Commentary: Is ‘It’s in There Somewhere’ Enough?
Sheila Sawyer and William Athanas of Waller Lansden Dortch & Davis discuss the government’s discovery obligations under Brady in cases involving large volumes of data and court rulings affecting the timing and manner of document production. P. 3.

Commentary: Control Person Liability Under The Foreign Corrupt Practices Act

Bear Stearns Hedge Fund Managers Not Guilty Of Subprime Fraud
A federal jury has acquitted two former Bear Stearns managers who faced up to 25 years in jail on charges they deceived investors in 2007 about the prospects of hedge funds with large holdings in subprime mortgage securities. United States v. Cioffi (E.D.N.Y.). P. 10.

Tenn. Investment Firm Operated $18M Scheme, Federal Indictment Says
The two top officers of a Tennessee investment firm ran a Ponzi scheme that fleeced investors of $18 million, according to an indictment filed in Nashville federal court. United States v. Kretz (M.D. Tenn.). P. 10.

Dreier Co-Conspirators Plead Guilty to Fraud In N.Y. Federal Court
Two men who helped formerly prominent New York attorney Marc S. Dreier in a fraud scheme that took several hedge funds for more than $400 million have pleaded guilty in Manhattan federal court to their parts in the scam. United States v. Kovachev (S.D.N.Y.). P. 11.

ALSO IN THIS ISSUE
Consultant Enters Guilty Plea to $6M Nigerian Bribery Scheme (S.D. Tex.) ..... 12
Army Sergeant Admits to Afghanistan Contract Scheme (D.N.J.) .................. 13
Army Official Is Sentenced for Role in Contract Scams (W.D. Okla.) ............ 13
Case and Document Index ............................................................................. 17
TABLE OF CONTENTS

Commentary: By Sheila Sawyer, Esq., and William Athanas, Esq.
Is ‘It’s in There Somewhere’ Enough? Defining the Scope
Of the Government’s Brady Obligations in ‘High-Volume
Discovery’ Prosecutions.........................................................3

Commentary: By Paul R. Berger, Esq., Sean Hecker, Esq.,
Colby A. Smith, Esq., and Steven S. Michaels, Esq.
Control Person Liability Under the Foreign Corrupt Practices
Act........................................................................................................8

Securities Fraud: United States v. Cioffi
Bear Stearns Hedge Fund Managers Not Guilty of Subprime
Fraud.................................................................................................10

Securities Fraud: United States v. Kretz
Tenn. Investment Firm Operated $18M Scheme, Federal
Indictment Says ..................................................................................10

Investment Fraud: United States v. Kovachev
Dreier Co-Conspirators Plead Guilty to Fraud in N.Y.
Federal Court........................................................................................11

Government Contracts: United States v. Tillery
Consultant Enters Guilty Plea to $6M Nigerian Bribery Scheme....12

Government Contracts: United States v. Chavez
Army Sergeant Admits to Afghanistan Contract Scheme ..........13

Army Official Is Sentenced for Role in Contract Scams...............13

Health Care Fraud: United States v. Imo
Superseding Indictment Names Doctor in $45M Medicare
Fraud.................................................................................................14

Health Care Fraud: United States v. Martinez
Feds: Medical Equipment Firms Ripped Off Medicare for $26M......14

Embezzlement: United States v. Figuracion
San Diego Bank Employee Gets 38 Months for Fraud..............15

Legal News in Brief.............................................................................16

Case and Document Index ..............................................................17
COMMENTARY

Is ‘It’s in There Somewhere’ Enough?

Defining the Scope of the Government’s Brady Obligations In ‘High-Volume Discovery’ Prosecutions

By Sheila Sawyer, Esq., and William Athanas, Esq.

Advances in technology mean increases in the volume of information generated and maintained by individuals, corporations and government entities. As white-collar prosecutions expand in complexity and scope, these technological advances have resulted in an exponential escalation in the amount of potentially relevant material collected and available for review. Terabytes have replaced banker’s boxes as the unit of measuring the size of a government investigation, and discovery productions numbering millions of pages of documents have become almost commonplace.

