UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v. Case No. 3:13-cr-58-J-99MMH-JRK

RICHARD DALE BROOKS

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UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS

The United States of America, by and through the undersigned Assistant United States Attorney, files this response to defendant's Motion to Suppress filed in this case on June 10, 2013 (Doc. 39). For the reasons set forth below, the Court should deny defendant's motion.

Factual Summary

The facts necessary for the resolution of defendant's motion are set forth in the affidavit (the "Affidavit") sworn by Jacksonville Sheriff's Office (JSO) Detectives Gary M. Snyder and Anthony Durfee[1] in support of the search warrant for defendant's residence, and in the search warrant (the "Warrant") issued by Duval County Circuit Judge Thomas Beverly (the "Circuit Judge") on August 1, 2012. These documents are attached hereto as Exhibits A and B respectively.

[1] Detectives Snyder and Durfee are cross-designated as Customs Officers and are federal task force agents with the U.S. Department of Homeland Security, Homeland Security Investigations (HSI).

Memorandum of Law

In his motion to suppress the evidence recovered from the search of his residence and computer media, defendant complains that the Warrant was executed in an unreasonable manner, that the Warrant was invalid because it lacked particularity and was overbroad, and that the agents lacked good faith in their reliance on and execution of the Warrant[2]. Doc. 39 at 1-3. To the contrary, the Warrant was executed in a reasonable manner by agents who acted in good faith, and the Warrant was sufficiently particularized and not overbroad. Accordingly, the Court should deny defendant's motion.

I. The Warrant was executed in a reasonable manner.

In his motion, defendant contends that the Warrant was executed in an unreasonable manner solely because the officers seized computer media and related technology from defendant's residence, including some items that were not evidence of child pornography offenses and retained these items for several months. Doc. 39 at 13-19. Defendant is mistaken.

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[2] In United States v. Conrad, Case No. 3:12-cr-134-J-34TEM, the defendant filed a motion to suppress raising these same three issues. See Conrad, Doc. 43. The facts in Conrad are strikingly similar – it is a child pornography case involving the execution of a state search warrant, and the affiant was JSO Detective Snyder. On May 14, 2013, United States Magistrate Judge Thomas E. Morris issued a Report and Recommendation ("Conrad R&R") recommending that Conrad's motion to suppress be denied. See Conrad, Doc. 85. The United States commends this well-reasoned R&R to this Court as highly persuasive authority in this case, and has attached a copy of the opinion for the Court's convenience as Exhibit C.

The Supreme Court has determined that a seizure is reasonable if a warrant has been issued on probable cause. United States v. Place, 462 U.S. 696, 722 (1983). Total suppression of all items seized, including items within a search warrant's scope, is not appropriate unless the executing officers' conduct "exceeded any reasonable interpretation of the warrant's provisions." United States v. Wuagneux, 683 F.2d 1343, 1354 (11th Cir. 1982). "Absent a 'flagrant disregard' of the terms of the warrant, the seizure of items outside the scope of the warrant does not affect the admissibility of items properly seized," or "constitute reversible error on direct appeal from the conviction." United States v. Lambert, 887 F.2d 1568, 1572 (11th Cir. 1989). Of course, contraband items cannot be returned after seizure, since no "suspect has...even a bare possessory right to contraband." Warden v. Hayden, 387 U.S. 294, 311 (1967).

Defendant contends that a lawful seizure can still violate the Fourth Amendment if the search is conducted in an "unreasonable" manner. Doc. 39 at 13. However, "many of the same considerations that determined the sufficiency of the warrant's particular description of things to be seized also affect the reasonableness of the search itself." Wuagneux, 683 F.2d at 1352. "A rather extensive search [can] reasonably be expected" when the nature of the crimes under investigation is such that they can be detected exclusively through examination and review of a large number of files. Id. This is certainly true in child pornography investigations.

