

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CLINTON MARK LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TABLE OF CONTENTS

Order Denying Rehearing, <i>United States v. Lewis</i> , No. 22-10186 (9th Cir.) (Apr. 2, 2024)	003
Memorandum Decision, <i>United States v. Lewis</i> , No. 22-10186 (9th Cir.) (Feb. 21, 2024)	004
Judgment in a Criminal Case, <i>United States v. Lewis</i> , No. CR-20-00044-001-PHX-SPL (July 26, 2022).....	009
Indictment, <i>United States v. Lewis</i> , No. CR-20-00044-001-PHX-SPL (Jan. 14, 2020)	015

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APR 2 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
CLINTON MARK LEWIS,
Defendant-Appellant.

No. 22-10186

D.C. No.
2:20-cr-00044-SPL-1
District of Arizona,
Phoenix

ORDER

Before: MURGUIA, Chief Judge, and HAWKINS and JOHNSTONE, Circuit Judges.

The panel has voted to deny Appellant's petition for panel rehearing.

Judges Murguia and Johnstone have voted to deny Appellant's petition for rehearing en banc, and Judge Hawkins so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for panel rehearing and petition for rehearing en banc are denied.

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 21 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
CLINTON MARK LEWIS,
Defendant-Appellant.

No. 22-10186
D.C. No.
2:20-cr-00044-SPL-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Steven Paul Logan, District Judge, Presiding

Argued and Submitted February 8, 2024
Phoenix, Arizona

Before: MURGUIA, Chief Judge, and HAWKINS and JOHNSTONE, Circuit
Judges.

Defendant Clinton Lewis (“Lewis”) appeals his conviction for possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B), arguing that the district court abused its discretion by denying his sixth motion for a continuance and that there was insufficient evidence to support his conviction. We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

I.

We review the denial of a motion for continuance for an abuse of discretion, and the district court’s decision will only be disturbed on appeal if the denial was “arbitrary or unreasonable.” *United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir. 1985). Factors to consider include: (1) whether the defendant “was diligent in preparing his defense or whether his request for a continuance appears to be a delaying tactic”; (2) whether “the purpose of the continuance would have been achieved had it been granted”; (3) the “extent to which granting the continuance would have inconvenienced the court and the opposing party”; and (4) “whether [the defendant] was prejudiced by the denial.” *United States v. Kloehn*, 620 F.3d 1122, 1127 (9th Cir. 2010) (discussing the “*Flynt* factors”).

There was no abuse of discretion by denying the continuance. The underlying forensic data from Lewis’s computers had been timely provided to the defense more than a year earlier, and government agents had previously met with Lewis’s defense team twice. The government also timely provided trial exhibits based on the computer evidence in advance of the deadline established in the court’s pretrial order and again met with counsel to walk through the exhibits and the proposed expert testimony.¹ Granting the continuance would not have served its stated purpose,

¹ The district court disallowed introduction of two of the government’s proposed demonstrative exhibits that were not based on previously-disclosed discovery.

particularly where previous continuances had been granted for similar reasons. In addition, granting a continuance so close to scheduled trial would have inconvenienced the court and the parties since the government had already prepared its exhibits, drafted potential stipulations, and filed pretrial motions and the court had already sent out jury questionnaires to a prospective jury pool and ruled on striking some jurors for medical reasons. *See Morris v. Slappy*, 461 U.S. 1, 11 (1983). Nor can Lewis demonstrate prejudice from the failure to continue the case, as “[g]eneral allegations that a continuance would have allowed him to prepare a better defense . . . are insufficient to allow us to find an abuse of discretion.” *United States v. Sarno*, 73 F.3d 1470, 1493 (9th Cir. 1995).

II.

In reviewing a challenge to the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution, draw all inferences from evidence in favor of conviction, and affirm if *any* rational trier of fact could find the elements of the crime beyond a reasonable doubt. *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010). The government need not prove that Lewis knew of and exercised control of the *thumbnails* themselves—rather, the thumbnails are the leftover evidence of what pornographic materials Lewis had previously accessed on his desktop by viewing specific files in icon mode. From the testimony of the forensic expert, a jury could have reasonably inferred that Lewis had exercised

possession over the underlying files and/or “knowingly accesse[d] with intent to view” child pornography. 18 U.S.C § 2252(a)(4)(B).

Evidence was presented that Lewis had been using recording software such as ShareX and Replay Video Capture to make duplicate recordings of pornography files he was viewing on his desktop, viewing these files in icon mode (requiring a change from the default list view and creating residual thumbnails on his desktop), encrypting such files using Veracrypt software, and transferring them to an encrypted container, which he later loaded and viewed on his laptop.² Lewis also used deletion programs such as File Shredder and CCleaner to attempt to eliminate all traces of the files on his desktop. Lewis stipulated that he was the only one in his household who accessed the computers, and the government also introduced statements in which Lewis claimed not to have any familiarity with ShareX or Veracrypt, while evidence showed these programs had been run numerous times on his computers during the relevant timeframe.