The government’s obligation to make exculpatory information available to defendants exists regardless of the size of the prosecution. While some information clearly qualifies as exculpatory, what constitutes Brady material is often debatable, even in the smallest and simplest of cases. In an environment where the failure to produce exculpatory evidence is a strict liability offense triggering sanctions ranging from a stern judicial rebuke to criminal contempt charges against the prosecutor, and because material made available to the defense cannot be considered “suppressed” for Brady purposes, it is not surprising that most prosecutors resolve the issue by simply granting the defense “open file” discovery in prosecutions involving a high volume of documents. This typically means that defendants are allowed to review and copy all documents and objects obtained by the government during the course of the investigation, as opposed to having prosecutors decide which portion of the mass of available information meets the applicable criteria.

Numerous defendants have challenged this approach, arguing that the government does not fulfill its obligation to provide exculpatory evidence by simply letting them search the haystack for the proverbial needle. Most courts over the years have rejected such claims on the theory that it is unfair or inappropriate to burden prosecutors with the task of formulating defense theories and rooting out information that might support those theories. But as the amount of collected and available information underlying white-collar prosecutions swells in size, a new question emerges: What happens when that evidentiary haystack grows into a mountain?

This article explores the evolution and contours of the government’s discovery obligations when the prosecution rests on a large volume of information. While it seems unlikely that the government will ever be required to segregate exculpatory evidence from a larger mass of discovery, several courts have at least tacitly endorsed the adoption of certain safeguards designed to give defendants more meaningful access to and use of large volumes of data—measures that arguably enable defense lawyers to search through massive amounts of discovery and retrieve exculpatory evidence more effectively and efficiently. Those measures serve to level the playing field and inure to the benefit of all parties by reducing the chances that the outcome of white-collar prosecutions will be skewed by a disparity of resources. At a minimum, defense counsel should be aware of this trend and these measures, so that they can make specific discovery-related requests of the government and better defend their clients in massive document production cases.

The Typical Universe of Documents

While differing in size, scope and subject matter, white-collar prosecutions typically rest on the same basic components. Documents and records, as referenced in Federal Rule of Criminal Procedure 16, make up the overwhelming majority of information. Included in this category are documents and other materials seized through a search warrant, received pursuant to a grand jury subpoena or produced voluntarily. Depending on the circumstances,
the government may maintain some or all of this data electronically, either because it was originally received in that condition or because it was converted to that format by the government after to receipt. Electronic storage devices, including hard drives and other portable storage media, are especially common where the government has used search warrants in its investigation. While these media often contain valuable data directly pertinent to the government's allegations, they are also frequently littered with vast quantities of extraneous, irrelevant material.

**The government’s obligation to make exculpatory information available to defendants exists regardless of the size of the prosecution.**

Depending on the preferences of the prosecutor and the individual circumstances, some cases may also generate thousands of pages of grand jury transcripts memorializing the testimony of witnesses. Investigative grand juries may hear from hundreds of witnesses in large cases, sometimes producing multiple appearances for the same witness. Where the grand jury is not used in that fashion, interview memoranda (including FBI “302s”) are the primary vehicle for recording witnesses’ statements. A particularly large prosecution can produce a high volume of grand jury transcripts and interview memoranda. Where the criminal prosecution stems from the initial efforts of a regulatory body such as the Securities and Exchange Commission, that agency will also have discoverable information. This material typically takes the form of investigative transcripts of statements by witnesses or defendants and usually also includes documents the agency collected.

**The Government’s Document Management Techniques**

Managing large amounts of information, regardless of the setting, requires discipline in organization. The stakes are raised considerably in the federal criminal context, and they require prosecutors to use various techniques to allow for the storage, retrieval and review of pertinent information. The starting point is usually an index that records the form of the information (e.g., boxes of documents, hard drives), their volume and their source.

Database building has become commonplace in the white-collar setting. Many prosecutors use some form of commercially available document control software such as Summation or Concordance to store and manage the mass of collected information. At a minimum, these programs contain an optical character reader, or OCR, function that reads the individual letters and words contained in the documents, allowing for searching of particular terms or phrases. In addition, those programs usually allow for “coding” of documents, a process by which certain key information regarding particular item (including date, individuals referenced and subject matter) can be entered manually to allow for later sorting and more focused review.

In addition to building a database with documents and electronic information, the government has the ability to load transcripts and interview memoranda. While this can be done by scanning the individual pages of those materials, more efficient technicians will acquire and load electronic versions of the documents from either the stenographers who prepared the transcripts or the agents who prepared the memoranda. Once loaded, these materials can also be searched, viewed and coded as desired.

