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IN THE DIGITAL AGE, ENSURING THAT THE DEPARTMENT DOES JUSTICE

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INTRODUCTION

An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: “The United States wins its point whenever justice is done its citizens in the courts.”¹

The goal of every federal prosecutor is not just to win cases but to do justice. That has been, and remains, one of the Department of Justice’s core principles. Every day, throughout our nation, federal prosecutors are resolutely working to keep our communities safe and to ensure that criminals are brought to justice—and to do so honorably and ethically. This is a commitment that I have taken seriously throughout my career, as well as a responsibility and tradition that has guided federal prosecutors for decades. As this Preface explains, when it comes to meeting our obligations to provide disclosure to criminal defendants, the Department of Justice (“the Department”) honors its fundamental commitment to do justice by requiring federal prosecutors to go beyond what the Constitution requires. Additionally, over the past three years, we have created an unprecedented program to ensure that federal prosecutors have the necessary training and resources to meet their disclosure obligations. Finally, recognizing the impact of technological advancements on disclosure—and consistent with the Supreme Court’s important observation in *Brady v. Maryland*, quoted above—the Department recently released a ground-breaking electronic discovery Protocol as an essential step to ensure that justice is done in this digital age. The Department and courts across the country have recognized that advances in electronic information technology merit particular attention in the criminal discovery process.² Especially in complex cases, electronically stored information (ESI) provides the potential for a more efficient and accessible criminal disclosure process for all participants. Yet, courts and litigants nationwide are grappling with both the changing landscape of criminal discovery and determining the contours of disclosure obligations in the digital age. It is against this backdrop that the Department’s fundamental commitment to seeing that “justice is done its citizens in the courts” becomes ever more imperative. To that end, this Preface will discuss the Department’s leadership role in promoting effective and comprehensive ESI discovery production in criminal cases.

I. PROSECUTORS’ DISCLOSURE OBLIGATIONS: *BRADY*, *GIGLIO*, JENCKS, AND RULE 16

Disclosure of ESI has played a gradually increasing role in criminal prosecutions.

* The author was sworn in as the eighty-second Attorney General of the United States on February 3, 2009. He would like to thank Andrew D. Goldsmith, the Department’s National Criminal Discovery Coordinator in the Office of the Deputy Attorney General, and Laura-Kate Denny, J.D. candidate May 2012, Harvard Law School, a legal intern with the Criminal Division, for their assistance in the preparation of this article. This Preface is considered to be in the public domain.

1. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

2. For the purposes of this Preface, “discovery” or “discoverable information” includes information required to be disclosed by Federal Rules of Criminal Procedure 16 and 26.2; the Jencks Act, 18 U.S.C. § 3500; *Brady v. Maryland*, 373 U.S. 83 (1963); and *Giglio v. United States*, 405 U.S. 150 (1972).

While civil litigators have been dealing with discovery of ESI for years,³ ESI-related discovery issues have only recently started to surface in the criminal justice system. Unlike civil litigation, which requires broad discovery on the basis of relevance, the prosecution's disclosure obligations are limited in scope, extending only as far as the requirements of *Brady v. Maryland*, *Giglio v. United States*, the Jencks Act, and Federal Rule of Criminal Procedure 16; that is, prosecutors are affirmatively obligated to disclose material exculpatory and impeachment information; witness statements; a defendant's statements and prior record; certain documents, objects, and scientific reports; and expert witness summaries.⁴ Prosecutors have similar disclosure obligations for ESI as they have for traditional hard copy documents and records. With certain exceptions,⁵ the form of the information generally does not affect its discoverability. For example, material exculpatory information must be disclosed under *Brady* whether it exists in a letter, email, or voice mail, or was disclosed to the prosecutor during a face-to-face conversation.

In determining whether the government has met its constitutional obligations under *Brady* and *Giglio*, courts will consider whether the undisclosed evidence is "material," defined as where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."⁶ Furthermore, undisclosed evidence is material only if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."⁷

II. FEDERAL PROSECUTORS EXCEED CONSTITUTIONAL OBLIGATIONS

In addition to being bound by the requirements set forth in *Brady*, *Giglio*, the Jencks Act, and Rule 16, federal prosecutors operate under the guidance of the United States Attorneys' Manual (USAM). The USAM is a comprehensive and controlling reference of Department policy.⁸ Following amendment of USAM § 9-5.001 in 2006, it is the Department's policy that federal prosecutors are required to "exceed [their] constitutional obligations" in criminal disclosures.⁹ The USAM outlines the constitutional obligation to disclose material exculpatory and impeachment evidence, but requires federal prosecutors to go further: "Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence."¹⁰

As explained above, the Constitution only requires that the Government disclose evidence that is "material" to guilt.¹¹ The USAM, however, requires federal prosecutors to surpass their constitutional obligations:

[A] fair trial will often involve examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or . . . make the difference between guilt and

3. For example, discovery of ESI was explicitly incorporated into the Federal Rules of Civil Procedure in December 2006. *See, e.g.*, FED. R. CIV. P. 26(b)(2)(B), 26(f)(3)(B).