In support of his argument that the Warrant was executed in an "unreasonable" manner, defendant cites United States v. Mitchell, 565 F.3d 1347 (11th Cir. 2009), and United States v. Laist, 702 F.3d 608 (11th Cir. 2012). Doc. 39 at 14. In these cases, agents seized computer media without a warrant and held it for a period of time *before* obtaining search warrants for the contents of the media. Mitchell, 565 F.3d at 1329; Laist, 702 F.3d at 610-12. Mitchell and Laist are inapposite because here, Detectives Snyder and Durfee obtained a valid search warrant *first*, and then lawfully seized and searched defendant's computer media and related technology pursuant to the Warrant. So, defendant's reliance on Mitchell and Laist is misplaced as these cases are "distinguishable and inapposite." Conrad R&R at 20.

Defendant's argument that the government's retention of the non-contraband items between the completion of the forensic examination and defendant's request for their return somehow justifies suppression of lawfully seized evidence is not supported by case law. See Conrad R&R at 21. To the contrary, "the extreme remedy of blanket suppression should only be imposed in the most 'extraordinary' of cases," when officers take "particularly egregious actions" pursuant to a warrant. United States v. Foster, 100 F.3d 846, 852 (10th Cir. 1996). There were no such egregious actions here.

A review of the procedural history of this case is instructive. On August 2, 2012, the Warrant was executed at defendant's residence. On March 27, 2013,

defendant was indicted in this case, and he was arrested on April 3, 2013 in Cocoa, Florida. During the 8-month period between the execution of the Warrant and defendant's arrest, neither defendant nor counsel nor any other interested persons ever made a request to either the Jacksonville Sheriff's Office or the Department of Homeland Security to return any of the items seized. Defense counsel entered an appearance on April 5, 2013, and received a copy of the indictment. Doc. 14. The indictment set forth in detail the items seized from defendant's residence that the United States intended to forfeit. Doc. 1 at 5. Discovery was provided to defendant on April 16, 2013, detailing the numerous images and video files containing child pornography found on various media seized from defendant's residence. See Exhibit D.

Soon after defendant's arrest and appearance in court, counsel for the parties consulted regarding the United States' position on the return of seized property to defendant. Counsel for defendant advised that he was seeking return of all of the property and declined to limit his request to property that does not contain or consist of contraband. Doc. 29 at 2. Consequently, counsel for the United States advised defense counsel that she would oppose a motion seeking return of the property. Id.

On April 26, 2013, defendant filed his motion for return of seized property, Doc. 25, naming all of the property identified in the forfeiture count of the indictment, and claiming only that "the property seized pursuant to the Court's

search warrant was lawfully possessed by Defendant." Id. at 2. Several of the items listed contained contraband, were used in the commission of the criminal offenses with which defendant is charged, and were therefore subject to forfeiture. In his motion for return of property, defendant did not identify any non-contraband items. The United States filed a response opposing this motion on May 9, 2013, explaining, among other things, that defendant had failed to provide any support as to his lawful possession of the property that contained files depicting minors engaging in sexually explicit conduct. Doc. 29. Counsel for the United States noted that the government was willing to return contraband-free items to a designee of defendant who is not prohibited from possessing these items, but that counsel for defendant had declined to discuss specific items. Id.

On May 16, 2013, this Court entered an order instructing the parties to confer and attempt to reach an agreement regarding which property, if any, could be returned to defendant or another suitable individual, and requiring the parties to file a joint notice by May 28, 2013, identifying the property still at issue. Doc. 30 at 1. Counsel for the parties conferred, and on May 24, 2013, the law enforcement agents returned two cameras, a notebook computer, and 4 CD/DVDs to counsel for defendant. See Exhibit E. The parties also made arrangements to return an additional computer to defendant's designee. On May 28, 2013, the parties filed a joint notice so stating. Doc. 32. In the joint notice,

defendant listed, for the first time, several specific items that he wanted to be returned. Id. at 1-2. In the notice, the Court was also advised that some of these listed items were unlabeled and were, in some instances, commingled with contraband. Id. at 2.

