



# Piling On: Unresolved Issues Regarding Voluminous Discovery in Complex Criminal Cases in Federal Court

By: Nina Marino and Reed Grantham  
KAPLAN MARINO, PC  
Beverly Hills, CA

## I. Introduction

Federal criminal discovery is growing in size and complexity. Indeed, across the country, federal criminal litigation is in the process of experiencing an explosion in the volume of electronic documents produced through criminal discovery. Unsurprisingly, the production, management, and review of this material poses significant problems for the courts, prosecutors, and, perhaps most directly, for criminal defendants and their attorneys.

Specifically, within the subset of certain federal criminal offenses commonly referred to as “white collar crimes” the manner and format of such massive discovery productions have raised important questions, which, at present, have remained largely unanswered by federal courts. For instance, in such large discovery productions, what are the prosecution’s obligations under *Brady v. Maryland*? Additionally, what are the prosecution’s obligations to produce such discovery in a readable and searchable format? Lastly, is the prosecution required to create an index or table of contents of such voluminous discovery?

As a result of the lack of clarity regarding the prosecution’s obligations in such cases, criminal defendants in white collar cases prosecuted in federal court have increasingly been the victim of enormous document dumps which threaten the ability of defendants to mount a meaningful and substantial defense. Absent specific rules, guidelines, and policies to guide the post-indictment discovery process in large-scale complex criminal matters involving massive amounts of electronic discovery in federal court, criminal defendants will continue to remain at a significant disadvantage when it comes to post-indictment discovery.

This Article seeks to explore the emerging issues surrounding the problem of voluminous discovery in the federal criminal context, focusing particularly on the obligations of the federal government to comply with its discovery obligations under *Brady v. Maryland*, and further seeks to summarize the developing case law on the prosecution’s obligations to produce voluminous discovery in a reasonably usable format to criminal defendants.

## II. Electronically Stored Information (“ESI”)

Technology and the storing of electronic information is now an omnipresent force in the world. From home computers to personal cell phones, the information that makes up an individual’s life is increasingly electronic. As a result, most criminal prosecutions today necessarily involve the production and discovery of massive amounts of electronic data that have been collected from a myriad of electronic devices. Not only does this data include word-processing documents, electronic spreadsheets, and various documents in portable document format (“PDFs”), such electronic data often includes photographs, text messages as well as audio and video files. As it relates to any given federal prosecution, the amount of discovery seized and evaluated by the prosecution can be immense.

The amount of such material increases drastically when the offenses charged fall into the realm of “white collar” crimes. When the federal government prosecutes such offenses, investigations can span years and may involve the seizure and inspection of thousands of electronic devices. By the time individuals have been the subject of a criminal complaint, the federal government may be in possession of anywhere from hundreds of thousands to hundreds of millions of documents in electronic discovery. In addition to simply producing documents as they have been electronically stored, such documents often contain substantial “metadata,” which provides key information about a particular electronic document, including who created it, whether there have been any edits to the document, and who accessed the particular document.

Given the increasing size and complexity of criminal discovery in federal court, the manner and format in which such material is provided to a criminal defendant through post-indictment discovery has begun to receive more attention in recent years. In particular, criminal defendants—and their attorneys—have called for more specific guidance when it comes to the way in which voluminous discovery is produced. When discovery reaches the size of hundreds of thousands of documents, the issue of “piling on,” or over-burdening the defense with unorganized, uncategorized, and superfluous discovery productions becomes an issue that can affect substantial rights. It is now more important than ever to establish rules that govern not just what material is ultimately provided in discovery, but also to develop policies for the manner and format such voluminous discovery should take.

## III. *Brady v. Maryland* and Current Department of Justice (“DOJ”) Policies on Voluminous Electronic Discovery

The discovery obligations of federal prosecutors are generally established by the Federal Rules of Criminal Procedure 16, 26.2, the Jencks Act, codified in 18 U.S.C. § 3500, *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, the DOJ’s United States Attorney’s Manual (“USAM”) outlines the Department’s policy for the appropriate disclosure of information through discovery. *See* USAM § 9-5.001.

Perhaps most importantly, as it pertains to voluminous discovery in complex criminal matters, *Brady* requires the prosecution to provide all material that is exculpatory to the defense. In order to satisfy its *Brady* obligation, the prosecution, in matters involving large-scale voluminous discovery, have tended to use an “open file” policy to ensure compliance with *Brady*. Such a policy involves the prosecution producing in discovery all of the documents seized in the investigation of the case. While on its face, open file discovery appears to buttress the prosecution against allegations of *Brady* violations by providing *all* material in the prosecution’s possession, emerging case law has begun to call into question the practice of “dumping” voluminous discovery on a criminal defendant in order to satisfy *Brady*.