4. *See Brady*, 373 U.S. at 83; *Giglio*, 405 U.S. at 150; 18 U.S.C. § 3500; FED. R. CRIM. P. 16.

5. *See, e.g.*, FED. R. CRIM. P. 16(a)(1)(A) and (B).

6. *United States v. Bagley*, 473 U.S. 667, 668 (1985).

7. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

8. *See* U.S. ATTORNEYS' MANUAL §§ 1-1.100-1-1.200 (2010) [hereinafter USAM], available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

9. *Id.* § 9-5.001(F).

10. *Id.* § 9-5.001(B)(1).

11. *See Bagley*, 473 U.S. at 676; *Kyles*, 514 U.S. at 439.

innocence. As a result, this policy requires disclosure by prosecutors of information beyond that which is “material” to guilt . . .¹²

Under the USAM, federal prosecutors must go further than the Constitution requires in several other ways. Notably, for exculpatory information, prosecutors “must disclose information that is inconsistent with any element of any crime charged . . . or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal . . .”¹³ Similarly, for impeachment information, prosecutors “must disclose information that either casts a substantial doubt upon the accuracy of any evidence—including . . . witness testimony—the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence . . . regardless of whether it is likely to make the difference between conviction and acquittal . . .”¹⁴ Also, unlike *Brady* and its progeny, which focus on evidence, the USAM requires prosecutors to disclose information regardless of whether that information would itself constitute admissible evidence.¹⁵

III. DISCOVERY REFORMS DURING THE PAST THREE YEARS: TRAINING & RESOURCES

In addition to the USAM policies, over the last three years, the Department has taken unprecedented steps to provide federal prosecutors and other law enforcement officials with the tools, resources, and training they need to meet their discovery and other ethical obligations. In January 2010, then-Deputy Attorney General David Ogden issued three memoranda to all federal prosecutors that provide overarching guidance on gathering and reviewing potentially discoverable information and making timely disclosure to defendants.¹⁶ The memoranda emphatically reiterate the USAM policy providing for “broader disclosures of exculpatory and impeachment information than *Brady* and *Giglio* require”¹⁷ and emphasize that “prosecutors must go beyond the requirements of the Constitution and ‘take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence.’”¹⁸ Pursuant to the memoranda, prosecutors are also advised to be inclusive when identifying the members of the prosecution team for discovery purposes.¹⁹ Significantly, the memoranda also directed each U.S. Attorney’s Office and Department litigating component to develop additional district- and component-specific discovery policies that account for controlling precedent, existing local practices, and judicial expectations.²⁰ Subsequently, the Office of the Deputy Attorney General issued separate guidance relating to discovery in national security cases and discovery of electronic communications.

12. USAM § 9-5.001(C).

13. *Id.* § 9-5.001(C)(1).

14. *Id.* § 9-5.001(C)(2).

15. *Id.* § 9-5.001(C)(3).

16. Memorandum from Deputy Attorney Gen. David W. Ogden, *Guidance for Prosecutors Regarding Criminal Discovery* (Jan. 4, 2010) [hereinafter Memorandum I], available at <http://www.justice.gov/dag/discovery-guidance.html>; Memorandum from Deputy Attorney Gen. David W. Ogden, *Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group* (Jan. 4, 2010) [hereinafter Memorandum II], available at <http://www.justice.gov/dag/dag-memo.html>; Memorandum from Deputy Attorney Gen. David W. Ogden, *Requirement for Office Discovery Policies in Criminal Matters* (Jan. 4, 2010) [hereinafter Memorandum III], available at <http://www.justice.gov/dag/dag-to-usas-component-heads.html>.

17. See Memorandum III at 1; see also Memorandum I at 9.

18. See Memorandum II at 2 (quoting USAM § 9-5.001).

19. As noted in Memorandum I at 3, this may not be feasible or advisable in some national security cases where special complexities arise.

