

Pretrial Discovery of Electronically Stored Information in Federal Criminal Cases

By Elizabeth A. Stafford

Today, electronically stored information (ESI) is ubiquitous; corporate executives and drug dealers alike use it to conduct their businesses, and criminal investigative techniques have evolved in order to keep up. Despite this technological transformation, criminal discovery rules have remained constant. This article describes how courts have addressed ESI discovery disputes in the absence of rules tailored for electronic discovery, and summarizes recommendations for best practices.

Manner of ESI Production

In contrast to Federal Rules of Civil Procedure provisions regarding pretrial discovery,¹ the Federal Rules of Criminal Procedure have not been amended to reflect the explosion of ESI in criminal cases. While Federal Rule of Civil Procedure 34 provides the manner of producing documents and ESI, Federal Rule of Criminal Procedure 16 “is entirely silent on the issue of the form that discovery must take; it contains no indication that documents must be organized or indexed.”² However, Rule 16(d)(1) of the criminal rules gives courts the discretion to grant “appropriate relief,” which has been interpreted as authorizing a court to regulate the manner of production.³ As a consequence, each court faced with an ESI production motion must devise its own scheme for resolving the dispute and determine which parties should bear the financial, manpower, and technological burdens associated with ESI discovery.⁴

While acknowledging that the Federal Rules of Civil Procedure are rarely applied in criminal cases, the magistrate judge in *United States v Briggs*⁵ looked to Rule 34 of the civil rules for guidance when resolving ESI production disputes.⁶ Noting that Rule 34(b)(2)(E)(ii) requires ESI to be pro-

duced in “reasonably usable form,” the court ordered the government to bear the cost of producing it in a searchable PDF format or in the native format at the government’s choice.⁷ In response to a subsequent motion requesting the government be ordered to produce discovery in specific formats sought by the defense, the court noted that the civil rules do not require the producing party to organize or alter its records to meet the demands of the requesting party.⁸ As such, the court adhered to its decision to leave the method of production up to the government.⁹

Even though the *Briggs* court looked to Civil Rule 34 for guidance, a district court is not required to do so in criminal cases. During the appeal in *United States v Warshak*,¹⁰ the defendants complained that the district court erred by permitting “the government to produce titanic amounts of electronic discovery in formats that were simultaneously disorganized and unsearchable.”¹¹ In addition to arguing that due process required that Civil Rule 34 be applied in a criminal context, the defendants faulted the government for failing to provide indices for the discovery materials.¹² However, the *Warshak* court doubted that the defendants had much difficulty navigating the electronic discovery.¹³ More significantly, the Sixth Circuit Court rejected the defendants’ argu-

ment that Rule 34 was applicable in criminal cases.¹⁴ The court declined to find an abuse of discretion because there is a “pronounced dearth of precedent suggesting that the district court was wrong.”¹⁵

Brady Obligations

In addition to Criminal Rule 16, *Brady v Maryland*¹⁶ and its progeny impose discovery obligations on the government; the prosecution has a due process duty to disclose material evidence favorable to the accused in sufficient time for use at trial.¹⁷ However, *Brady* disclosures need not be explicit. Use of an open-file policy is sufficient to comply with *Brady* obligations, so long as the file contains all the evidence the government is obligated to disclose.¹⁸

In *United States v Skilling*,¹⁹ the defendant challenged the government’s open-file disclosure of several hundred million pages of discovery in an electronic file. “As the government never directed Skilling to a single *Brady* document contained in the open file, Skilling argues that the government suppressed evidence in violation of *Brady*.”²⁰ The court disagreed, noting that the electronic file was searchable and the government had produced indexed “hot documents” that included evidence potentially relevant to the defense, and had made other

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potentially helpful databases available to the defense.²¹ The government was in no better position than the defense to scour the file in search of exculpatory evidence.²² However, the *Skilling* court warned that voluminous discovery would violate *Brady* if the government engaged in bad faith and “padded” the file with superfluous information, creating a file unduly onerous to access, or hiding exculpatory evidence.²³

In *Warsbak*, the Sixth Circuit followed *Skilling*, holding that the defendants’ contention that the government was “obliged to sift fastidiously through the evidence... in an attempt to locate anything favorable to the defense... [came] up empty.”²⁴ The court found that access to the evidence was not “unduly onerous” and there was no indication that the government engaged in the type of bad faith described by *Skilling*.²⁵

Several courts have followed *Skilling* and *Warsbak* to hold that prosecutors need not direct the defense to exculpatory evidence within a mass of discovery.²⁶ Contrary to this general trend, the magistrate judge in *United States v Salyer*²⁷ ordered the government to identify *Brady* evidence within the voluminous discovery that had already been disclosed to the defendant. In direct contradiction to *Skilling* and *Warsbak*, the *Salyer* court ruled that the government was required to scour the electronic discovery in search of exculpatory evidence, and rejected the relevancy of whether the government acted in good or bad faith.²⁸ While the holding of *Salyer* does not have precedential value in the Sixth Circuit, the case presents an illustration of why prosecutors should be prepared in large ESI cases to demonstrate their good faith in the early stages of the litigation.

