Responding to Defense Demands for Government Assistance in Large ESI Criminal Cases

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Voluminous discovery productions affect every stage of the Department of Justice's criminal cases. Investigations have become more data-driven, and prosecuting even seemingly simple cases often hinges on reliable data management as much as reliable witness testimony. Prosecutors' obligations dealing with electronically stored information ("ESI") have also changed, and Department lawyers handle ESI assiduously so that they can understand the full scope of what they have collected, discern the significance of the evidence, and meet stringent discovery obligations.[1]

Part of successfully navigating the criminal ESI landscape includes responding to increasingly common defense demands that prosecutors help them somehow manage and organize ESI turned over in discovery. Sometimes these entreaties are understandable requests from defense lawyers who are restricted by financial limitations or truly overwhelmed with the technical aspects of dealing with large amounts of data. However, defense attorneys may use less principled demands for additional government resources to delay cases, gain access to prosecutors' trial strategies, or assert a meritless *Brady* violation.[2]

These kinds of requests can put prosecutors between a Scylla of unwillingly helping defendants prepare their defense cases for them and a Charybdis of keeping cases on track towards a trial date. The immediate retort to such a request of "do your own job" may be well-supported in case law,[3] but in a case

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[1] The Department's discovery guidelines are broad in scope and crucial to the function of justice. These responsibilities are laid out in numerous resources that include: FED. R. CRIM. P. 16; the Jencks Act, (18 U.S.C.A. §3500 (West)); the U.S. Attorney's Manual at §9-5.001; the Department's 2010 Guidance for Prosecutors Regarding Criminal Discovery (the "Ogden Memo"); the Department's 2011 Guidance on the Use, Preservation, and Disclosure of Electronic Communications in Federal Criminal Cases; the 2012 Joint Electronic Technology Working Group ("JETWG") Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases; the Department's March 2014 Guidance on the Personal Use of Social Media by Department Employees; the Department's May 2014 Amendment of Section 9-5.100 of the U.S. Attorneys' Manual (the "Giglio Policy); the 2016 JETWG Guidance on ESI Discovery to Detainees; and, the 2017 Supplemental Guidance for Prosecutors Regarding Criminal Discovery Involving Forensic Evidence and Experts.

[2] Brady v. Maryland, 373 U.S. 83 (1963).

[3] *See, e.g.*, Polzin v. Mutter, 503 F. App'x 474, 476 (7th Cir. 2013) ("The Due Process Clause, whether generally or as interpreted in *Brady*, does not impose a constitutional duty on the state to search for, or assist a defendant in developing, mitigating evidence."); Werth v. United States, 493 F. App'x 361, 366 (4th Cir. 2012) ("The defendants seem to contend that under *Brady* and its progeny, the government was somehow obligated to conduct its own investigation of the incidents and turn over the results of that investigation to the defense. This argument is without merit."); United States v. Gray, 648 F.3d 562, 567 (7th Cir. 2011) (The government "had no duty to . . . conduct the defense's investigation for it."); Odem v. Hopkins, 192 F.3d 772, 777 (8th Cir. 1999) ("*Brady* imposes no obligation on the State to reveal the exculpatory nature of the evidence being turned over but only requires complete disclosure to the defense . . . To rule otherwise would impose a duty on the prosecution to do the defense's work, and broaden

involving large amounts of data, it may not appease judges who want to move cases to trial, are sympathetic to the plight of a seemingly-overwhelmed defense attorney, or look to keep a record that will survive post-trial review.

So what are a prosecutor's options when a defendant either asks for help with complex data discovery from the prosecution, or goes to the court and demands it?

I. Challenges Prosecutors Face: The Kinds of Requests Defendants May Make

In broadest terms, recent court battles in this area have centered around two general types of demands on prosecutors. The first are demands relating to locating specific, ostensibly exculpatory evidence within a larger set of data. The second are often more nettlesome demands to do something more with produced electronic discovery—reprocessing, reworking, or reorganizing data in some way to make access easier for the defense's pretrial convenience.

