our reliance on the Supreme Court's recent decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), on the ground that *Melendez-Diaz* was only about hearsay. The Government misses the point entirely. In *Melendez-Diaz*, the Supreme Court directly acknowledged the infirmities of scientific tests and forensic evidence. It did so in the context of analyzing the Confrontation Clause implications of presenting scientific evidence without cross-examination at trial. But the same analysis demonstrates why access to the documentation underlying the scientific tests conducted in this case is critical to the Defendants' preparation of their defense. The Supreme Court's holding in *Melendez-Diaz* – that a report of a drug analysis is testimonial hearsay subject to the requirements of the Confrontation Clause – aimed at ensuring that persons who conduct scientific tests for the Government will be confronted meaningfully about the basis for their conclusions through cross-examination at trial. That reasoning applies with equal force to our position that Rule 16 requires the Government to provide the Defendants with information that underlies an analyst's "bare-boned" conclusion

concerning the result of a scientific test. The opportunity to confront a witness is meaningless unless the defense has the knowledge it needs to prepare for the exercise. When complex scientific analyses are at issue, that preparation realistically cannot occur on the fly.

It is imperative that the Defendants and their experts have the opportunity, well in advance of trial, to study the government analysts' conclusions, and the methodologies and subjective judgments that led to those conclusions, in order to challenge them meaningfully, as the Confrontation Clause demands. It also is clear that such information will be used in the Government's case-in-chief when its experts testify about their test results and the underlying methods and analyses that were used to obtain those results. Under either theory, this information must be disclosed under Rule 16.

D. EXPERT WITNESSES

Fed. R. Crim. P. 16(a)(1)(G) entitles the defense to "a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial." The summary "must describe the witness's opinions, the bases and the reasons for those opinions, and the witness's qualifications." It is well established that Fed. R. Crim. P. 16(a)(1)(G) "is intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination." *Ferguson v. United States*, 866 A.2d 54 (D.C. 2005) (finding a violation of Rule 16(a)(1)(E) by the Government's vague "written summary" of the testimony and basis and opinion of the proposed expert testimony). Rule 16(a)(1)(G) also requires the production of the name, address and *curriculum vitae* of any Government witness who will offer expert testimony, as well as a summary of the witness's opinions, the bases and reasons for those opinions. *See id.*

(“The summary provided under this subparagraph must describe the witness’s opinions, the bases and reasons for those opinions, and the witness’s qualification.”); *see also*, *United States v. Ganier*, 468 F.3d 920, 925 (6th Cir. 2006) (failure to provide a written summary of expert testimony constitutes a violation of Rule 16(a)(1)(G)).

For more than six months, the Defendants have been requesting the Government’s expert disclosures pursuant to Rule 16(a)(1)(G). The Government has failed to identify a single expert witness it intends to present at trial or to make any expert disclosures whatsoever. The Government now claims that it will do so by September 30, 2009. With less than six months remaining before the trial of this case is scheduled to begin, the Government cannot be permitted to sandbag any longer. The Court should order the Government to produce its expert disclosures promptly and fully pursuant to Rule 16(a)(1)(E) or else be precluded from presenting any expert witness testimony under Rules 702, 703, or 705 of the Federal Rules of Evidence.

CONCLUSION

Given the serious nature of the allegations in this case and the complex facts and circumstances on which those allegations are based, the categories of information discussed above should be disclosed to the Defendants immediately. The Government’s earlier assertions to the Court about its ability to be ready for trial by Fall were either disingenuous, or the Government is delaying the disclosure of important evidence to disadvantage the defense. The potential prejudice to the Defendants caused by the Government’s delay on these matters is substantial. We are entering the final five months before trial is scheduled to begin. The discoverable material addressed in this motion, once disclosed, will require investigation and analysis by the defense and its experts. The Defendants therefore respectfully request that this

Court compel the Government to respond promptly and fully to the Defendants' discovery requests set forth above.

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Respectfully submitted,

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