On June 7, 2013, the Court issued an order directing the United States to return to defendant, or his designee, all property listed in the joint notice "that is not commingled with contraband and that can be located with Defendant's assistance." Doc. 36 at 2. On June 11, 2013, the undersigned filed a notice of appearance in this case. Doc. 41. On that same day, counsel contacted HSI Special Agent (SA) James Greenmun, who is also a computer forensic agent, and requested that he confer with counsel for defendant to make arrangements to provide defendant's non-contraband items in compliance with the Court's order. The undersigned also spoke with counsel for defendant and advised that the agents would provide non-contraband items to him if he provided a clean external hard disk drive. This conversation was cordial, and counsel agreed to do so.

On June 13, 2013, counsel for defendant mailed a clean external hard disk drive to HSI SA Greenmun that was received on June 17, 2013. On June 12, 2013, SA Greenmun spoke with counsel for defendant by telephone, and advised that he (Greenmun) was not comfortable providing defendant with copies of potentially pirated movies and music, and counsel agreed that such

items should not be provided. On June 17, 2013, SA Greenmun undertook the task of locating non-contraband items on defendant's media (personal photographs of his family, friends, and travel, together with loan documents, military documents, tax documents, and personal letters), and copying them onto the clean hard disk drive provided by defense counsel. On June 19, 2013, SA Greenmun delivered this disk drive containing these items to counsel's office in Jacksonville. On June 26, 2013, defendant notified the Court that the non-contraband items that could reasonably be separated had been returned. On June 28, 2013, an additional non-contraband item was returned to defense counsel.

Thus, the delay in the return of the non-contraband items was largely due to defendant's own actions (or inactions). This Court should not countenance defendant's effort to convert a purely administrative matter into a constitutional claim. Defendant's claim of "unreasonableness" must fail.

II. The Warrant is sufficiently particularized and not overbroad.

The Fourth Amendment requires a search warrant "particularly describing the place to be searched and the persons or things to be seized." U.S. Const. amend. IV. "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another." Marron v. United States, 275 U.S. 192, 196 (1927). "[A] warrant which fails to sufficiently

particularize . . . the things to be seized is unconstitutionally over broad." United States v. Travers, 233 F.3d 1327, 1329 (11th Cir. 2000). However, the scope of a lawful search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found." Maryland v. Garrison, 480 U.S. 79, 84 (1987) (citing United States v. Ross, 456 U.S. 798, 824 (1982)). A search warrant is not overbroad when it is "limited . . . to the instrumentalities of the specified offense. United States v. Osborne, 630 F.2d 374, 378 (5th Cir. 1980).

Here, the Warrant was particularized and not overbroad. It listed with specificity the place where the Warrant was to be executed as well as the particular items that law enforcement was authorized to seize and search. Warrant at 1-3. It specified that the Circuit Judge had "found probable cause that a computer or other digital device capable of accessing the internet by means of service provided at or through the above described residence was knowingly used as an instrumentality of a crime and contains evidence relevant to proving a violation of the following Felony laws:, to wit: [§] 847.0135(2), Florida Statutes, prohibiting possession of child pornography under the: 'Computer Pornography and Child Exploitation Prevention Act', and [§] 827.071, Florida Statutes, prohibiting the sexual performance of a child and the creation, possession or promotion of an image of such conduct,..." Id. at 2. See United States v. Martinelli, 454 F.3d 1300, 1308 (11th Cir. 2006) (search warrant not

overbroad when supporting affidavit sufficiently detailed alleged crimes). The Warrant authorized the seizure and search of computer storage media "which can be accessed by computers to store or retrieve data or images of child pornography," Warrant at 2, ¶ 3; correspondence or other documents "pertaining to the possession, receipt, origin or distribution of images involving the sexual exploitation of children," id. at 3, ¶ 8; documents "exhibiting an interest or the intent to sexually exploit children," id., ¶ 9; items that would establish ownership and use of computers and the residence, id., ¶¶ 10-11; and computer data, including images and videos, that relate to "the possession and distribution of child pornography," id., ¶ 12. The Warrant, when read together with the Affidavit, properly linked the items to be seized and searched to the suspected specified criminal activity, that is, child pornography offenses.

