

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)	
)	
v.)	No. 1:22-cr-392 (DLF)
)	
ABU AGILA MOHAMMAD)	
MAS'UD KHEIR AL-MARIMI,)	
Defendant.)	

**MR. AL-MARIMI'S MOTION TO COMPEL THE GOVERNMENT TO
PRODUCE ORIGINALS OF DOCUMENTS IN
GOVERNMENT'S EXHIBITS E AND F**

Mr. Al-Marimi moves the Court to order that the government produce the originals of the documents depicted in Government's Exhibits E and F to ECF No. 369. The government has represented that these exhibits depict what Jamal testified was a carbon copy of his original report containing Mr. Al-Marimi's alleged confession. *Id.* at 1. As Mr. Al-Marimi's response in ECF No. 392 makes clear, what is in Government Exhibits E and F cannot be a carbon copy of Jamal's original report containing Mr. Al-Marimi's alleged confession. *See* ECF No. 392. Common sense and a straightforward reading of Jamal's testimony compel the conclusion that what is in Government's Exhibits E and F is a photocopy later obtained from Al-Siddique Al-Sor's office of the report Jamal said he submitted to Al-Sor's office at the end of 2014 or the beginning of 2015.

However, because the jury's assessment of Jamal's credibility is of critical importance to Mr. Al-Marimi's defense, a forensic examination of the originals of the documents depicted in Government's Exhibits E and F is necessary. The defense has

noticed a responsive expert forensic document examiner in this case who can, upon obtaining access to the originals of the documents depicted in Government's Exhibits E and F, confirm with a high degree of confidence whether the original documents depicted in Government's Exhibits E and F are in fact what they appear to be: photocopies, not carbon copies.

LEGAL STANDARD

Federal Rule of Criminal Procedure 16(a)(1)(E)¹ requires that “[u]pon a defendant’s request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government’s possession, custody, or control” and, as relevant here, “the item is material to preparing the defense” or “the government intends to use the item in its case-in-chief at trial”.

Evidence is material to preparing a defense “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.” *United States v. Marshall*, 132 F.3d 63, 68 (D.C. Cir. 1998) (quoting *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (internal quotation marks

¹ This rule “is intended to prescribe the minimum amount of discovery to which the parties are entitled” and “is not intended to limit the judge’s discretion to order broader discovery in appropriate cases.” *United States v. GossJankowski*, 669 F. Supp. 3d 1, 5 (D.D.C. 2023) (quoting *United States v. Anderson*, 416 F. Supp. 2d 110, 113 n.2 (D.D.C. 2006)).

omitted)). “It matters not whether such evidence is inculpatory or exculpatory.” *United States v. Slough*, 22 F. Supp. 3d 1, 4 (D.D.C. 2014) (citing *Marshall*, 132 F.3d at 67–68); *see also United States v. Safavian*, 233 F.R.D. 12, 15 (D.D.C. 2005) (stating material evidence “is not limited to evidence that is favorable or helpful to the defense and does not immunize inculpatory evidence from disclosure”). In short, materiality “is not a heavy burden[.]” *Lloyd*, 992 F.2d at 351.

This Court has recognized that the government’s Rule 16 disclosure obligations extend to evidence possessed by law enforcement agents and persons acting on their behalf. *Safavian*, 233 F.R.D. at 14 (relying on *United States v. Griggs*, 111 F. Supp. 2d 551, 554 (M.D. Pa. 2000) (observing that Rule 16 applies to any person “allied with the prosecution once a federal investigation or prosecution commences, such as a state officer working on a joint task force or with the U.S. Attorney’s office” who “interrogates” the defendant)).

Independent of Rule 16, due process requires that the government turn over material, favorable information. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”). “*Brady* always trumps both Jencks and Rule 16.” *Safavian*, 233 F.R.D. at 16 (citing *United States v. Tarantino*, 846 F.2d 1384, 1414 n.11 (D.C. Cir. 1988)). Due process requires the prosecution to produce both exculpatory and impeachment evidence. *See,*

e.g., *United States v. Bagley*, 473 U.S. 667, 676-77 (1985).

Under both due process and Rule 16, the government must turn over “any written or recorded statements in its possession or custody or control regardless of the origin of the statements, so long as the government knows or through due diligence could know of their existence”. *Safavian*, 233 F.R.D. at 14-15. This obligation to discover and produce information encompasses a duty to learn of favorable evidence known to others acting on behalf of the prosecution and those closely aligned with the prosecution. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (“[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”); *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992) (finding a duty to obtain and disclose materials from government agencies who have a “close working relationship” with the prosecution in the case).

ARGUMENT

The original documents that are depicted in Government’s Exhibits E and F to ECF No. 369 plainly are material to Mr. Al-Marimi’s defense and, by all appearances, exculpatory in nature. The Court should require the government to produce them for examination by the defense.

In *Brooks*, the D.C. Circuit addressed whether the U.S. Attorney’s Office’s duty under *Brady* to search for possible sources of exculpatory information extended “to files in the possession of agencies other than the prosecutor’s office (conceived here

as simply the U.S. Attorney's office)". 966 F.2d at 1502. In answering that question in the affirmative, the court relied on *United States v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985), in which the Seventh Circuit found that the prosecutor had an obligation to discover, obtain, and disclose an exculpatory worksheet in the hands of a state police officer. The *Fairman* court observed that imposing a *Brady* obligation on the prosecution to search for evidence was especially appropriate "when the withheld evidence is under the control of a state instrumentality closely aligned with the prosecution, such as the police." *Id.*

Here, much like the police officer worksheet at issue in *Fairman* and the state police homicide and Internal Affairs Division files at issue in *Brooks*, the originals of the documents depicted in Government's Exhibits E and F to ECF No. 369 are material to Jamal's credibility and the reliability of the alleged confession, and they are in the hands of a witness that the government has chosen to closely align itself with in this prosecution.

Whether the original documents are in fact a carbon copy or a photocopy, testing to confirm one way or the other is material to the preparation of Mr. Al-Marimi's defense. "[I]t is just as important to the preparation of a defense to know its potential pitfalls as it is to know its strengths." *Marshall*, 132 F.3d at 67. In any event, the exculpatory value of the original documents can be assumed to be apparent to the government given the government's wordsmithing in ECF No. 369, which described these documents as the "Officer's copy" rather than the "carbon copy". ECF

No. 369 n.1. Rule 16 and *Brady* thus require the government to obtain and produce to the defense for forensic evaluation the originals of the documents depicted in Government's Exhibits E and F.

That Jamal is not employed by the U.S. government is irrelevant. Over several years, the government has developed a close working relationship with Jamal. Jamal works as a police officer for a government that the U.S. and Scottish government have routinely sought and obtained assistance from in investigating this case. *See, e.g.*, ECF Nos. 352-2 and 374. Multiple FBI agents have been designated as Jamal's handlers, communicating with him frequently via email and phone. Indeed, FBI agents have taken him to dinner when they are in the same town to keep Jamal entertained, and the government has provided other significant benefits to Jamal in exchange for his cooperation in this case. The extent of cooperation between Jamal and the government and the demonstrated ability of the government to successfully request specific information and assistance from Jamal places this case solidly within the purview of *Brooks* and *Fairman*.

CONCLUSION

To date, the government has not yet produced the originals of the documents depicted in Government's Exhibits E and F, despite a defense request. Thus, Mr. Al-Marimi asks the Court—pursuant to Rule 16 and his right to due process—to order the government to obtain and produce the originals of the documents depicted in Government's Exhibits E and F for defense forensic examination.

Respectfully submitted,

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By: _____ /s/ _____

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