A. The First Step: Producing Electronic Discovery in a Searchable, Usable Form

Simple organizational measures can help deflect either of these kinds of requests as trial approaches. Defeating defendants' excessive e-discovery demands often rests on how usable and accessible prosecutors make their discovery productions when they turn them over. The most important measure prosecutors can take to forestall an unreasonable court order is to put thought and effort into making discovery productions organized and searchable.[4]

The JETWG's 2012 protocol contains several key principles implicated in ESI discovery that, when followed, put prosecutors in a much better position to defend against defense requests to do more with discovery data. Principle Three of the protocol commands that at "the outset of a case, the parties should meet and confer about the nature, volume, and mechanics of producing ESI discovery . . . an on-going dialogue may be helpful."[5] Principle Four commands that "parties should discuss what formats of production are possible and appropriate, and what formats can be generated. Any format selected for producing discovery should maintain the ESI's integrity, allow for reasonable usability, reasonably limit costs, and, if possible, conform to industry standards for the format."[6] Principle Five commands that "[w]hen producing ESI discovery, 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."[7] Finally, Principle Nine commands that the "parties should make good faith efforts to discuss and resolve disputes over ESI discovery, involving those with the requisite technical knowledge when necessary, and they should consult with a supervisor, or obtain

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Brady beyond its dictate of disclosure to include a requirement as to the manner of the disclosure."); United States v. Mmahat, 106 F.3d 89, 94 (5th Cir. 1997) ("[T]here is no authority for the proposition that the government's *Brady* obligations require it to point the defense to specific documents within a larger mass of material that it has already turned over."); United States v. Hill, 2016 WL 8674241, at 10 (E.D. Mo. Aug. 5, 2016) ("The government does not have a duty to do [a defendant's] work for her.").

[4] When prosecutors fail to make reasonable efforts to assist defense counsel, judges sometimes impose onerous requirements on prosecutors to level the playing field. *See, e.g.,* United States v. Sherifi, 2012 WL 3260251 (E.D.N.C. Aug. 8, 2012) (judicial order requiring prosecutors to transcribe numerous audio recordings even though the government did not intend to use those recordings as evidence.).

[5] *See* Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases (Feb. 2012) at 2.

[6] *Id.* at 2-3.

[7] *Id.* at 3.

supervisory authorization, before seeking judicial resolution" of any disputes.[8] Prosecutors that follow the Protocol's guidance anticipate and avoid many of the potential roadblocks defendants may try to construct as cases move towards trial.

Aside from Departmental guidance, the case law is also overwhelmingly clear on this issue: the government's obligation is to produce discovery information transparently, in a manner that the defense can use and access. However, aside from that wide-ranging requirement, our *Brady* obligations, in and of themselves, do not place additional burdens on the specific manner that ESI is provided to defendants.[9] In *United States v. Warshak,* the Sixth Circuit pointed out that Rule 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."[10] That leaves the organization to the prosecution; the government is in the best position to determine the specific form discovery takes as long as it is usable and accessible.[11] In other words, when defendants demand more from the government, the overarching consideration judges should consider is whether the discovery information is accessible to the defense, not whether it is in a form the defense prefers.

So what constitutes producing ESI in usable, accessible form? Rulings since *Warshak* at both the District and Circuit Court level have provided helpful guidance for prosecutors to organize e-discovery productions and deflect unprincipled defense requests. Specific case rulings guide prosecutors to:

- identify the sources of seized items;[12]
- provide materials in a "load-ready" file format that can be easily searched; [13]
- provide searchable copies of documents,[14] or provide discovery in an electronically searchable database;[15]
- thoroughly index audio and make it as searchable as possible;[16]
- meet with defense counsel and recommend where they focus their review efforts;[17]
- provide indices to the defendants, and direct defendants to where they can find the most relevant information;[18]
- present evidence pretrial in an attempt to persuade defendants to cooperate; [19]
- identify "hot docs" the government is likely to use as trial exhibits; [20]
- provide any trial exhibits used in any case against codefendants;[21]

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[8] *Id.*

[9] *See* United States v. Dunning, 2009 WL 3815739, at 1 (D. Ariz. Nov. 12, 2009) ("*Brady* does not mean that the Government must take the evidence that it has already disclosed to Defendant, sift through this evidence, and organize it for Defendant's convenience.").

