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Defendants' Pretrial Access To Documents In White-Collar Prosecutions

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Accused of withholding a DNA report favorable to the defendants in the Duke lacrosse case, Durham, NC, District Attorney Mike Nifong reached for an argument familiar to defense attorneys: Even if he didn't produce a report identifying exculpatory DNA results, he did produce documents containing those results — among over a 1,000 pages of related documents produced before trial. Of course, the North Carolina Bar found that Nifong did more than simply bury favorable evidence in a document production. Assume, however, that he *had* produced exculpatory DNA results, and even a report explaining them, in thousands of pages of documents, but defense counsel didn't find them. Did he satisfy his disclosure obligations?

No, according to at least some decisions. Indeed, courts have long held that the government cannot satisfy its discovery obligations by merely turning over mountains of documents. *See, e.g., U.S. v. Bortnovsky*, 820 F.2d 572 (2d Cir. 1987); *U.S. v. Poindexter*, 727 F. Supp. 1470 (D.D.C. 1989). Nevertheless, the "document dump" has become only more common, especially in complex white-collar criminal cases. And defense attorneys in those cases would be lucky to get only a few thousand pages; they often face millions. Even if the documents are electronically searchable, most defendants lack the money and time before trial for their attorneys to review them.

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Rule 16(a)(1)(E)

Upon a defendant's request, Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure requires the government to produce documents (and other tangible items) in its "possession, custody, or control" if: 1) they are "material to preparing the defense"; 2) the government intends to use them in its case-in-chief; or 3) the government obtained them from the defendant. But Rule 16 does not explicitly require the government to tell the defense which documents it intends to use and which are material to the defense. To prepare a defense, counsel must guess what's relevant.

Recognizing this problem, a few courts have required the government in document-heavy cases to provide a bill of particulars or to produce before trial (and sooner than weeks before, which the government often agrees to) an exhibit or witness list to aid defendants' discovery review. Courts have done so despite government arguments that this relief isn't required if the government has given "open file" discovery or has produced searchable electronic documents.

In *U.S. v. Anderson*, 416 F. Supp. 2d 110, 113 n.2 (D.D.C. 2006), the government produced hundreds of thousands of documents, and the defendant moved to require the government to identify those it intended to use in its case-in-chief. Given the volume of documents produced, the court held that forcing defense counsel to "peruse each page" and duplicate the government's review would materially impede counsel's ability to prepare an adequate defense. The court noted that it had discretion to impose the remedy requested, although it wasn't required by the text of Rule 16.

Similarly, in *U.S. v. Locascio*, 2006 WL 2796320, *6-7 (D.S.C. Sept. 27, 2006), the defendants, charged with conspiracy to commit health care fraud, wanted the government to identify the medical records it intended to use at trial. The government had produced over 10,000 pages containing records for more than 3,000 patients. Defendants argued they could not prepare for trial without knowing which of the records the government intended to use, especially since they needed experts to review those records.

The government countered that it had satisfied its Rule 16 obligations by producing searchable electronic documents, plus an index, and thus it shouldn't have to reveal its hand further. The court disagreed. Even though the government technically complied with Rule 16, the volume of material produced may hinder the defense's understanding of the government's case and make it akin to "finding a needle in a haystack."

Prosecutors' Double Standard of Materiality

When haystacks of documents are produced by the government, you'd think that means prosecutors are taking a broad view of what's "material to preparing the defense" under Rule 16(a)(1)(E). Instead, it often turns out that the government has two contradictory standards for materiality: a broad

one when it comes to producing haystacks and a narrow one for withholding key documents, like investigative reports and analyses obtained from company counsel that not only discuss the central facts and issues in the case (and are material for that reason alone), but also would substantially help the defense analyze the mountain of documents the government has produced. Predictably, prosecutors will argue that their dumping volumes of immaterial documents on the defense is no waiver of their right to withhold others they know the defense would want by pronouncing them immaterial.