From all of this evidence, a jury could reasonably infer that Lewis “knowingly possesse[d], or knowingly accesse[d] with intent to view” child pornography in

² The extensive evidence of the ways in which Lewis accessed and manipulated these files makes this case factually distinguishable from *United States v. Flyer*, 633 F.3d, 915, 918–19 (9th Cir. 2011), on which Lewis heavily relies, in which pornographic images were merely found in unallocated space on a computer. *Flyer* also applied the 2004 version of the statute, which did not include the “knowingly accesses with intent to view” language of the current version. See Prosecution—Child Pornography Cases, Pub. L No. 110-358, 122 Stat. 4001.

violation of 18 U.S.C. § 2252(a)(4)(B). *See United States v. Romm*, 455 F.3d 990, 998 (9th Cir. 2006).³

AFFIRMED.

³ Appellant's Unopposed Motion for Extension of Time to File Reply Brief [Dkt. Entry No. 33] is granted. The reply brief filed on December 4, 2023, is deemed filed.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America

v.

Clinton Mark Lewis

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

No. CR-20-00044-001-PHX-SPL

David Eisenberg (CJA)
Attorney for Defendant

USM#: 41708-179

THERE WAS A VERDICT OF guilty on 7/22/2021 as to Count 1 of the Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 18, U.S.C. §2252(a)(4)(B), (b)(2) and 2256, Possession of Child Pornography, with Prior Qualifying Conviction, a Class C Felony offense, as charged in Count 1 of the Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is committed to the custody of the Bureau of Prisons for a term of **ONE HUNDRED FIFTY-ONE (151) MONTHS**, with credit for time served. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **LIFE**.

IT IS FURTHER ORDERED that defendant's interest in the following property shall be forfeited to the United States: One Compaq desktop, serial number CNH7270MGM; One ASUS laptop, serial number 960AAS004967; One Dell laptop, service tag 65DTR91; Western Digital 200 GB hard drive, serial number WCANR1275897; One Buffalo external hard drive, serial number WX81E32UEH01; One Buffalo external hard drive, serial number unreadable; Four Experiment USB drives; 21 CDs/DVDs; One Naxa Core tablet, serial number n/a; One HP digital camera, serial number CN6BRB60R2; One Samsung cell phone; Three Kyocera cell phones; One Alcatel cell phone; One Seagate one TB hard drive, serial number Z9ABJRF; Hitachi 500 GB hard drive, serial number 101012PCJ400VLMK5NVJ; Hitachi 160 GB hard drive, serial number VCFMEGAA; Hitachi 40 GB hard drive, serial number MPB2PAX2FM47MM; Buffalo External one TB hard drive, serial number WX81E32UEH01; and Hitachi one TB hard drive, serial number PBGTDDPE.

The defendant shall forfeit any property, real or personal, used or intended to be used to commit or to promote the commission of such offense or any property traceable to such property, including, but not limited to a desktop computer with a hard drive and other digital devices seized by law enforcement on January 29, 2019.

CR-20-00044-001-PHX-SPL
USA vs. Clinton Mark Lewis

Page 2 of 6

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: \$100.00 FINE: WAIVED RESTITUTION: TBD

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

Restitution will be determined at a later date.

The defendant shall pay a special assessment of \$100.00 which shall be due immediately.

If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than \$25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of \$100.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Count 1 of the Indictment.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, (10) costs, including cost of prosecution and court costs.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

It is ordered that while on supervised release, the defendant must comply with the mandatory and standard conditions of supervision as adopted by this court, in General Order 17-18, which incorporates the requirements of USSG §§ 5B1.3 and 5D1.2. Of particular importance, the defendant must not commit another federal, state, or local crime during the term of supervision. Within 72 hours of sentencing or release from the custody of the Bureau of Prisons the defendant must report in person to the Probation Office in the district to which the defendant is released. The defendant must comply with the following conditions:

MANDATORY CONDITIONS

- 1) You must not commit another federal, state or local crime.
- 2) You must not unlawfully possess a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted.
- 3) You must refrain from any unlawful use of a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted. Unless suspended by the Court,

you must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

STANDARD CONDITIONS

- 1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of sentencing or your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
- 2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
- 3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
- 4) You must answer truthfully the questions asked by your probation officer.
- 5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
- 7) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- 9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
- 10) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (*i.e.*, anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
- 11) You must not act or make any agreement with a law enforcement agency to act as a confidential

human source or informant without first getting the permission of the court.