**The Government’s Obligations to Provide Exculpatory Evidence**

The government’s obligation to provide exculpatory information emanates from two sources: Federal Rule of Criminal Procedure and Brady v. Maryland. Rule 16 requires the government to “permit the defendant to inspect and copy … books, papers, documents [or] data … if the item is within the government’s possession, custody or control if (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.”

*Brady* prohibits “the suppression by the prosecution of evidence favorable to the accused” where that evidence is material to guilt or to punishment. While there is no uniformly recognized precise deadline for producing *Brady* material, due process requires that disclosure of exculpatory and impeachment evidence be made in sufficient time to permit the defendant to make effective use of that information at trial.

The government is also required to provide “statements” of witnesses under the Jencks Act, but that requirement is not triggered until after the witness testifies. Even though many prosecutors voluntarily produce Jencks material early, some wait until shortly before trial (e.g., 10 or 14 days) before doing so. Statements discoverable under Jencks may also contain *Brady* information, however, and the government is obligated to make such information available before trial because the obligations imposed under *Brady* trump those imposed by the Jencks Act. Some prosecutors resolve this issue by allowing defense counsel to review grand jury transcripts or other statements but waiting until the deadline set for Jencks production before actually turning over copies.
Rule 16

In an effort to winnow down large volumes of data made available by the government, defendants occasionally argue that Rule 16 obligates the government to not only produce discovery falling into its three designated categories, but also segregate those materials by category. Imposing this obligation theoretically assists the defense by requiring the government to cull those items “material to preparing the defense” from the larger mass of information made available, effectively requiring the government to pull the laboring oar in locating exculpatory information.

Some older district court decisions have embraced this theory and required the government to separate its discovery production into the categories identified in Rule 16.7 More recent decisions, however, have rejected the holdings of those cases as inconsistent with the plain language of Rule 16.8 While the issue has yet to be resolved definitively by any circuit court, the trend — at least in high-volume-document prosecutions — appears to reject the notion that Rule 16 imposes any duty on the government to segregate those documents that might be “material to preparing the defense” from the larger collection of discovery.

Most courts decline to impose on prosecutors the burden of segregating exculpatory evidence from among a larger mass of discovery.

The Government’s Brady Obligations

The U.S. Supreme Court has endorsed the use of open-file discovery.9 Before and since that 1996 ruling, prosecutors frequently have used this method to fulfill their constitutional obligations and avoid the expenditure of resources necessary to cull from large volumes of documents those materials required to be produced under Rule 16 and Brady, while simultaneously eliminating the risk of inadvertent nondisclosure. Some defendants challenged this approach, contending that Brady required the government to do more than simply grant the defense access to the discovery pile. Most courts rejected such challenges, declining to require the government to make decisions about which portions of discovery made available qualify as exculpatory.10

Where articulated, the rationale underlying these decisions was rooted in the notion that, consistent with the adversarial system of justice, Brady imposed upon the defense an obligation to exercise “reasonable diligence” in obtaining exculpatory evidence.11 These decisions made clear that “suppression” for the purposes of Brady meant that the exculpatory material was withheld or destroyed, not that it was produced along with hundreds of thousands, if not millions, of pieces of other information.

To be sure, some district courts have held that the government is obligated to segregate and explicitly identify Brady material for the defense.12 Much like the isolated district court decisions suggesting that Rule 16 imposes a similar “segregation” obligation, these rulings lack precedential support and reasoned analysis. As such, they stand as tenuous authority for requiring the government to segregate Brady material.

Several recent decisions have considered the issue in the context of prosecutions involving massive amounts of discovery. While no court has yet explicitly required the government to use measures designed to facilitate the defense’s review of large volumes of data, several have implicitly suggested that such measures are a necessary prerequisite to maintaining a level playing field. As such, these rulings strongly support the argument that the government must do more than merely turn over the keys to the proverbial “warehouse” in cases where the prosecution rests on prodigious amounts of data.

