

**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 REPLY IN SUPPORT OF HIS
MOTION TO COMPEL THE GOVERNMENT TO PRODUCE ORIGINALS OF
DOCUMENTS IN GOVERNMENT'S EXHIBITS E AND F**

After working with Jamal for years to develop the case against Mr. Al-Marimi, meeting with him in person on multiple occasions in secure locations to develop his testimony, bringing him to the United States to testify against Mr. Al-Marimi, and quickly procuring follow-up evidence to support its legal positions, the government now contends that it cannot be compelled to produce documents in Jamal's physical possession despite agreeing such evidence would otherwise be subject to disclosure. Not so. Courts have recognized that the government's obligations under Criminal Rule 16 and the Due Process Clause extend beyond persons directly employed by the U.S. government when, as here, there is a close working relationship with the government.

As an initial matter, the government does not dispute that the original documents are both material to the preparation of a defense for purposes of Rule 16 and material, favorable information for purposes of the Due Process Clause. *See* ECF No. 402, at 2 (stating the originals would be "subject to disclosure"). Mr. Al-Marimi acknowledges the government's continued efforts to obtain the originals, which are

consistent with that position. However, the government is incorrect that the Court has no role to play.

Under the Due Process Clause, the government “has a duty to learn of any favorable evidence known to the others *acting on the government’s behalf* in the case. . . .” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (emphasis added). Likewise, the government’s obligations under Rule 16 do not stop at documents in its possession. *United States v. Jordan*, 316 F.3d 1215, 1249 (11th Cir. 2003) (“[C]ourts have found that the ‘possession, custody, or control of the government’ requirement includes materials in the hands of a governmental investigatory agency closely connected to the prosecutor.”). Instead, the government must disclose certain materials in its possession, or custody, or control. Fed. R. Crim. P. 16(a)(1)(E). These obligations are critical to ensuring a fair trial. “Criminal discovery is not a game. It is integral to the quest for truth and the fair adjudication of guilt or innocence.” *Taylor v. Illinois*, 484 U.S. 400, 419 (1988) (Brennan, J., dissenting).

Like the D.C. Circuit in *United States v. Brooks*, 966 F.2d 1500, 1502 (D.C. Cir. 1992), other circuits have ruled that a federal prosecutor’s disclosure obligations may extend to evidence possessed by another state’s agents. *See, e.g., United States v. Risha*, 445 F.3d 298, 303–306 (3rd Cir. 2006) (recognizing “cross-jurisdictional constructive knowledge” in the presence of a “close working relationship” between state agents and federal prosecution and remanding for factual determination on constructive possession); *United States v. Moussaoui*, 382 F.3d 453, 462 n.14 (4th Cir. 2004) (noting a “due process problem” could arise depending on what information was

and was not passed on to the government by classified entities responsible for witnesses); *United States v. Perdomo*, 929 F.2d 967, 971 (3d Cir. 1991) (holding information in “local Virgin Islands records” was “readily available” to the government; explaining availability “is not measured in terms of whether the information is easy or difficult to obtain but by whether the information is in the possession of some arm of the state”); *United States v. Mitchell*, 613 F.2d 779, 781 (10th Cir. 1980) (finding Rule 16 violation and stating the “fact that [a] statement was made to a state probation officer does not make [Rule 16] inapplicable”); *United States v. Antone*, 603 F.2d 566, 569–570 (5th Cir. 1979) (“Imposing a rigid distinction between federal and state agencies which have cooperated intimately from the outset of an investigation would artificially contort the determination of what is mandated by due process. Rather than endorse a [p]er se rule, we prefer a case-by-case analysis of the extent of the interaction and cooperation between the two governments.”).

Much of the government’s argument dances around the nature of its relationship with Jamal in favor of irrelevant categorical assertions. For example, it cites *United States v. Libby*, 429 F. Supp. 2d 1, 7 (D.D.C. 2006), for the proposition that the government “generally need not produce” materials in the possession, custody, or control “of a separate branch of government such as Congress . . . or a state or local government agency[.]” Likewise, the government maintains that it “has no duty to obtain and disclose documents held by partners in a joint international investigation.” ECF No. 401, at 3. But those broad claims do not comport with the fact-intensive and granular nature of these inquiries, which considers entity-level

relationships as only one potential indicator of the government’s access to materials. *See United States v. Trump*, 753 F. Supp. 3d 17, 44–51 (D.D.C. 2024) (applying *Brooks* and refusing to view other government entities “as a monolith”; instead deeming “certain personnel therein closely aligned with the prosecution” and “some of their files as within the prosecution’s constructive control”).