[10] United States v. Warshak, 631 F.3d 266, 296 (6th Cir. 2010).

[11] United States v. Briggs, 2011 WL 4017886, at 8 (W.D.N.Y. Sept. 8, 2011).

[12] United States v. Vujanic, 2014 WL 3868448, at 2 (N.D. Tex. Aug. 6, 2014).

[13] United States v. Weaver, 992 F. Supp. 2d 152, 156 (E.D.N.Y. 2014).

[14] United States v. Skilling, 554 F.3d 529, 577 (5th Cir. 2009).

[15] United States v. Ohle, 2011 WL 651849, at 4 (S.D.N.Y. Feb. 7, 2011).

[16] United States v. Rubin Chambers, 825 F.Supp. 451, 457 (S.D.N.Y. 2011). *See also* Sherifi, 2012 WL 3260251 at 3.

[17] United States v. Simpson, 2011 WL 978235 at 8 (N.D. Tex. Mar. 21, 2011).

[18] United States v. Parnell, 32 F. Supp. 3d 1300, 1309 (M.D. Ga. 2014).

[19] Ohle, 2011 WL651849 at 2.

[20] United States v. Godfrey, 2013 WL 1414887, at 2 (D. Mass. Apr. 5, 2013).

[21] Vujanic, 2014 WL 3868448, at 2.

- through the court, ensure that the defendant is provided with appropriate software to comb through the evidence and employ the services of a computer technician;[22]
- encourage the appointment of a coordinating discovery attorney;[23]
- offer to clarify points of confusion for defense counsel;[24]
- note the size of the defense team, which may be relevant to defeat a later claim of inadequate resources;[25] and,
- generally work to facilitate the defense's review of the files both before and during the trial.[26]

The rulings from these cases all speak to the same general theme: if prosecutors take time to appropriately organize productions and put defendants in a place where they are "just as likely to uncover the purportedly exculpatory evidence as was the Government," then further requests for particular formats or functionality likely will not be successful.[27]

B. Responding to Demands to Locate Specific Evidence Within a Large ESI Discovery Production

Once material is made accessible, how far do prosecutors need to go to identify *Brady* in otherwise usable, accessible ESI productions? If ESI discovery is in a usable form, the case law informs us that prosecutors are not also charged with affirmatively searching massive amounts of data to single out every last piece of potentially exculpatory evidence. Courts have consistently ruled that defendants are in a better position than prosecutors to find and determine what is and is not *Brady*.

In *United States v. Skilling*, the defendant claimed that the prosecutors were required to identify potential *Brady* information in voluminous discovery.[28] The Fifth Circuit determined that the prosecutors were not required to do so because the government "did much more than drop several hundred million pages on Skilling's doorstep."[29] Government attorneys indexed the electronic files, made them searchable, and highlighted particularly relevant documents.[30] The *Skilling* court noted the potential dangers of prosecutors conducting a *Brady* search when it wrote that the government "was in no better position to locate any potentially exculpatory evidence than was Skilling."[31] The problem is that *Brady* is in the eye of the beholder: a prosecutor may view what a defense attorney thinks is exculpatory data as valuable, incriminating evidence.[32] *Skilling* and its progeny, which are specifically co-opted in the Ogden memo, provide guidance to avoid this potential problem altogether.[33]