- 12) If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
- 13) You must follow the instructions of the probation officer related to the conditions of supervision.

SPECIAL CONDITIONS

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

- 1) You must cooperate in the collection of DNA as directed by the probation officer.
- 2) You must consent, at the direction of the probation officer, to having installed on your computer(s) (as defined at 18 U.S.C. § 1030(e)(1), including internet capable devices), at your own expense, any hardware or software systems to monitor your computer use.
- 3) You must not possess or use a computer (including internet capable devices) with access to any 'on-line computer service' at any location (including place of employment) without the prior written permission of the probation officer. This includes any Internet service provider, bulletin board system, or any other public or private network or e-mail system. You must consent, at the direction of the probation officer, to having installed on your computer(s) (as defined at 18 U.S.C. § 1030(e)(1), including internet capable devices), at your own expense, any hardware or software systems to monitor your computer use.
- 4) You must attend and participate in periodic polygraph examinations as a means to determine compliance with conditions of supervision and the requirements of your therapeutic program, as directed by the probation officer. No violation proceedings will arise solely on the result of the polygraph test. A valid Fifth Amendment refusal to answer a question during a polygraph examination will not be used as a basis for a violation proceeding. You must contribute to the cost of such polygraph examination not to exceed an amount determined to be reasonable by the probation officer based on ability to pay.
- 5) You must not knowingly possess, view, or otherwise use material depicting sexually explicit conduct involving children, as defined by 18 USC 2256(2), and material depicting sexually explicit conduct involving adults, defined as explicit sexually stimulating depictions of adult sexual conduct that are deemed inappropriate by your probation officer. This condition does not prohibit you from possessing, viewing, or using materials necessary to litigation in which you are a party (such as statutes, caselaw, or court documents related to the litigation, but not including the image(s) that gave rise to your conviction unless specifically allowed by court order), or from creating and possessing journals or writings required as part of any mandated

sex-offender treatment, but you must notify the probation officer within 72 hours of possessing, viewing, or using any such litigation materials, journals, or writings.

- 6) You must attend and participate in a sex offender treatment program and sex offense specific evaluations as approved by the probation officer. You must abide by the policies and procedures of all the treatment and evaluation providers. You must contribute to the cost of such treatment and assessment not to exceed an amount determined to be reasonable by the probation officer based on ability to pay.
- 7) You must submit your person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct, and by any probation officer in the lawful discharge of the officer's supervision functions. You must consent to and cooperate with the seizure and removal of any hardware and/or data storage media for further analysis by law enforcement or the probation officer with reasonable suspicion concerning a violation of a condition of supervision or unlawful conduct. You must warn any other residents that the premises may be subject to searches pursuant to this condition.
- 8) You must register as a sex offender in compliance with all federal, state, tribal or other local laws or as ordered by the Court. Failure to comply with registration laws may result in new criminal charges.
- 9) You must not be in the company of or have contact with children who you know are under the age of 18, including your own children. Contact includes, but is not limited to, letters, communication devices, audio or visual devices, visits, or communication through a third party.
- 10) You are restricted from engaging in any occupation, business, volunteer activity or profession where you have the potential to be alone with children under the age of 18 without prior written permission. Acceptable employment shall include a stable, verifiable work location and the probation officer must be granted access to your work site.
- 11) You must not go to, or remain at, any place where you know children under the age of 18 are likely to be, including parks, schools, playgrounds, and childcare facilities.
- 12) You must not possess any device capable of capturing and/or storing an image, or video recording device without the prior written permission of the probation officer.
- 13) You must not contact the following victim: the victim of the "Vicky" series who uses the pseudonym "Lily", and the probation officer will verify compliance.

THE DEFENDANT IS ADVISED OF DEFENDANT'S RIGHT TO APPEAL BY FILING A NOTICE OF APPEAL IN WRITING WITHIN 14 DAYS OF ENTRY OF JUDGMENT.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or

CR-20-00044-001-PHX-SPL
USA vs. Clinton Mark Lewis

Page 6 of 6

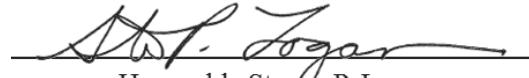
supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

The Court orders commitment to the custody of the Bureau of Prisons.

The defendant is remanded to the custody of the United States Marshal.

Date of Imposition of Sentence: **Monday, July 25, 2022**

DATED this 26th day of July, 2022



Honorable Steven P. Logan
United States District Judge

RETURN

I have executed this Judgment as follows: _____, the institution
defendant delivered on _____ to _____ at _____
designated by the Bureau of Prisons with a certified copy of this judgment in a Criminal case.