Because white-collar cases frequently arise from a company's investigation of alleged misconduct, company lawyers often know better than anyone else what documents support the government's case. In fact, these lawyers were likely the ones who gave those documents to the government, in well-organized binders, to demonstrate the company's cooperation. Although company counsel's work helps the government wade through the documents, the government typically withholds it from the defense, arguing it's not material.

Courts have accepted the government's position, largely based on a narrow interpretation of Rule 16 materiality. For example, in *U.S. v. Rigas*, 258 F. Supp.2d 299, 307 (S.D.N.Y. 2003), the defendants sought documents from Adelphia's internal investigation that had been provided to the government. The defendants argued that those documents would expedite document review and, because the internal investigation presumably had played a role in the structure of the government's case, provide material information. Judge Sand denied the request, ruling that the defense argument conflated "useful" with "material." (The court may have ruled differently had the government not agreed, in response to defense motions, to provide a bill of particulars identifying each alleged sham transaction and false entry, and to disclose two-and-a-half months before trial the business records to be used at trial, and a month and a half before trial witness lists and impeachment material.)

By contrast, a recent decision in the KPMG tax-shelter prosecution reflects a broader view of materiality. *U.S. v. Stein*, 488 F Supp. 2d 350 (S.D.N.Y. 2007). The KPMG defendants sought various documents from the government, including correspondence between KPMG and various government entities, and a "white paper" KPMG submitted to the government. Despite the government's right under KPMG's deferred prosecution agreement to demand documents in KPMG's possession, the government argued it lacked "possession, custody, or control" of documents still in KPMG's possession — in other words, documents it hadn't demanded yet. But because the government could demand documents from KPMG, and because the government's Rule 16 obligations aren't limited to documents it possesses, Judge Kaplan found that the KPMG documents were under the government's control. (*See* the article on page 3, by Jacqueline C. Wolff and Ethan I. Jacobs.)

Judge Kaplan also found that the defendants had established that most of the requested documents were material, *i.e.*, they showed a "'strong indication'" that the documents sought "'will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.'" Accordingly, he ordered the government to produce communications between KPMG and government agencies concerning the facts at issue, and one section of the KPMG white paper discussing incidents apparently central to charges in the Indictment.

Deciding a motion seeking similar documents — an internal investigation report and interview memoranda — the court in *U.S. v. Bergonzi*, 216 F.R.D. 487, 500-502 (N.D. Cal. 2003), likewise found them material. Although the government argued that those documents were merely analyses of evidence already available to the defense, the court held they could help defendants uncover admissible evidence and impeachment material, including information about other allegedly culpable parties and the reasons for the accounting judgments at issue. The court noted the government's concession that the documents were a "roadmap" for the facts of the case, which had allowed the government to save resources in its investigation.

Strength in Numbers

The sheer number of documents confronting defendants in white-collar cases demonstrates the need for particularization and identification of the government's evidence well before trial; meaningful document review cannot occur without it. In *Bortnovsky*, the Second Circuit found that four days was insufficient time to review 4,000 documents. Under that ratio, *10 years* would be insufficient to review four million documents — a typical production in a complex case today.

In response, prosecutors may offer to produce fewer documents. But no defense attorney will take less when the government will give more. The better remedy would be to amend Rule 16 to require the government to identify from among the documents it produces those it believes support the allegations in the Indictment. After all, Rule 16 is supposed to allow defendants to see the evidence against them. Furthermore, because witness statements would focus document review perhaps better than anything else, the Jencks Act should be amended to require the government to produce witness statements well before trial — as part of Rule 16 discovery — unless doing so threatens witness safety.

Meanwhile, when the government produces voluminous documents, it should be required to provide a bill of particulars, an early list of exhibits and witnesses, or both. And the government should recognize that documents material to the defense include those, like reports and analysis by company counsel available to the government, that facilitate the defense's document review—just as they facilitated the government's. If the defense can't find a document, the government hasn't really produced it. In retrospect, Nifong would probably agree.