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[22] United States v. Parnell, 2015 WL 5559818, at 2 (M.D. Ga. Sept. 18, 2015).
[23] Vujanic, 2014 WL 3868448, at 2.
[24] United States v. Henderson, 2016 WL 7377118, at 2 (E.D. Va. Dec. 20, 2016).
[25] Rubin Chambers, 825 F.Supp. 451, 456 (S.D.N.Y. 2011).
[26] United States v. Richards, 659 F.3d 527, 545 (6th Cir. 2011).
[27] Ohle, 2011 WL651849 at 4.
[28] Skilling, 554 F.3d at 576-77.
[29] *Id.* at 577.
[30] *Id.*
[31] *Id.*
[32] *See, e.g.,* United States v. Cadden, 2015 WL 5737144, at 3 (D. Mass. Sept. 30, 2015) (". . . one man's *Brady* item is another woman's smoking gun.").
[33] *See* Guidance for Prosecutors Regarding Criminal Discovery ("Ogden Memo," January 4, 2010) ("In cases involving voluminous evidence obtained from third parties, prosecutors should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence.").

Several other cases have emphasized that there is no authority that commands the prosecution to "root out" potentially exculpatory evidence from a large mass of discovery.[34] These holdings are especially applicable to data that originally comes from a target company. ESI seized from targets through a search warrant, for example, is understandably more immune to defense demands for particularized searching than data from third parties.[35] In reaching its decision in *Warshak*, the court noted that much of the data the defendant wanted additional government resources to sort out was originally his own material, seized in the investigation.[36]

There are, however, some special circumstances that may exist that would drive a court to order the government to affirmatively identify *Brady* in a large trove. Based upon the unusual facts in *United States v. Salyer*, the court ordered the government to scour voluminous materials and identify documents that "may" be *Brady* material.[37] The sole defendant was incarcerated, had a small defense team, lacked the benefit of any parallel civil investigation, and could not access any computers to view discovery. However, the judge in *Salyer* also carefully limited his decision, writing that it was not generally applicable to other cases. In fact, discovery review problems facing an incarcerated defendant[38] with limited access to software tools can be remedied in other ways, as in *United States v. Graves*.[39] There, the court simply granted an incarcerated defendant a continuance, appointed a pretrial investigator to help the defendant review ESI discovery, and ordered the Marshal Service to grant him "adequate computer access" either at his detention facility or at the courthouse.[40]

As Department guidance enumerates, the large size of discovery does not shield prosecutors from identifying and turning over data encountered in the course of their investigation that they affirmatively determine is exculpatory.[41] The *Skilling* court made the same point when it wrote that "it should go without saying that the government may not hide *Brady* material of which it is actually aware in a huge open file in the hope that the defendant will never find it."[42] This idea was reiterated in *United States v. Blankenship*, where the court ruled that the government should identify *Brady* material it had affirmatively collected and set aside.[43]

The *Blankenship* court did not require prosecutors to scour their database in a search for as-yet-unidentified exculpatory evidence. Yet, absent the duty to scour, prosecutors should still be mindful not to obscure incriminating ESI as a litigation strategy, even when doing so is not specifically a *Brady* violation. In *United States v. Stirling*, the prosecution discovered recordings of highly incriminating Skype chats during its investigation.[44] The government turned the chats over in discovery,

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[34] Warshak, 631 F.3d at 297; United States v. AU Optronics Corp., 2011 WL 6778520, at 1 (N.D. Cal. Dec. 23, 2011); United States v. Alvarado, 2001 WL 1631396, at 4 (S.D.N.Y. Dec. 19, 2001).

[35] *Id. See also, e.g.,* United States v. George, 684 F. App'x 223, 226 (3d Cir. 2017) (rejecting defendant's assertion that an unreadable production containing information from his own bank accounts constituted a *Brady* violation.); United States v. Meredith, 2015 WL 5570033, at 3 (W.D. Ky. Sept. 22, 2015) (rejecting defendant's motion to compel Brady production in part because "the particular hard drives referenced in Defendant's complaint were those drives taken from his laptop and desktop.").

[36] Warshak, 631 F.3d at 297.