In United States v. Skilling13 the 5th U.S. Circuit Court of Appeals addressed former Enron executive Jeffrey Skilling’s contention that “the voluminosity of the government’s open file prevented him from effectively reviewing the government’s disclosure.”14 Recognizing the dearth of authority on the question of whether a voluminous open file can itself amount to a Brady violation, the court held that the outcome of the issue turns on “what the government does in addition to allowing access to a voluminous open file.”15

In rejecting Skilling’s claim, the court relied on several factors, including:

- The open file was electronic and searchable;
- The government produced a subset of “hot documents” culled from the larger mass of discovery that the government believed were important to the case or relevant to Skilling’s defense;
- The government produced indices cataloging the various discovery it received and maintained;
- The government granted access to various databases related to other Enron litigation; and
- There was no evidence that the government “found something exculpatory but hid it in the open file with the hope that Skilling would never find it” or that the government “padded” the open file “with pointless or superfluous information to frustrate” the defendant’s review.16
The 5th Circuit’s ruling was grounded in the recognition that the government’s efforts provided each side the opportunity to find potentially relevant material in the mass of discovery and that nothing more was required. In this respect, the holding aligns with those of the district courts that have considered the issue in the same context.

In United States v. Ferguson defendants charged with securities fraud sought to require the government to specifically identify any exculpatory material contained in the “voluminous Rule 16 production.” The court denied the request, noting that it was premised on tenuous precedent and was unnecessary in light of the government’s provision of a subset of “hot docs” and access to a searchable electronic database, the fact the government’s final Brady disclosure would occur “far in advance of trial,” and the absence of any allegations of gross misconduct by the government.

Similarly, in United States v. W.R. Grace the court examined the protections afforded the defendants in a massive environmental crimes prosecution in their efforts to review 3.3 million pages of discovery made available by the government. While the court rejected the notion that the government’s mass production of this volume of documents constituted a Brady violation, it premised that ruling on two key facts: the defendants were able to use a searchable database containing all data, and the majority of documents came from defendant W.R. Grace & Co. Under those circumstances, the court found “no reason to believe that the defendants [were] less able to locate exculpatory materials within the evidentiary database than is the government.”

Together, these decisions signal a new reality in colossal discovery prosecutions. While most courts are unlikely to require the government to sort through millions of pages of documents and identify those items that might be helpful to the defense, increasingly they will expect the government to take steps to facilitate the defense’s review of that material. Those steps will include requiring the prosecution to share access to technological means that facilitate the discovery review process and prohibiting the prosecution from frustrating those efforts by burying known exculpatory evidence or by purposely larding the collected materials with extraneous data in an effort to reduce the defense’s ability to efficiently locate helpful evidence.

Increasingly, courts recognize that these steps are necessary to protect the integrity of the process and the rights of defendants confronted with mountains of data in cases that are often highly complex and challenging, even without the logistical hurdles poses by “data dumps.”

Operating Effectively in This New Environment

Collectively, the holdings reviewed above provide strong support for defense counsel in their efforts to separate the wheat from the chaff in massive-discovery prosecutions. At the outset of the discovery process in such cases, the defense’s main goal should be to gather information about the nature and volume of the discovery material. As part of that process, the defense should consider using the following steps:

1. Request a comprehensive index from the government of all information collected during the investigation or otherwise within the government’s possession, custody or control. At a minimum, this request should seek details about the volume, source, format and date of production of all such information. As part of this request, the defense should also seek access to any indices received from those who produced documents or records under subpoena.

2. Ask the government whether it has created a searchable electronic database and request a listing of type of materials contained therein and the ability to copy or access that database.

3. Determine whether the government has attempted to separate “hot” documents from the larger mass of discovery collected and, if so, ask for access to that subset of materials.

4. Ask the government whether it directed subpoena recipients to filter e-mails prior to production and, if so, request a full listing of all terms used. If production to the government was segregated in accordance with this filtering, request the ability to review the materials in the form they were produced.

5. Request a listing of all grand jury transcripts and interview memoranda relating to the investigation, and seek to determine the volume of those materials. Make a specific request for access to all Brady material in those transcripts and memoranda, whether in the form of copies or the opportunity to review the documents at the earliest possible opportunity. Request that Jencks production and final Brady disclosures occur as far in advance of trial as possible, in light of the substantial volume of information underlying the prosecution.

This should not be considered an exhaustive list, and no harm results from requesting additional information. Defense counsel should recognize, however, that the government is unlikely to voluntarily provide access to materials that reflect its work product, such as “coded” versions of documents loaded into document control software, and no authority currently exists entitling defendants to judicial relief when requests for such information are denied.

Nevertheless, depending on the size of a particular prosecution, either the government or the court may be amenable to providing (or ordering) additional information to the
defense in order to ensure that both sides can prepare for trial as efficiently as possible. Such information might include the early production of government exhibit and witness lists, early identification of evidence the government intends to offer under Federal Rule of Evidence 404(b), and the provision of Jencks materials well in advance of trial.