20. See Memorandum II at 3; Memorandum III at 2.

Later in January 2010, the Deputy Attorney General appointed a long-serving career prosecutor as the Department's first full-time National Criminal Discovery Coordinator to lead and oversee all Department efforts to improve disclosure policies and practices.²¹

To fulfill these mandates, the Department has undertaken rigorous enhanced training efforts, provided prosecutors with key discovery tools such as online manuals and checklists, and continues to explore ways to address the evolving nature of ESI and related discovery issues. A sampling of the Department's most significant achievements includes the following: all 6,000 federal prosecutors nationwide—regardless of experience level—are now required to undertake annual discovery training on a wide variety of criminal discovery-related topics; since 2010, the Department has held several “New Prosecutor Boot Camp” courses, designed specifically for newly hired federal prosecutors, which include training on *Brady*, *Giglio*, and ESI, among other topics.²² In 2011, more than 26,000 federal law enforcement agents and other officials—primarily from the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)—received training from the Department on criminal discovery policies and practices.²³ Finally, the Department created a Federal Criminal Discovery Blue Book, which comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations. This Blue Book was distributed to prosecutors nationwide in 2011, and is now electronically available on the desktop of every federal prosecutor and paralegal.

IV. ESI PROTOCOL

In addition to the coordinated training efforts discussed above, the Department has taken a leadership role in developing best practices for addressing ESI in the discovery process. The overwhelming majority of information today is created and stored electronically, which has dramatically altered the landscape of the criminal justice system. ESI presents an opportunity for greater efficiency and substantial cost savings for the entire system, particularly in the representation of indigent defendants. But, in order to take advantage of this opportunity, criminal practitioners have a responsibility to educate themselves and use best practices when managing ESI discovery.

To ensure that practitioners are able to effectively manage ESI discovery, the Department developed—in collaboration with representatives from the Federal Public Defenders (FPD) and counsel appointed under the Criminal Justice Act (CJA)—a ground-breaking criminal ESI Protocol. In 1998, a working group known as the Joint Electronic Technology Working Group, or JETWG, was established by then-Attorney General Janet Reno and the Director of the Administrative Office of the U.S. Courts to identify best practices for discovery of ESI between the government and defendants in federal criminal cases. JETWG consists of representatives from the Depart-

21. In order to ensure consistent long-term oversight of the Department's discovery practices, in late 2011 the Department moved the National Criminal Discovery Coordinator position into the Office of the Deputy Attorney General and made it a permanent executive-level position.

22. These training requirements were institutionalized through codification in the USAM: specifically, USAM § 9-5.001 was amended in June 2010 to make training mandatory for all prosecutors within 12 months after hiring, and to require two hours of update/refresher training on an annual basis for all other prosecutors.

23. The Department is currently developing annual update/refresher training for these agents, as well as the next round of training for additional federal law enforcement agencies, including Department of Homeland Security agencies such as Immigration and Customs Enforcement, various Offices of the Inspector General, and other federal agencies.

ment of Justice, FPD representatives, CJA lawyers, and liaisons from the United States Judiciary.

JETWG was dormant from 2007 until early 2010 when the Department's newly-appointed National Criminal Discovery Coordinator and the FPD's National Litigation Support Administrator began the collaborative effort that ultimately led to the creation of the joint ESI Protocol. They agreed that misunderstandings about basic principles of ESI often led to unnecessary expenditures, as well as unnecessary motion practice. During the next two years, a small working group of senior prosecutors and information technology experts from the Department, as well as representatives of FPD and CJA, met regularly and exchanged numerous drafts of the Protocol. It was also reviewed by representatives from the federal judiciary, who provided valuable input and suggestions.

The Protocol, formally entitled "Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases,"²⁴ was distributed to prosecutors, defense attorneys, and members of the federal judiciary in February 2012. By its express terms, it is designed to:

promote the efficient and cost-effective post-indictment production of electronically stored information (ESI) in discovery between the Government and defendants charged in federal criminal cases, and to reduce unnecessary conflict and litigation over ESI discovery by encouraging the parties to communicate about ESI discovery issues, by creating a predictable framework for ESI discovery, and by establishing methods for resolving ESI discovery disputes without the need for court intervention.²⁵