[37] United States v. Salyer, 2010 WL 3036444 at 3 (E.D. Cal. Aug. 2, 2010).

[38] Prosecutors who are handling cases with incarcerated defendants are well-advised to consult the Department's Guidance for the Provision of ESI to Detainees, produced by the JETWG in 2016.

[39] United States v. Graves, 856 F.3d 567, 570 (8th Cir. 2017).

[40] *Id.* at 569.

[41] *See* Ogden Memo ("[T]he format of the information does not determine whether it is discoverable. For example, material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email.").

[42] Skilling, 554 F.3d at 577.

[43] United States v. Blankenship, 2015 WL 3687864, at 7 (S.D.W. Va. June 12, 2015).

[44] Stirling, 2012 WL 12926045 at 1.

but they were not readily apparent in the production; a specific program was necessary to locate them on a seized hard drive. Despite warnings to the defense that the defendant should not testify, the prosecutors did not produce the specific chats until their rebuttal case, after the defendant had taken the stand in his own defense.[45] The chats completely eviscerated the defendant's testimony, resulting in a conviction. The district judge, however, granted a new trial, reasoning that while the prosecution had satisfied its basic discovery obligations, its failure to identify that specific evidence or the means to find it demanded a new trial in the interests of justice.[46] The takeaway from *Stirling* is that data is not meaningfully produced if additional steps, like special software, are required to review it. Like *Salyer*, *Stirling* is limited in its holding, and no other cases have cited it as authority, but it counsels prosecutors to favor ESI usability and transparency over trial strategy.

C. Responding to Demands for Additional Data Management or Support

Other than demanding that prosecutors locate specific data within a production, the complex nature of electronic data may provide defense attorneys a number of other opportunities to accuse the government of misfeasance. In some recent cases, defense attorneys have asserted that the government has somehow technically mishandled ESI, asked the government to cull material from a production, demanded paper files that stand apart from ESI, and pleaded for additional data manipulation in support of their defense theories. These claims all highlight the need for care and diligence when managing large sets of ESI through all phases of investigations and subsequent discovery productions.

For example, when prosecutors first receive large troves of data, either through the execution of a search warrant, from a grand jury subpoena, or other sources, they ought to devise and employ methods to identify and extract relevant material from the heaps of extraneous data that will inevitably accompany the production. That is usually accomplished through a combination of employing date restrictions, custodian identifications, and keyword searches. Culling irrelevant data from your mass of evidence is crucial so that prosecutors can avoid spending time reading useless personal email or spam rather than communications between targets. After this process, however it is employed, two buckets of data will remain: (1) relevant data that the prosecution team will need to process further, then search, review, and investigate; and, (2) irrelevant data that is not processed, but that the prosecution ought to maintain in its pristine form.

However, what prosecutors may view as unprocessed and extraneous may become a target for defense attorneys approaching trial. Citing the government's obligation under *Brady*, defendants may request that the Department process and produce irrelevant data, arguing that it, too, must be searched for exculpatory material. In actuality, defendants may not actually want it, but pointing to a mass of unviewed data may be a tempting target for defendants trying to delay a case.

In order to defeat potential *Brady* claims, prosecutors have two options when dealing with data they deem irrelevant. First, they can give a copy of their unprocessed data to the defense. In *United States v. Parnell* and its attendant cases, the Department attorneys gave defense teams copies of all of the unprocessed forensic images, separated from the load-ready processed data. At that point, the decision about what to do with irrelevant data rested solely with the defense team and the government had satisfied its *Brady* obligation.[47] Another option is to simply offer the defendant the opportunity to inspect and copy the unprocessed, irrelevant data early in the discovery process. Defeating a *Brady* claim may be as simple as adding one sentence to the initial discovery transmittal letter offering the irrelevant ESI to the

[45] *Id.*
[46] *Id.* at 2.
[47] *See* United States v. Parnell, 2015 WL 5559818, at 2 (M.D. Ga. Sept. 18, 2015) (Defendant received all data from government, was granted multiple continuances, was provided software to search the data, and employed a computer technician to help her.).

defendants, in unprocessed form, at the outset of discovery. At that point, the responsibility again falls to defendants to make a decision about it.