Conclusion

Most courts decline to impose on prosecutors the burden of segregating exculpatory evidence from among a larger mass of discovery. Increasingly, however, courts (and prosecutors) tacitly recognize that Brady’s mandate regarding “meaningful use” of exculpatory evidence implicates not just the timing of its production but its manner of production as well. Effectuating the concerns underlying Brady and its progeny in high-volume-document prosecutions means that the defense is entitled to a level playing field in its efforts to identify the exculpatory needles in the mountain-sized haystacks of evidence made available by the government. While the task of locating that material will remain daunting, the defense can maximize its efficiency and effectiveness in finding helpful information by making focused requests of the government for certain tools at the outset of the discovery process and pressing forward with the court if necessary.

Notes

2. Id. (emphasis added).
4. Weatherford v. Bursey, 429 U.S. 545, 559 (1997). On this point, it is important to note as well the decision in United States v. Coppa, 267 F.3d 132 (2d Cir. 2001), where the appeals court rejected the trial court’s order requiring “the prosecution to disclose all exculpatory and impeachment materials as soon after an indictment as such materials are requested by a defendant.” Id. at 147.
5. 18 U.S.C. § 3500(a).
8. See United States v. Causey, 356 F. Supp. 2d 681, 686-87 (S.D. Tex. 2005) (“the plain language of Rule 16 does not require the government to specify from among the universe of discovery documents produced to the defendants which documents it considers material to the defense or which documents it intends to use in its case-in-chief”); United States v. Reddy, 190 F. Supp. 2d 558, 571 (S.D.N.Y. 2002) (“It is clear that Rule 16(a)(1)(C) does not require the government to identify specifically which documents it intends to use as evidence. It merely requires that the government produce documents falling into the three enumerated categories.”); United States v. Nachamie, 91 F. Supp. 2d 565, 568-70 (S.D.N.Y. 2000) (relying on plain language of Rule 16 in denying defendant’s motion to require prosecution to separate about 200,000 pages of discovery into identified categories).
9. See Strickler v. Greene, 527 U.S. 263, 283 n. 23 (1999) (“We certainly do not criticize the prosecution’s use of the open-file policy. We recognize that this practice may increase the efficiency and the fairness of the criminal process.”).
10. See, e.g., United States v. Mmahat, 106 F.3d 89, 94 (5th Cir. 1997) (“there 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 it has already turned over”); United States v. Eisenberg, 773 F. Supp. 662, 687-88 (D.N.J. 1991) (rejecting defendant’s claim that “the onus of [specifically identifying Brady material] should be borne by the government”); United States v. Bloom, 78 F.R.D. 591, 617-18 (E.D. Pa. 1977) (denying defendant’s motion to require that government specify which portions of discovery material provided qualified as exculpatory).
11. See United States v. Aubin, 87 F.3d 141, 148 (5th Cir. 1996) (“the purpose of the Brady rule is to ensure that a miscarriage of justice does not occur; not to displace the adversary system as the primary means by which truth is uncovered”); United States v. Brown, 328 F.3d 471, 473 (9th Cir. 1980) (“truth, justice and the American way do not, however, require the government to discover and develop the defendant’s entire case”).
12. See United States v. Hsia, 24 F. Supp. 2d 14, 29-30 (D.D.C. 1998) (“to the extent the government knows of any documents or statements that constitute Brady material, it must identify that material to [the defendant]”); United States v. McVeigh, 954 F. Supp. 1441, 1443 (D. Colo. 1997) (containing extended quotation of court’s statement to parties in discovery conference: “I don’t consider that the government … has met its obligations … by simply stating ‘This is anything there that’s exculpatory, you’re welcome to it.’”).
13. 554 F.3d 529 (5th Cir.), No. 08-1394, cert. granted (U.S. Oct. 13, 2009).
14. Id. at 576.
15. Id. at 577.
16. Id.
17. See id. (noting, after reviewing various materials provided to the defense that “the government was in no better position to locate any potentially exculpatory evidence than was Skilling”).
19. Id. at 242.
20. Id.
22. Id. at 1080-81.
23. Id. at 1081.
24. Often parties producing documents under subpoena will provide their own index or listing of materials produced. Gaining access to such information can improve the defense’s ability to determine the scope and content of discovery and further ease the process of review.