The Protocol quickly received attention in media reports,²⁶ garnered praise from the judiciary and defense bar, and became the main topic of a wide variety of conferences and programs. For example, in April 2012, representatives from the Department, FPD, and CJA who were directly responsible for developing the Protocol participated in a program at Georgetown University Law Center, one of the nation's preeminent law schools in the field of e-discovery, entitled "The New Criminal ESI Protocol: What Judges and Practitioners Need to Know," at which Deputy Attorney General James Cole delivered the opening remarks. Consistent with the Department's long-term commitment in this area, every prosecutor will receive training on the Protocol this year. And plans are underway for the Department, FPD, and CJA to participate in joint training efforts. The Department will also be assisting the Federal Judicial Center to train members of the federal bench.²⁷

The structure of the Protocol deserves mention. The Introduction section provides a series of core principles and contains hyperlinks to the detailed guidance contained elsewhere in the Protocol. Next, a set of basic Recommendations offers general guidance on the production of ESI. The Strategies and Commentary section then expands on the Recommendations, providing technical and more specific guidance. The Protocol concludes with a one-page ESI Discovery Production Checklist. This four-part structure will allow prosecutors, defense attorneys, and the judiciary to

24. DEP'T OF JUSTICE AND ADMIN. OFFICE OF THE U.S. COURTS JOINT WORKING GRP. ON ELEC. TECH. IN THE CRIMINAL JUSTICE SYS., RECOMMENDATIONS FOR ELECTRONICALLY STORED INFORMATION (ESI) DISCOVERY PRODUCTION IN FEDERAL CRIMINAL CASES (2012) [hereinafter Protocol], available at http://www.fd.org/pdf_lib/final%20esi%20protocol.pdf.

25. *Id.*

26. See, e.g., Eric Topor, *Joint Federal Criminal E-Discovery Protocol Places Cooperation Above Motion Filings*, BLOOMBERG BNA: DIGITAL DISCOVERY & E-EVIDENCE, Mar. 1, 2012.

27. To facilitate this process, in April 2012 representatives from the Department and FPD spoke about the Protocol at the Conference for Chief Judges of U.S. District Courts, sponsored by the Federal Judicial Center.

access guidance for ESI discovery at the level of detail most appropriate to a particular case or set of circumstances.

V. THE IMPORTANCE OF A TABLE OF CONTENTS IN COMPLEX CASES INVOLVING LARGE QUANTITIES OF ESI

One critical aspect of the ESI Protocol merits particular attention, as it addresses the unique challenges presented by cases involving large quantities of ESI. Section 5 of the Strategies and Commentary portion addresses “Planning for ESI Discovery Production—The Meet and Confer Process.” Within this description of the meet and confer process, subsection (b) addresses the importance of creating a table of contents for complex cases involving large quantities of ESI:

If the producing party has not created a table of contents prior to commencing ESI discovery production, it should consider creating one describing the general categories of information available as ESI discovery. In complex discovery cases, a table of contents to the available discovery materials can help expedite the opposing party’s review of discovery, promote early settlement, and avoid discovery disputes, unnecessary expense, and undue delay.²⁸

The Protocol then refers, in a footnote, to *United States v. Skilling*, where the Fifth Circuit analyzed the government’s *Brady* obligations in the context of an ESI database that was several hundred million pages.²⁹ In recent years, courts and advocates have grappled with an increasing number of criminal cases where disclosure occurs in the context of huge amounts of ESI, often in the form of large databases of electronically-stored documents, audio and video files, image files, and other materials. *Skilling*—and cases that have applied its reasoning—provides an important guidepost at this critical intersection of the criminal justice system and ESI. As described in the following section, *Skilling* and its progeny identify the line between an impermissible data “dump”³⁰ of discovery materials and appropriate open access to the ESI. These cases support the notion that where the government in good faith provides ESI, voluminous as that ESI may be, in a format that readily allows defendants to search for and locate potentially exculpatory material—particularly where an index or table of contents is provided—*Brady* is satisfied. As a general rule, prosecutors do not have the additional obligation to search for and attempt to locate potential *Brady* material within the ESI. Indeed, in this particular context, it may be in a defendant’s interest to manage this task, rather than rely on the prosecution to do so.

VI. *SKILLING* AND ITS PROGENY

Skilling is the seminal case concerning the government’s obligation to disclose information within voluminous quantities of ESI. In *Skilling*, the Fifth Circuit applied a standard of reasonableness to find that the government did not violate *Brady* in turning over a massive open file because of additional steps it took to make the file easier for the defense to navigate.³¹ Although the government turned over several hundred million pages, the files were electronic and searchable, the government

28. Protocol, *supra* note 24, Strategies and Commentary at 2.

29. 554 F.3d 529, 577 (5th Cir. 2009), *vacated in part on other grounds*, 130 S. Ct. 2896 (2010).