In *United States v. Cadden*, the defendant claimed that the methods the government used to cull irrelevant data may have left exculpatory material out of the discovery production.[48] Defense counsel demanded that the government process that irrelevant data and search it, that the court delay the trial date, and that the court assign a Federal agent to assist the defense in executing its own searches, claiming that the newly processed irrelevant data would have resulted in an increase of ESI to search. The AUSAs defeated this through two methods. First, they employed redundancy when they identified the relevant material, relying on a combination of keyword searching, custodian identities, and appropriate date restrictions to find the data that was truly germane to their investigation. They asserted that these steps represented a thorough, good faith methodology to ensure the culled data was indeed irrelevant. Then, in their first discovery transmittal letter, the prosecutors told the defendants that there was unprocessed, irrelevant data available for inspection and copying. Unsurprisingly, when it was initially offered, none of the defendants involved in the case jumped at the chance to obtain and process gigabytes of data the government deemed to be irrelevant. The defendants in *Cadden* waited until the end of the discovery period to make their motion, nearly a year after the USAO first produced discovery. All of these factors led the court to reject the defense request.

A defendant's request for additional manipulation or reprocessing may also implicate the government's duty not only to include irrelevant files, but also to recover deleted files. In *United States v. Dunning*, the defendant claimed that prosecutors should have forensically recovered information that was deleted from a hard drive seized from a third party,[49] asserting that the failure to do so was a *Brady* violation. However, the government did not delete the files at issue. The entity from whom the government seized the drives deleted the information before the government obtained it. The court ruled that the government had no duty to go back to the third party and recover the data.[50]

Adding information to a production can also have its perils. The axiom that "no good deed goes unpunished" was proven in *United States v. Shabudin*, where prosecutors hosted a database and, in an effort to streamline the discovery process, allowed the defense to have access to it.[51] The prosecutors agreed with the defense on the scope and duration of the database, including funding and staffing for the project for two years at an anticipated cost of nearly $2 million. In addition to the database, the case involved some paper discovery. Initially, the prosecutors did not upload the paper material to the database, but did provide it to the defense. As the case progressed, the defendants demanded that the government add electronic images of the paper materials into the database, and the government agreed to do so.[52] That addition, however, drew down the budget for maintaining the database, and would have closed it months ahead of the initial schedule. Here, the prosecutors' diligence in making the material available to the defense did not suffice, because the court determined that the prosecution did not effectively inform the defendants that adding the additional material would, in effect, close off the Relativity database early. The court ordered the Department to not only maintain the Relativity database, but to continue to pay for non-technical support and paralegal assistance that the defendants demanded. This was so even though the defense still had access to the whole of the discovery material through a Concordance database they maintained at their own expense.[53] That court order resulted in an additional

[48] Cadden, 1:14-CR-10363, Doc. 531, February 5, 2016 (D. Mass 2016).
[49] Dunning, 2009 WL 3815739 at 1.
[50] *Id.* at 2.
[51] United States v. Shabudin, 2014 WL 1379717 at 1 (N.D. Cal. Apr. 8, 2014).
[52] *Id.*
[53] *Id.* at 4.

multi-million dollar expense for the government. The lesson from *Shabudin* is that no matter how expeditious or well-intentioned, sharing discovery platforms with defense counsel is rarely a good idea.