Defendant argues that particularity was lacking because "neither the warrant nor affidavit defines the critical phrases 'child pornography' or 'sexual exploitation of a minor.'" Doc. 39 at 23. However, the Affidavit specifically details what constitutes child pornography. Affidavit at 5-6. This description was made out of an abundance of caution and has not been found necessary in other circuits. See, e.g., United States v. Layne, 43 F.3d 127, 133 (5th Cir. 1995) (holding that material depicting "child pornography" was sufficiently particular); United States v. Hurt, 808 F.2d 707, 707 (9th Cir. 1987) (holding that

"minors (that is, persons under the age of 16) engaged in sexually explicit activity" was sufficiently particular).

Defendant argues that the Warrant does not expressly incorporate by reference the Affidavit and thus the Affidavit cannot be used to cure any deficiencies in the Warrant. Doc. 39 at 20 n.11, 23 n.14. As stated above, the Warrant is not deficient, and it expressly references the Affidavit. Warrant at 1. The case cited by defendant, Groh v. Ramirez, simply notes that most circuits allow an affidavit to cure deficiencies in a warrant if the warrant incorporates by reference the affidavit and accompanies it. 540 U.S. 551, 557-58 (2004). The Court did not opine that such was the *only* way an affidavit can "cure" a warrant. In United States v. Pratt, 438 F.3d 1264, 1269 n.8 (11th Cir. 2006), the Eleventh Circuit noted that "[s]earch warrants can incorporate by reference the words of supporting documents if the documents are attached to the warrant." This circuit as well as others recognize additional ways of validly encompassing the affidavit. See Wuagneux, 683 F.2d at 1351 n.6 (holding that an affidavit cured a warrant because the affidavit was available at the search site and had been explained to the executing agents); see, e.g., United States v. Haydel, 649 F.2d 1152, 1157 (5th Cir.), corrected, 664 F.2d 84 (5th Cir. 1981) (holding that an affidavit cured a warrant, though not physically attached, because "the affidavit appears in the record with the warrant each time the warrant itself appears" and the affidavit was at the search site); and United States v. Thompson, 495 F.2d 165, 170 n.4 (D.C. Cir. 1974) (holding that an affidavit cured a warrant because

both were simultaneously delivered to the magistrate and the affidavit was available at the search site). Here, the Affidavit was presented as part of the application for the Warrant to the Circuit Judge, and was available at the search site, defendant's residence.

Defendant also complains that the Warrant was defective because "it should have been limited by reference to the various technical means that enable the government to confine the search to the scope of the probable cause." Doc. 39 at 30. This argument has been rejected by the Eleventh Circuit and at least two other circuit courts. See United States v. Maali, 346 F. Supp. 2d 1226, 1246 (M.D. Fla. 2004), aff'd sub nom United States v. Khanani, 502 F.3d 1281, 1290 (11th Cir. 2007) (absence of written search protocol did not render search warrant overbroad); see also United States v. Brooks, 427 F.3d 1246, 1251-52 (10th Cir. 2005) (search warrant need not include a search protocol to satisfy the particularity requirement of the Fourth Amendment); and United States v. Hill, 459 F.3d 966, 977-978 (8th Cir. 2006) (same).

Defendant further grouses that suppression of all evidence acquired based on the Warrant is required because several of its provisions are facially invalid. Doc. 39 at 36-39. In support, he relies on Cassady v. Goering, 567 F.3d 628 (10th Cir. 2009). In Cassady, a landowner brought a civil action against a local sheriff alleging that his Fourth Amendment right to be free from unreasonable searches and seizures was violated because the search warrant

for the property was not sufficiently particularized and was overbroad. In finding that the search warrant was overbroad and invalid, the court noted:

> The warrant here is ungrammatical and difficult to read in many respects. It authorized the search of the entire farm, including Mr. Cassady's house, and the seizure of "[a]ny & all narcotics," "[a]ny and all illegal contraband" and various specific items mostly related to a narcotics operation. ... In addition, however, and most damaging to [Sheriff] Goering's argument, the warrant expressly permitted the search and seizure of "all other evidence of criminal activity," as well as personal property that was stolen, embezzled, or otherwise illegal; or was designed, intended, or had been used to commit a criminal offense; or would be material evidence in a criminal prosecution in Colorado or any other state; or the seizure of which was expressly required, authorized, or permitted by any Colorado statute. ... Hence, the warrant did not confine the scope of the search to any particular crime. The officers had only probable cause to search for evidence related to marijuana cultivation, yet the warrant authorized the seizure of *all* possible evidence of *any* crime in *any* jurisdiction.