30. *See, e.g., United States v. Ferguson*, 478 F. Supp. 2d 220, 241-42 (D. Conn. 2007) (where government provided defendants with “hot docs” and a searchable electronic format of its entire production, court rejected defendant’s argument that this amounted to an impermissible “document dump.”).

31. 554 F.3d at 557.

produced a set of “hot documents” and indices, and there was no evidence that the government in bad faith hid any exculpatory information in the huge volume of data.³² The court rejected Skilling’s argument that the government should have located and turned over exculpatory evidence within the file, finding that “the government was in no better position to locate any potentially exculpatory evidence than was Skilling.”³³ The court instead found that “[a]s a general rule, the government is under no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence,” rejecting the defendant’s argument that the government concealed favorable information amidst millions of pages of information.³⁴ While the government is not permitted to act in bad faith in performing its obligations under *Brady*, such as purposely hiding exculpatory information in a huge open file, the affirmative steps the government took beyond merely providing the defendant with the open file demonstrated the government’s good-faith efforts to comply with *Brady*.³⁵

Other courts have reached similar conclusions in comparable circumstances. In *United States v. Warshak*, relying in part on *Skilling*, the Sixth Circuit found that *Brady* did not require the government to aggressively review massive amounts of data searching for exculpatory material where there was no evidence that the government was concealing *Brady* materials or acting in bad faith by providing the records in bulk, which had been taken from “tera drives” seized from the defendant.³⁶

In *United States v. Ohle*, the government produced several gigabytes of data—including millions of separate files extending to several million pages in length—in nine separate databases, and any document search had to be conducted on a database-by-database basis.³⁷ The court rejected the defendants’ contention that because “the materials were unduly onerous to access,” the government failed to fulfill its *Brady* obligations.³⁸ The court noted that, “to facilitate review of the documents,” the government provided an “electronically searchable Concordance database,” and held that “as a general rule, the government is under no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence.”³⁹

As *Skilling* indicates, “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.”⁴⁰ Where the government is aware of the location of potentially exculpatory material within a larger database, it should disclose this information to the defense. In *United States v. Perraud*, for example, the government provided the defendants with a searchable database and indicated that it believed it

32. *Id.* at 575-77.

33. *Id.* at 577.

34. *Id.* at 576.

35. *Id.*

36. 631 F.3d 266, 297 (6th Cir. 2010); see also *United States v. Simpson*, No. 3:09-CR-249-D (06), 2011 WL 978235, *8-9 (N.D. Tex. Mar. 21, 2011) (where the government produced 200 terabytes of digital data, specifically identified 50 gigabytes of potentially exculpatory material, and met with the defendant to make recommendations of how the defendant should conduct and focus his search, the court found that the government had “acknowledged its obligations to comply with *Brady* and *Giglio*, and it has taken additional steps . . . some of which are of the type cited with approval in *Skilling*, to facilitate [the defendant]’s review of the evidence.”); *United States v. Shafer*, No. 3:09-CR-249-D (05), 2011 WL 977891, *3-4 (N.D. Tex. Mar. 21, 2011) (same).

37. No. S3 08 CR 1109 (JSR), 2011 WL 651849, *3 (S.D.N.Y. Feb. 7, 2011).

38. *Id.*

39. *Id.* at *4. Furthermore, the court noted that *Brady* “does not place any burden upon the government to conduct a defendant’s investigation or assist in the presentation of the defense’s case.” *Id.* (citing *United States v. Marrero*, 904 F.2d 251, 261 (5th Cir. 1990)).

40. 554 F.3d at 577.

had directed the defendants to all exculpatory evidence.⁴¹ The court approved of these actions and ordered that “to the extent that the Government becomes aware of exculpatory evidence that it has not already identified to Defendants [the government is ordered] to make such identification immediately upon discovering such evidence.”⁴²

Courts have also recognized in this line of cases that if neither party is aware of particular *Brady* material within a large file, defendants are often equally positioned and capable of locating potentially exculpatory material. Put another way, the government usually has no advantage in terms of being able to locate potential *Brady* material within a large quantity of ESI (and may actually be in worse position). For example, in *Ohle*, the court reasoned that, since the government and defense had equal access to the searchable database, “the defendants were just as likely to uncover the purportedly exculpatory evidence as was the Government.”⁴³ The court also rejected the argument that the government had any “heightened obligation to uncover exculpatory evidence in light of its allegedly extensive resources and subpoena powers.”⁴⁴