However, compare the production additions in *Shabudin* to an issue relating to additional paper discovery raised in *Ohle*. Aside from their demands that the government affirmatively search for *Brady*, the *Ohle* defendants moved the District court for a new trial after prosecutors discovered they had inadvertently failed to include electronic images of 110 boxes of documents in the discovery produced. However, much of the material was included in other forms within the government's production, and the prosecutors made the entire 110 boxes available for inspection prior to the trial.[54] The court ruled that these redundant measures were sufficient, and that there was no *Brady* violation.[55]

Defendants may also ask prosecutors to remove data that survived initial processing, arguing that it unnecessarily burdens discovery, removing it from its usable, accessible form. In *United States v. Meredith*, the defendant moved the court to compel the government to spend $300,000 to reprocess an extensive discovery production in order to remove what he deemed was extraneous data such as personal emails.[56] The defendant there claimed that the data was not relevant to the case and obstructed his ability to review what was turned over. The court in *Meredith* rejected the request because the ESI was searchable, and noted that the government had no duty to remove documents from the production. The court also noted that the prosecutors had provided ample oral and written assistance to the defendant in searching for files so that the alleged "extra" ESI was not a hindrance.[57]

Finally, in an effort to create potentially exculpatory evidence, defendants may demand that prosecutors analyze or sort existing data in a certain way to create new, mined information. Just as prosecutors are not required to contribute to a defense investigation, they are not required to perform additional data analysis aside from what they did as part of their own investigation. In *United States v. Gray*,[58] the prosecutors had created their own analysis of payment records in a Medicaid fraud case as they prepared for trial, and they turned that information over, along with the original underlying data. On appeal of his conviction, the defendant asserted that the government should have employed a Medicaid bill processor to run a different forensic computer analysis of the data that would have revealed information about a possible co-conspirator. That analysis, he argued, may have potentially helped the defense at trial demonstrate a lesser role for Gray in the fraud. The Seventh Circuit rejected that argument, finding that having turned over the underlying data as well its own analyses, the prosecutors "had no duty to go further and conduct the defense's investigation for it."[59]

Other courts have taken a similarly restrictive view of ordering the government to provide active litigation support when the underlying factual information central to the defense's request was produced in discovery. This includes allowing defense access to government computers. For example, in *United States v. Schmidt*, the court denied a defendant's request to access summary material on IRS computers when the defense had longstanding access to underlying reports that were produced in discovery.[60]

II. Practice Tips Distilled from the Case Law

Prosecutors' responses to motions demanding these kinds of ESI discovery assistance have included some common recitals of information that put judges and magistrates in a good position to

[54] *See* Ohle, 2011 WL 651849 at 2.
[55] *Id.* at 4.
[56] Meredith, 2015 WL 5570033 at 1.
[57] *Id.* at 2.
[58] Gray, 648 F.3d 562.
[59] *Id.* at 567.
[60] United States v. Schmidt, 2007 WL 1232180, at 1 (D. Colo. Apr. 25, 2007).

understand the particular issue and make favorable rulings. Any response to such a motion is well-served to include the following:

- an outline of all the steps the prosecution team took to provide discovery, with specific accounting of pages or documents produced;
- an outline of how the prosecution team handled the processing of ESI to ensure it could be produced in a usable form to defense counsel;
- an outline of how irrelevant data was culled, either through searches for all custodians of note, names, key words, date restrictions, or any technology assisted review that was employed;
- a description of any offers to make that irrelevant material available for inspection or production, which should be included in the first transmittal letter relating to ESI production;
- a recitation of specific efforts made to make discovery accessible, organized, and searchable;
- specific descriptions of the databases used to make searching easier, including those databases' searchability parameters;
- an outline of the resources available to the defense, including a description of the size of the defense team, its technical capabilities, and the presence of a coordinating discovery attorney;
- a recitation of discussions with defense attorneys about how the discovery is produced, and any assistance offered or given; and,
- a description of the defendant's own knowledge and ability to assist his or her own defense team in searching for and managing the discovery material.

Of course, prosecutors cannot make these responsive legal arguments unless they keep their own files organized and the evidence searchable as their investigation progresses. Good organization helps prosecutors create reasonable discovery productions. Thus, preparing for discovery while still in the investigative phase of a case puts Department lawyers in a position to meet their discovery obligations, successfully deflect defense demands to go beyond their duties, and affect justice.

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