In his August 2, 2010 order, Magistrate Judge Gregory Hollows cited “fairness” as a basis for his authority to require the government to identify *Brady* material within the discovery.²⁹ The court faulted the government for acquiring such massive amounts of evidence, saying “the government more or less made its own bed...”³⁰ Judge Hollows indicated he had questioned the government at a hearing about why it had sought so much information and “the response, pared to its essence, was ‘because we can.’”³¹

Judge Hollows’ assessment changed dramatically in April 2011 when he rejected the

defendant's motion to order the government to create a common database for all electronic discovery. In this later order, he explained that the 1–2 terabytes of discovery (equivalent to 1,000 to 2,000 copies of the *Encyclopedia Britannica*) was the result of the size of the companies involved in the alleged crimes and a decade-long investigation.³² Armed with more concrete information, Judge Hollows concluded that the government was not at fault for the magnitude of the discovery.³³ Further, he had learned that the electronic files were searchable and the government had “gone the extra mile” of segregating the specific evidence upon which it would rely at trial.³⁴ Most importantly, he found that the defendant would be able to sufficiently access the evidence he needed for his defense.³⁵

The *Salyer* prosecutors' earlier lack of preparation to detail the ESI issues and solutions and the court's initial fear that the amount of discovery was overwhelmingly unfair to the defendant were likely exacerbated by a lack of standards for addressing ESI in criminal cases. However, a collection of recommended best practices published in February 2012 may help fill that void.

Recommendations for ESI in Federal Criminal Cases

The Joint Electronic Technology Working Group was established by the director of the Administrative Office of the U.S. Courts and the U.S. attorney general and is made up of representatives of various criminal justice system stakeholders.³⁶ Its “Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases” are intended to promote efficient and cost-effective pretrial production of voluminous ESI discovery, reduce conflicts, and encourage communication between parties to resolve disputes without court intervention.³⁷ They are not intended to create legal rights or claims for relief.³⁸

The working group recommends that, in complex ESI production cases, each party involve individuals with sufficient technical knowledge.³⁹ Coordinating discovery attorneys have this technical expertise and may be appointed to assist Criminal Justice Act

and Federal Defender Office attorneys.⁴⁰ The parties should “meet and confer” about the nature, volume, and mechanics of producing the ESI discovery.⁴¹ The discussions should address the organization of the ESI (e.g., the use of tables of contents), the format of the production, methods for segregating privileged information, and any limitations imposed on incarcerated defendants by correctional institutions.⁴² In furtherance of its objective of encouraging efficient discovery processes, the working group recommends that “a party should not be required to take on substantial additional processing or format conversion costs and burdens beyond what the party has already done or would do for its own case preparation or discovery production.”⁴³

In *Briggs*, the court urged the parties to work in good faith to resolve their ESI issues and not force the court to micro-manage the discovery in the case.⁴⁴ This is sound advice for all parties in criminal actions, and adherence to the working group's recommendations should help facilitate more cooperative resolution of ESI production issues. ■



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FOOTNOTES

1. FR Civ P. 26 and FR Civ P. 34.
2. *United States v Warshak*, 631 F3d 266, 296 (CA 6, 2010).
3. *United States v Briggs*, unpublished opinion of the US District Court for the Western District of New York, issued September 8, 2012 (Docket No. 10-CR-184S).
4. *Id.* at 7.
5. *Id.*
6. *Id.* at 5–7.
7. *Id.* at 8–9.
8. *United States v Briggs*, 831 F Supp 623, 628–629 (WD NY, 2011).

9. *Id.* at 629–630.
10. *Warshak*, n 2 *supra*.
11. *Id.* at 295.
12. *Id.*
13. *Id.* at 296.
14. *Id.* at 296, n 26.
15. *Id.*
16. *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).
17. *Id.* at 87; *Strickler v Greene*, 527 US 263, 280–282; 115 S Ct 1936; 144 L Ed 2d 286 (1999).
18. *Strickler*, n 17 *supra* at 283, n 23.
19. *United States v Skilling*, 554 F3d 529 (CA 5, 2009) *aff'd* in part, vacated on other grounds.
20. *Id.* at 576.
21. *Id.* at 577.
22. *Id.*
23. *Id.*
24. *Warshak*, n 2 *supra* at 297.
25. *Id.* at 297–298.
26. See, e.g., *United States v Gray*, 648 F3d 562, 567 (CA 7, 2011); *United States v Rubin/Chambers, Dunhill Ins Services*, 825 F Supp 2d 451, 454 (SD NY, 2011).
27. *United States v Salyer*, unpublished opinion of the US District Court for the Eastern District of California, issued August 2, 2010 (Docket No. S-10-0061).
28. *Id.* at 3–4, and 7.
29. *Id.* at 2.
30. *Id.* at 4.
31. *Id.* at 3.
32. *United States v Salyer*, unpublished opinion of the US District Court for the Eastern District of California, issued April 18, 2011 (Docket No. S-10-0061), 1, n 2.
33. *Id.* at 4.
34. *Id.*
35. *Id.* at 8–11.
36. Joint Working Group on Electronic Technology in the Criminal Justice System, *Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases*, February 2012, Introduction, p 1, available at <<http://www.fd.org/docs/litigation-support/final-esi-protocol.pdf>> (accessed February 23, 2013).
37. *Id.*, Recommendations, pp 1–2.
38. *Id.*, Recommendations, p 2.
39. *Id.*, Recommendations, p 2.
40. *Id.*, Strategies, p 11. To inquire about CDAs or other technical support, defense counsel may contact Sean Broderick, national litigation support administrator, or Kelly Scribner, assistant national litigation support administrator, at (510) 637-3500 or sean_broderick@fd.org or kelly_scribner@fd.org.
41. *Id.*, Recommendations, p 2.
42. *Id.*, Strategies, pp 1–2, and 7.
43. *Id.*, Recommendations, p 3.
44. *Briggs*, n 8 *supra* at 630.