UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL THE GOVERNMENT TO PRODUCE ORIGINALS OF DOCUMENTS IN GOVERNMENT'S EXHIBITS E AND F

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this opposition to the defendant's motion to compel the government to produce originals of documents in Government's Exhibits E and F. Because the documents are not within the government's possession, the Court should deny the defendant's motion. Should the government obtain these original documents, which it will endeavor to do, it will promptly allow the defense to inspect and copy them. *See* Fed. R. Crim. P. 16(a)(1)(E).

FACTS

Following the Suppression Hearing, the government had telephonic contact with the Libyan Police Officer, who agreed at the government's request to send photographs, and later a video, of the document he has referred to as the "carbon copy."[1] The Officer did so; those photographs and the video have been provided to the defense and the Court, and the defense has made arguments to the Court regarding them. *See generally* ECF 392.

[1] As explained in greater detail in the government's contemporaneously filed response to the ECF 392, which explanation is incorporated herein, [redacted]

On the date defense counsel informed the Court via email about its intent to file a motion to compel, counsel also asked the government whether it planned to obtain the originals of the documents in Government's Exhibits D and E. The government responded that it would attempt to secure the originals. Nothing has changed on that front – the government is continuing to pursue obtaining the originals. When it does, they will be in the government's possession and subject to disclosure. Until then, the defendant's motion is moot, or at the very least is not ripe; the government is already attempting to retrieve these documents, and the Court has no power to compel disclosure of a document in the possession of a foreign national.

ARGUMENT

Federal Rule of Criminal Procedure 16 requires the government to produce, among other things, items that are material to the preparation of the defense if those items are "within the government's *possession, custody, or control*." Rule 16(A)(1)(E) (emphasis added). "[T]he government cannot be required to disclose evidence that it neither possesses nor controls." *United States v. Marshall*, 132 F.3d 63, 68 (D.C. Cir. 1998). The defendant here seeks to compel documents currently in the possession of a foreign-national witness. There is no basis in law for doing so. "[I]t is settled that the government generally need not produce documents that are in the possession, custody, or control of a separate branch of [the U.S.] government such as Congress, or a state or local government agency." *United States v. Libby*, 429 F. Supp. 2d 1, 7 (D.D.C. 2006) (internal citation omitted) (citing *Marshall*, 132 F.3d at 68 and *United States v. Safavian,* 233 F.R.D. 12, 14 (D.D.C. 2005). If the government cannot be compelled to produce documents in the possession of a separate branch of the federal government, or of a state or local government, it follows with even greater force that it cannot be compelled to produce documents in the possession of a foreign national outside of the United States, and beyond the subpoena power of the Court.

The defendant attempts to dodge the straightforward conclusion of the case law that the documents are not presently in the possession of the United States by arguing that any "close working relationship" between the government and the Officer renders documents in his possession subject to disclosure.[2] *See* ECF 396 at 6. When it comes to retrieval of physical documents, the defense's argument fails on its own terms: it discusses how FBI agents can contact him "by email and phone." *Id.* Neither of those options are viable means of obtaining original documents, even in the 21st century.[3] [redacted], have rendered it impossible for the government to meet with him in person to retrieve the documents.

Separately, however, the defendant's argument fails as a matter of law. The government is not in a joint investigation or joint venture with Libya, for the reasons stated in its Opposition to the defendant's Motion to Dismiss for Due Process Violations. *See* ECF 368 (partially redacted version filed at ECF 367) at 17-24, which the government incorporates herein. Even if it were, the government has no duty to obtain and disclose documents held by partners in a joint international investigation. *See United States v. Mitrovic*, 95 F. 4th 1064, 1070 (7th Cir. 2024); *United States v. Lee*, 723 F.3d 134, 141 (2d Cir. 2013) ("Indeed, we have made it abundantly clear that, even in the course of a joint investigation undertaken by United States and foreign law enforcement officials, the most the Jencks Act requires of United States officials is a good-faith

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[2] The defendant cites to *United States v. Brooks*, 966 F.2d 1500 (D.C. Cir. 1992). There, the D.C. Circuit found a duty for the U.S. Attorney's Office for the District of Columbia to search the files of the D.C. Metropolitan Police Department specifically because of the close working relationship between the two agencies, given that the D.C. U.S. Attorney's Office prosecutes both federal and local crime, in both federal and D.C. Superior Court. *Id.* at 1504. That level of working relationship is not at issue here.

[3] The government continues to disagree with the defense that it has provided any benefits "in exchange for" testimony. *See* ECF 393 at 6.

effort to obtain the statements of prosecution witnesses in the possession of the foreign government") (cleaned up). As the Seventh Circuit noted in *Mitrovic*:

> A contrary ruling would impose an unrealistic burden. Requiring U.S. prosecutors to produce all material and responsive documents held by foreign partners would expand their duty to produce beyond their capacity to obtain. To comply with Rule 16, prosecutors would be compelled to produce documents that they do not possess, cannot acquire, have not confirmed exist, and—because Rule 16 is triggered by merely a preliminary showing of materiality—may not even matter to the defendant's case. Rule 16 imposes no such duty.

95 F. 4th at 1070 (internal citations omitted).

As the defendant is aware, the government is attempting to obtain the materials he has requested. His request that the Court order the government to obtain them is thus moot, or at the very least not yet ripe. The government has every incentive to make efforts to obtain the documents for its own purposes. If the government is unable to do so, the defense would be free to petition the Court for any relief to which it believes it is entitled under the law, and the government will respond at that time. Until such time, however, the Court has no power to compel the government to produce that which it does not possess. Accordingly, the defendant's motion must be denied.

CONCLUSION

For the above reasons, the defendant's motion to compel should be denied.

Respectfully submitted,

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