Jamal is not a branch of government or a foreign agency. What Jamal *is* is a critical law enforcement witness working on the government’s behalf in this case, and an officer with whom the government has a close working relationship. *Libby*, which the government quotes selectively,¹ is entirely consistent with this granular lens: “Courts have in the main been more concerned with fairness to the defendant, on the one hand, and the government’s ease of access to the documents sought, on the other, than with the issue whether the documents are actually within the physical possession of the prosecutor.” *Libby*, 429 F. Supp. 2d at 5–6 (quoting *United States v. Poindexter*, 727 F. Supp. 1470, 1477 (D.D.C. 1989)). The court in *Libby* synthesized the D.C. Circuit’s reasoning in *Brooks* with both the Ninth Circuit’s approach—emphasizing the prosecutor’s awareness of and access to materials, *see United States v. Santiago*, 46 F.3d 885, 894 (9th Cir.1995)—and caselaw from other circuits that found no discovery violations when materials “were possessed by agencies which *had no part in the criminal investigation* or when the prosecution *had no control* over the

¹ *Libby*’s statement that the government “generally” need not produce documents physically possessed by other branches of government or other jurisdictions was notably followed by a footnote reaffirming the court’s view “that documents will be presumed to be in the government’s possession, custody and control if the government has both knowledge of and access to the documents[,]” and a “but see” cite to *Brooks*, 966 F.2d at 1503. *Libby*, 429 F. Supp. 2d at 7 & n.11.

agency officials who physically possessed the documents.” *Libby*, 429 F. Supp. 2d at 6 (emphasis added).

In partly granting the defendant’s motion to compel discovery, the court in *Libby* emphasized the extent of cooperation between the agencies and the prosecution, the agencies’ responsiveness to requests from the prosecution and the absence of any known incident in which they refused a request, and the importance of the agency documents to the prosecution’s case. *Id.* at 11 (“These entities have therefore contributed significantly to the investigation, and without their contribution it is unlikely that the indictment in this case would ever have been secured.”). The record showed a “close working relationship” between the agencies and the prosecution under *Brooks*, and the court refused to sanction a state of play where the prosecution could build its case by securing the documents it needed from the agencies but had no obligation to obtain documents the defense needed. *Id.*

Here, Jamal has a major part in the government’s investigation and prosecution of this case. Moreover, the government has demonstrated on several occasions its ability to control and influence Jamal to assist it, including through travel to the United States and elsewhere. The government contends Jamal is merely “a foreign-national witness”, ECF No. 402, at 2, but it does not meaningfully push back against the facts that show the extent of its cooperation with Jamal. To the contrary, the government highlights in its parallel briefing on the photocopy exhibits that “the Officer took the time to send the photographs and video he did to the government on a quick turnaround[.]” ECF No. 403, at 2. The government’s ability to

secure material from Jamal that is favorable to the prosecution of Mr. Al-Marimi strongly supports its ability to secure other material, including the original documents that were photographed and recorded. That access, along with Jamal's history of complying with requests and the importance of the materials sought, should weigh heavily in favor of Mr. Al-Marimi's request for compelled discovery.

United States v. Mitrovich, 95 F.4th 1064 (7th Cir. 2024), does not compel a different conclusion. There, the Seventh Circuit held the government could not be compelled to produce requested materials that were in the physical possession of foreign law enforcement organizations when the record was clear that the government did not have "the capacity to access or acquire that information through reasonable means[.]" *Id.* at 1070–71. Critically, information about the nature of the relationship between the government and the foreign authorities showed that the government's requests repeatedly went unanswered. *Id.* at 1070 (discussing years of unsuccessful requests). *Mitrovich* does not stand for a general proposition that the government never has a duty to disclose materials physically held by foreign partners. *See id.* at 1071 (concluding "[t]his case presents no such occasion" to address "whether the principle of constructive possession under *Brady* extends to co-participants in a joint international investigation"). *Mitrovich* is simply inapt where, as here, there is evidence supporting the government's ability to access and secure materials in Jamal's possession.

The government offers that if the government is unable to obtain a copy of the requested documents from Jamal, "the defense would be free to petition the Court for

any relief to which it believes it is entitled under the law”. ECF No. 401-2 at 4. Should the government not ultimately produce the requested documents, the only relief that can remedy the government’s failure to produce those documents is the complete exclusion of Jamal’s testimony and Mr. Al-Marimi’s alleged confession from the government’s case-in-chief.

Other potential relief would deny Mr. Al-Marimi his constitutional rights to present a defense, cross-examine the government’s witnesses against him, and due process. Simply excluding Jamal’s testimony about the alleged carbon copy would deny Mr. Al-Marimi the ability to present to the jury potent evidence denigrating Jamal’s credibility and his continued efforts to support his false testimony by providing false documents. Likewise, the government’s ongoing efforts to rehabilitate Jamal’s false testimony render meaningless any potential stipulation about Jamal’s false testimony and his continued efforts to support that false testimony. Access to the documents themselves is the only thing short of excluding Jamal’s testimony in its entirety that will satisfy Rule 16 and Due Process.

Accordingly, the Court should grant Mr. Al-Marimi’s motion and order the government to produce the originals of the documents depicted in Government’s Exhibits E and F.

Respectfully submitted,

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