



Government is to Bear Burden of Reproducing ESI in Criminal Case

October 4, 2011

United States v. Briggs, et al, No. 10-CR-184S (W.D.N.Y. Sept. 8, 2011)

In a matter of first impression, the Western District Court of New York recently answered the question as to the manner in which the Government is to produce certain ESI where the Federal Rules of Criminal Procedure are silent as to the issue.

In *United States v. Briggs*, the defendants were charged with a conspiracy to distribute cocaine and money laundering. The criminal investigation involved court-authorized interceptions of the defendant's cell phone conversations. During discovery, the phone calls were transcribed and converted to ".tiff" ("TIFF") graphic files using the **IPRO program**, which is the national standard for all United States Attorneys' Offices. The Government then furnished the defense counsel with disks containing thousands of TIFF files that were unable to be sorted or searched, and lacked information that a ".pdf" ("PDF") file would have included. Because the TIFF files were unusable in the format produced, the defense moved to compel the Government to produce the ESI in either a searchable PDF in native format.

When deciding whether to grant the defendants' motion, the Court wrote that unlike the Federal Rules of Civil Procedure, which sets forth a procedure for electronic discovery, the Federal Rules of Criminal Procedure has "no express ESI regime." Furthermore, "in this District, the Local Criminal Rules do not address ESI, or even incorporate by reference the analogous civil rules which address ESI discovery."

Relying on the "only other published decision involving production of criminal ESI," *U.S. v. O'Keefe*, 537 F. Supp. 2d 14 (D.D.C. 2008), the Court held that Fed. R. Crim. P. 16(d)(1) permits a court to use its discretion when granting the appropriate relief in discovery, which includes ordering the manner of production. *U.S. v. O'Keefe*, *supra*, 537 F. Supp. 2d at 19 (adopting the pertinent Federal Rules of Civil Procedure wholesale as the standard for production of criminal ESI). Therefore, the Court held that for "purposes of the motion *in this case*, the standard of Federal Rule of Civil Procedure 34(b)(2)(E)(ii) should apply[;] that is the Government produces this ESI 'in a reasonable usable form or forms.'"

In analyzing if the TIFF images generated by the IPRO program were a "reasonable useable form," the Court noted that "the paper equivalent [of the manner in which the Government produced the ESI] would be if the Government took photographs of thousands of pages (which the TIFF files are), put them in boxes, and invited inspection by defense counsel." Thus, in order to avoid "'docu-dump' discovery prevalent in civil practice almost

a generation ago,” the Court ruled that the Government should have to produce the ESI in a PDF format suitable for searching or in the information’s native format.

Finally, in what seems to be an effort to express the Court’s concern about having the Advisory Committee on Criminal Rules “take note of the omissions [in the rules] and address it at the earliest opportunity,” the Court concluded that because the “Government is the party better able to bear the burden of organizing” the ESI, they should bear the cost of “reproduce[ing] [the] ESI materials in a fashion that defendants can retrieve and manipulate.”

A special thanks to Sean Gajewski for helping with this post. Sean is a third-year law student at Hofstra University School of Law. You can reach him by email at [srgajewski \[at\] gmail dot com](mailto:srgajewski@gmail.com). Bio: www.sgajewski.com.