United States Marshal By: _____ Deputy Marshal _____

CR-20-00044-001-PHX-SPL- Lewis 7/26/2022 - 1:29 PM

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<u>FILED</u>	<u>LODGED</u>
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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF ARIZONA

No. CR-20-00044-PHX-SPL (DMF)

**REDACTED
INDICTMENT**

VIO: 18 U.S.C. §§ 2252(a)(4)(B), (b)(2),
and 2256
(Possession of Child Pornography,
With Prior Qualifying Conviction)
Count 1

18 U.S.C. §§ 981 and 2253,
21 U.S.C. § 853, and
28 U.S.C. § 2461(c)
(Forfeiture Allegations)

21 | THE GRAND JURY CHARGES:

COUNT 1

23 On or about January 18, 2019, in the District of Arizona, and elsewhere, defendant
24 CLINTON MARK LEWIS, a person with a prior qualifying conviction of Possession of
25 Child Pornography, Case No. 4:05-cr-00092-DCB-EJM, District of Arizona (Tucson
26 Division), did knowingly possess and knowingly access with intent to view, visual
27 depictions that involved the use of a minor engaging in sexually explicit conduct and such
28 visual depictions were of such conduct. The visual depictions possessed and accessed by

1 the defendant were contained on a desktop computer. The visual depictions on the desktop
2 computer had been mailed, had been shipped and transported using any means and facility
3 of interstate and foreign commerce and in and affecting interstate and foreign commerce,
4 and had been produced using materials which had been mailed, shipped, and transported,
5 by any means, including by computer. Some of the visual depictions of minors engaged in
6 sexually explicit conduct are listed below:

7 256_1fb24a7e91a45744.jpg
8 256_4a7adf6b4bc3358d.jpg
9 256_8b513b88995b76e3.jpg
10 256_33c18e58526801b6.jpg
11 256_105e8a08e8b57294.jpg
12 256_413aef9916e615b6.jpg
13 256_7138d5d7811fa007.jpg
14 256_906396c794e7ad59.jpg
15 256_6330552ad11fa30b.jpg
16 256_678642189565832e.jpg
17 256_a05ac2f074040129.jpg
18 256_c136445653fc0fc9.jpg
19 256_d06b49f1deca9384.jpg
20 256_fa0e014c93ebb506.jpg
21 b6cdd3f92763f568.jpg
22 eb0f9ff74928379a.jpg

23 In violation of Title 18, United States Code, Sections 2252(a)(4)(B), (b)(2), and
24 2256.

25 **FORFEITURE ALLEGATIONS**

26 The Grand Jury realleges and incorporates the allegations of Count 1 of this
27 Indictment, which are incorporated by reference as though fully set forth herein.

1 Pursuant to Title 18, United States Code, Sections 981 and 2253, Title 21 United
2 States Code, Section 853, and Title 28, United States Code, Section 2461(c), and upon
3 conviction of the offenses alleged in Count 1 of this Indictment, the defendant shall forfeit
4 to the United States of America all right, title, and interest in any visual depiction, or any
5 book, magazine, periodical, film, videotape, or other matter which contains any such visual
6 depiction, which was produced, transported, mailed, shipped or received in violation of
7 statute, and any property, real or personal, constituting or traceable to gross profits or other
8 proceeds obtained from such offense, and any property, real or personal, used or intended
9 to be used to commit or to promote the commission of such offense or any property
10 traceable to such property, including, but not limited to a desktop computer with a hard
11 drive and other digital devices seized by law enforcement on approximately January 29,
12 2019, containing visual depictions of minors engaging in sexually explicit conduct and
13 child erotica and used to facilitate child pornography activities. If any of the above-
14 described forfeitable property, as a result of any act or omission of the defendant:

15 (1) cannot be located upon the exercise of due diligence,
16 (2) has been transferred or sold to, or deposited with, a third party,
17 (3) has been placed beyond the jurisdiction of the court,
18 (4) has been substantially diminished in value, or
19 (5) has been commingled with other property which cannot be divided without
20 difficulty,

21 it is the intent of the United States to seek forfeiture of any other property of said defendant
22 up to the value of the above-described forfeitable property, pursuant to 21 United States
23 Code, Section 853(p).

24 //
25 //
26 //
27 //
28 //

1 All in accordance with Title 18, United States Code, Sections 981 and 2253, Title
2 21, United States Code, Section 853, Title 28, United States Code, Section 2461(c), and
3 Rule 32.2, Federal Rules of Criminal Procedure.

4

A TRUE BILL

5

S/

6

7 FOREPERSON OF THE GRAND JURY
Date: January 14, 2020

8

MICHAEL BAILEY
United States Attorney
District of Arizona

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S/

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11

GAYLE L. HELART

BRETT A. DAY

12 Assistant United States Attorneys

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