On January 4, 2010, in the wake of several high-profile criminal discovery violations found against the federal government, Deputy Attorney General David Ogden issued a memorandum to United States Attorneys entitled “Guidance for Prosecutors Regarding Criminal Discovery,” which aimed to provide guidance and training to federal prosecutors on how the federal government should meet its discovery obligations. In particular, the memoranda provided instructions to United States Attorneys on where to look for exculpatory evidence, what documents must be reviewed, and lastly, how such material should be reviewed and provided to the defense. Although comprehensive in scope, the memorandum fails to provide any guidance to federal prosecutors on how to handle producing voluminous discovery. And while the memorandum does state that “[p]rosecutors should never describe the discovery being provided as ‘open file,’” such a recommendation was not intended to discourage the practice of open file discovery, but rather was intended to guard against “unintentionally misrepresent[ing] the scope of materials provided.” Without any guidance on the manner and format in which voluminous discovery is to be produced, federal prosecutors have little incentive to change the way in which such discovery is produced to defendants.

In February 2012, the DOJ, in conjunction with the Administrative Office of the U.S. Courts (“AO”) collaborated with the Joint Working Group on Electronic Technology in the Criminal Justice System (“JETWG”) to produce a set of “Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases” (referred to hereinafter as “the Protocol”). While not binding on federal litigants, the Protocol outlined a series of recommendations for parties to engage in when confronted with a federal criminal matter involving extensive voluminous discovery. Of particular note, the Protocol encourages criminal litigants to consult early on in the discovery process regarding any potential issues relating to a voluminous or otherwise complex discovery production. In addition, the Protocol strongly advocates for the creation and use of a table of contents, which can serve to “expedite the opposing party’s review of discovery, promote early settlement, and avoid discovery disputes, unnecessary expense, and undue delay.” Lastly, and perhaps most importantly, the Protocol “recommends that ESI received from third parties . . . be produced in the form it was received or in a reasonably usable form.” Such recommendations are crucial first steps in the process of streamlining the discovery process in cases involving voluminous discovery. Indeed, attention to the manner and format of such discovery—table of

contents, indexes, identification of *Brady* material, etc.—would go a long way to address the complaints of criminal defendants that the prosecution is using open file or voluminous discovery to bury exculpatory and relevant documents from criminal defendants.

Despite the Protocol’s attention to the manner and format in which voluminous discovery is produced in complex criminal matters, DOJ policy and practice appear to take the position that an open file or a voluminous and unorganized discovery dump satisfies the principal discovery obligations of the prosecution, which it does not. Accordingly, the practice of dumping large amounts of unorganized and uncategorized electronic discovery on a criminal defendant persists.

#### IV. Relevant Case Law on Voluminous Discovery Obligations

At present, there are relatively few federal court decisions that provide conclusive guidance on the appropriate format in which voluminous electronic discovery should be produced. The few decisions that do address the problem of voluminous discovery turn on the efforts made by the prosecution to provide organized and indexed discovery.

In *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009), the leading case on whether large voluminous discovery can run afoul of *Brady*, the defendant asserted that the “seven hundred million pages of documents” produced by the prosecution violated the federal government’s *Brady* obligations because the voluminous open file was so large as to suppress exculpatory evidence. Skilling argued that no amount of due diligence could have successfully identified exculpatory materials within such a large production. Although the Fifth Circuit rejected Skilling’s argument, holding that the reasonable steps taken by the prosecution—making the discovery searchable, providing an index of documents, producing a set of “hot documents”—put the defendant in no better position to identify potentially exculpatory material than the prosecution, the Fifth Circuit did note that “we do not hold that the use of voluminous open file can never violate *Brady*.” Additionally, the Court identified several factors that should be evaluated when determining whether there has been an impermissible “data dump” in violation of *Brady*: whether the open file production contained “pointless or superfluous” materials, whether the production was so voluminous as to be “unduly onerous,” and whether the placement of exculpatory material within the production indicated an attempt to conceal such documents.