Similarly, in *United States v. Dunning*, the court rejected the defendant’s contention that government had a duty to conduct forensic analysis on the same hard drives that the defendant possessed, finding that the government was not suppressing any information because the defendant had the same access to the information that the government did.⁴⁵ The court noted that “*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.”⁴⁶

One court reached a different conclusion, but expressly noted the limited precedential significance of its opinion. In *United States v. Salyer*, a magistrate judge required the government to identify particular exculpatory evidence where it produced “voluminous” discovery to “a singular, individual defendant, who is detained in jail pending trial, and who is represented by a relatively small defense team.”⁴⁷ The magistrate ordered the government to identify these materials as a “matter of case management and fairness,”⁴⁸ but specifically emphasized the narrow application of the order to the unique factual circumstances of the case.⁴⁹

Most recently, in *United States v. Rubin/Chambers, Dunhill Insurance Services*, the court refused to follow *Salyer*.⁵⁰ In *Rubin/Chambers*, the government provided searchable databases of audio files, documents, and other discovery material, indices describing those databases, metadata permitting searches of audio files, and tran-

41. No. 09-60129-CR, 2010 WL 228013, *12 (S.D. Fla. Jan. 14, 2010).

42. *Id.*

43. 2011 WL 651849, at *4.

44. *Id.*; see also *United States v. W.R. Grace*, 401 F. Supp. 2d 1069, 1080 (D. Mont. 2005) (where the government produced its entire evidentiary database of over 3.3 million documents, the court found that *Brady* was satisfied, as the defendants were no less able than the government to locate exculpatory materials in the database in part because the documents were easily searchable).

45. No. CR-07-1390-PHX-MHM, 2009 WL 3815739, *2 (D. Ariz. Nov. 12, 2009).

46. *Id.* at *1 (also noting that “Federal Rule of Criminal Procedure 16(a)(1)(E) requires the Government merely to permit the inspection and copying of certain items ‘if the item is within the government’s possession, custody or control.’”).

47. No. S-10-0061 LKK (GGH), 2010 WL 3036444, *7 (E.D. Cal. Aug. 2, 2010).

48. *Id.* at *2.

49. *Id.* at *8 (“The undersigned emphasizes that the initial order and this reconsideration order is limited to the circumstances of this case. The undersigned does not find, nor would he, that the identification requirements of this case would apply to other cases not similarly situated in factual circumstances.”).

50. No. 09 Cr. 1058, 2011 WL 5448066, *4 (S.D.N.Y. Nov. 4, 2011).

scripts of available audio files.⁵¹ The defendant relied on *Salyer* to request that the government be ordered to organize and format the production into four categories framed by the defendant.⁵² The court rejected this request. The court recognized that the Ninth Circuit had identified “certain circumstances” where as a matter of fairness and case management courts may require prosecutors to identify or sort *Brady* material within a voluminous production, but held that “[a]bsent prosecutorial misconduct—bad faith or deliberate efforts to knowingly hide *Brady* material—the Government’s use of ‘open file’ disclosures, even when the material disclosed is voluminous, does not run afoul of *Brady*.”⁵³ This holding affirms *Skilling* and its progeny: where the government provides electronic production materials, voluminous as those materials may be, in a format that readily allows defendants to search for and locate potentially exculpatory material, *Brady* is satisfied.

CONCLUSION

These decisions underscore the significance of the Department’s commitment to best practices concerning disclosure of ESI in criminal prosecutions. Courts across the country have looked favorably on precisely the practices that are recommended in the ESI Protocol, including providing ESI in a usable format with a comprehensive table of contents. As the Protocol advises, “[i]n complex discovery cases, a table of contents to the available discovery materials can help expedite the opposing party’s review of discovery, promote early settlement, and avoid discovery disputes, unnecessary expense, and undue delay.”⁵⁴ As the volume and complexity of ESI continues to increase in criminal cases, the Department’s firm commitment to meeting and exceeding disclosure obligations, in formats that are mutually beneficial for all parties, is essential to ensuring that justice is done in the digital age.

51. *Id.* at *1, *4.

52. *Id.* at *1.

53. *Id.* at *2-3.

54. Protocol, *supra* note 24, Strategies and Commentary at 2.