Id. at 635 (italics in original).

Unlike the warrant in Cassady, the Warrant is neither "ungrammatical" nor "difficult to read." It is straightforward, contains provisions that are limited to child pornography offenses, and does not authorize unlimited search and seizure of all evidence of any criminal activity. By its terms, the Warrant permitted the seizure of items in which evidence of the specified child pornography offenses may be located, and a search of such seized items for evidence of such offenses. The provisions of the Warrant are both limited in

scope and linked to the crimes specified. Thus, Cassady does not support defendant's argument.

Assuming *arguendo* that some of the provisions of the Warrant were *somehow* construed to be invalid, the remedy would not be suppression of all of the evidence. Rather, the district judge "should sever the infirm portion of the search warrant from so much of the warrant as passes constitutional muster." United States v. Cook, 657 F.2d 730, 735 (5th Cir. Unit A Sept. 30, 1981)[3]. Even if this Court were to sever the seven provisions of the Warrant that defendant finds objectionable, Doc. 39 at 21-22, the remaining provisions[4] are sufficient to justify the seizure and search of the evidence in this case.

The Warrant authorized the seizure of computer storage media, Warrant at 2, ¶ 3, as well as "data maintained on ... computer related storage devices ..., in particular, data in the form of images and/or videos ..., as they relate to violations of Florida cited herein as related to the possession and distribution of child pornography," Warrant at 3, ¶ 12. As shown above, the Affidavit established probable cause that child pornography, that is, evidence of the specified criminal offenses, would likely be found on this computer storage media. Therefore, the Warrant properly authorized the seizure of all computers

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[3] Pursuant to Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), all decisions of the former Fifth Circuit announced prior to October 1, 1981, are binding precedent in the Eleventh Circuit.

[4] In his motion, defendant overlooks paragraph 10 of the Warrant, which specifically refers to items that prove the ownership of internet service used "to obtain child pornography" See Warrant at 3, ¶ 10.

and a subsequent search for particular items falling within its scope, including images and videos of child pornography. See Wuagneux, 683 F.2d at 1353 (court found that it was "reasonable for agents to remove intact files, books and folders when a particular document within the file was identified as falling within the scope of search warrant").

The Affidavit states that law enforcement had obtained substantial evidence that someone was sharing illegal computer files containing child pornography using an IP address assigned to defendant's residence. The Warrant properly limited the search to digital storage devices, accessories, and other items that could contain such contraband and evidence linked to the child pornography offenses specified in the Warrant. See United States v. Gabel, 2010 WL 3927697, at *10 (S.D. Fla.), aff'd, 470 F. App'x 853 (11th Cir. 2012). The fact that some of the specific numbered items in the Warrant do not reference child pornography is unremarkable under the circumstances. See Conrad R&R at 12. Because the Warrant is sufficiently particularized and not overbroad, defendant's argument must fail.

III. The agents exercised good faith in relying on the search warrant.

In his motion, defendant protests that the "good faith" exception recognized in United States v. Leon, 468 U.S. 897 (1984), should not apply because the Warrant "should be construed as facially invalid, [and] no reasonable agent could have presumed it to be valid." Doc. 39 at 43. Defendant is mistaken. The Warrant was issued based upon sufficient probable

cause as set forth in the Affidavit and is facially valid. However, the United States will briefly address the "good faith" exception mentioned by defendant.

In Leon, the Supreme Court has created a "good faith" exception to the exclusionary rule. 468 U.S. at 907-08. This exception allows courts to admit evidence obtained by police officers in reasonable reliance upon search warrants that are ultimately found to be unsupported by probable cause. United States v. Anton, 546 F.3d 1355, 1358 (11th Cir. 2008). The Leon good faith exception applies in all but four limited circumstances, one of which defendant argues in this case, that is, the warrant is based on an affidavit completely lacking probable cause such that an officer's reliance on the warrant is unreasonable. Leon, 468 U.S. at 923. A court should look to the face of the particular affidavit at hand in order to determine whether the warrant is so devoid of probable cause that the officer's belief in its validity at the time it was issued was entirely unreasonable. United States v. Martin, 297 F.3d 1308, 1313 (11th Cir. 2002).