Additional cases have further cautioned the prosecution against large-scale, unorganized voluminous discovery productions. In *United States v. Saylor*, 2010 U.S. Dist. LEXIS 77617, at \* 19-23 (E.D. Cal. Aug. 2, 2010), the court ordered the prosecution to identify Rule 16, *Brady*, and *Giglio* documents contained in a voluminous discovery production “as a matter of case management (and fairness).” The court noted:

“In light of the above, and to return to the real problem here, it bears repetition to emphasize that the ultimate issue

is whether there is ‘disclosure’ in the letter and spirit of *Brady/Giglio* simply by turning over a mountain of ‘everything’ acquired over half a decade, and telling defense counsel nothing about where exculpatory/impeaching information can be found. Again, ‘the government cannot meet its *Brady* obligations by providing [the defendant] with access to 600,000 documents and then claiming that she should have been able to find the exculpatory information in the haystack.’ *United States v. Hsia*, 24 F.Supp. 2d 14, 29-30 (D.D.C. 1998). Or, as the undersigned put it in the initial order: ‘[A]t some point (long since passed in this case) a duty to disclose may be unfulfilled by disclosing too much; at some point, ‘disclosure,’ in order to be meaningful, requires ‘identification’ as well.”

*Id.* at \*19-20. Additional cases have further warned the prosecution against voluminous and unorganized discovery productions and have commented on the manner and format such voluminous discovery is required to take. See *United States v. Warshak*, 631 F.3d 266, 297-98 (6th Cir. 2010) (cautioning the prosecution against the practice of “lard[ing] its production with entirely irrelevant documents”); *United States v. Ohle*, 2011 U.S. Dist. LEXIS 12581, at \*10 (S.D.N.Y. Feb. 7, 2011) (no discovery violation where the evidence is equally accessible by both parties and the production was made electronically searchable); *United States v. Hsia*, 24 F.Supp. 2d 14, 29-30 (D.D.C. 1998) (the prosecution cannot meet its *Brady* obligations by providing the defendant with access to voluminous documents and then claiming that she should have been able to find the exculpatory information within the massive production); *Emmett v. Ricketts*, 397 F.Supp. 1025, 1043 (N.D. Ga. 1975) (the prosecutorial duty to produce exculpatory evidence imposed by *Brady* may not be discharged by simply dumping a voluminous mass of files, tapes, and documentary evidence).

In addition to the above, recent case law suggests that courts have begun to draw on civil discovery principles to inform the criminal discovery process in cases involving massive amounts of electronic information. In *United States v. O’Keefe*, 537 F.Supp. 2d 14 (D.D.C. 2008), the court held that a voluminous discovery production in a criminal matter should adhere to comparable civil standards set forth in the Federal Rules of Civil Procedure. The defendants in *O’Keefe* argued that the manner in which the prosecution produced voluminous discovery made it impossible to identify the source or custodian of the document. Acknowledging that there is no analogous criminal rule to guide massive discovery productions, the court in *O’Keefe* looked directly to Rule 34 of the Federal Rules of Civil Procedure, which requires that documents produced in discovery be produced in the form in which they are ordinarily maintained and requires that such documents be organized and labelled to correspond with the categories of the request for production. Fed. R. Civ. P. 34(b)(2)(E)(i). In addition, Rule 34 requires electronically-stored information produced in discovery to be provided in the form in which it is

ordinarily maintained or in “a reasonably usable form”. Fed. R. Civ. P. 34(b)(2)(E)(ii). Using civil rules as guidance, the court required that an index be created of the discovery and required that the discovery produced by the prosecution be produced “in a reasonably usable form.”

Between *Skilling*, *O’Keefe*, and other recent case law, defendants have a growing arsenal of case law with which to challenge unorganized voluminous discovery productions produced by the prosecution. And although this area of the law is in the process of developing as electronically stored information becomes more and more prevalent, courts are hinting that voluminous discovery, absent indexing, making the discovery searchable, and providing an organized discovery production, may run afoul of *Brady*.

## V. Conclusion

Federal criminal discovery is in the process of changing. Discovery productions, particularly in white collar prosecutions, now rival their civil counterparts. To ensure fairness and justice for criminal defendants, specific rules and procedures must be developed and implemented in the criminal context to ensure that voluminous and open file discovery does not infringe on a defendant’s trial rights. Drawing from the Protocol developed by the DOJ, JETWG, as well as the existing case law, the following recommendations would go a long way to ensure fair play in criminal discovery.

First, requiring that the prosecution and defense meet and confer regarding any potential voluminous discovery is paramount. Through such discussions, both parties can address the difficulties of a potentially large-scale discovery production. Second, as the Protocol states, the creation of an index or table of contents ensures that a voluminous discovery production remains organized and appropriately categorized for review. Third, in order to satisfy its *Brady* obligations, the prosecution should create a list of hot documents, which identify any potential *Brady* material. Lastly, in accordance with Rule 34 of the Federal Rules of Civil Procedure, documents should be produced in the form in which they were seized by law enforcement and such information should be produced to the defendant in a reasonably usable form, which would include making such material searchable.

Given the potential risks associated with unorganized voluminous discovery, it is imperative that specific rules be developed to manage this evolving area of the law.