The Affidavit was not "so lacking in probable cause" for the seizure and search of defendant's residence and computer media to make the agents' reliance on it unreasonable. To the contrary, the Affidavit provided sufficient information for the Circuit Judge to determine that there is a fair probability that evidence of the listed child pornography offenses would be found therein. The Affidavit established a nexus between defendant, the residence, his computer media, and the criminal activity. It is not "bare-boned," but rather sets forth

specific and articulable facts that support the seizure and search of the listed items. It was objectively reasonable for the agents to rely in good faith on the validity of the Warrant, as it was supported by admissible evidence that was sufficiently particularized. See United States v. Haynes, 160 F. App'x 940, 944 (11th Cir. 2005) (court declined to suppress evidence from search warrant in child exploitation case because officers acted in reasonable reliance upon warrant).

There is no evidence in this case that the agents deliberately exceeded the scope of the Warrant in the items seized during the search. The Warrant stated that there was probable cause to believe that a computer located in defendant's residence contained child pornography, Warrant at 1, and the Warrant was sufficiently detailed that a reasonable officer would have believed in good faith that the Warrant was valid. See Conrad R&R at 22. This is not a situation where "even a cursory reading of the warrant would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal." Id. (citing Groh 540 U.S. at 564; see also United States v. Riccardi, 405 F.3d 852, 864 (10th Cir. 2005) (holding that the good faith exception applied, even though warrant lacked particularity because it authorized the seizure of all computer equipment and did not reference the alleged crime)). Accordingly, defendant's "lack of good faith" argument must fail.

As a corollary, defendant claims that the law enforcement officers "did not act in good faith" in "continuing to hold all the property agents seized from [d]efendant's home despite completing its forensic analysis." Doc. 39 at 40. Defendant cites United States v. Metter, 860 F. Supp. 2d 205, 216 (E.D.N.Y. 2012) to support this argument. In Metter, the district court suppressed computer evidence obtained by a lawful warrant because the government waited over fifteen months to commence its review of the seized computer media. Id. at 215-16.

Metter is distinguishable. In Metter, the seized computer media did not contain contraband. In this case, defendant's computer media contained images and videos of child pornography that subjected the items to criminal forfeiture. See Doc. 39 Exhibit 6, at 5; see also 18 U.S.C. § 2253. Hence, these items cannot be returned to defendant. In Metter, the government did not *commence* its forensic examination of the seized computer media for over *fifteen months*, despite repeated requests from defense counsel and direction from the district court to do so. 860 F. Supp. 2d at 217. In this case, the forensic analysis of defendant's computer media was commenced by the agents *five days* after the Warrant was executed, Doc. 39 Exhibit 6, at 5, and the return of the non-contraband items was negotiated by counsel and has largely been effectuated. Defendant's reliance on Metter is misplaced.

In sum, the fact that the return of the non-contraband materials seized by the agents from defendant's residence has only recently been accomplished is

simply an administrative matter and has no constitutional dimension whatsoever. There is no "lack of good faith" on the part of the agents; to the contrary, the agents have gone the "extra mile" to honor defendant's request and provide him with personal, non-contraband items from his computer media. Therefore, suppression of the evidence and contraband seized from defendant is neither required nor justified.

WHEREFORE, the United States respectfully requests that the Court deny Defendant's Motion to Suppress.

Respectfully submitted,

ROBERT E. O'NEILL
United States Attorney

BY: *s/ D. Rodney Brown*

D. RODNEY BROWN
Assistant United States Attorney
Florida Bar No. 906689
300 North Hogan Street, Suite 700
Jacksonville, Florida 32202-4270
Telephone: (904) 301-6300
Facsimile: (904) 301-6310
E-Mail: rodney.brown@usdoj.gov

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Wm. J. Sheppard, Esq.

s/ D. Rodney Brown
D. RODNEY BROWN
Assistant United States Attorney