ORAL ARGUMENT HAS NOT BEEN SCHEDULED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

ELAINE CIONI,

Appellant

No. 09-4321

APPELLANT'S REPLY BRIEF

CORRECTED COPY

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Appointed by the Court for Appellant

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ARGUMENT

1. The Court Erroneously Denied Pretrial Motion to Dismiss Indictment based on Grand Jury Improprieties

The Court erroneously denied the appellant's motion to dismiss the indictment made after disclosure of the *Jencks* for SA Born[1] showed that the superseding indictment was based **in its entirety** on SA Born's testimony at the grand jury of a reading of the requested indictment. App. 78-81. The Fifth Amendment provides that "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury. The right to indictment guards persons from wrongful prosecution where they are

[1] The government stated, Appellee Brief at 11-12, that S.A. Born testified at trial that Sharon Thorn told her that the defendant admitted she was reading Bruce Enger's and his daughter Ashley's e-mail, that Thorn further claimed the defendant, while on a trip to Washington, D.C., mailed a letter from the J.W. Marriott to Bruce Enger, Thorn also stated that the defendant admitted she was reading Bruce Enger's and his daughter Ashley's e-mail, that Thorn further claimed the defendant, while on a trip to Washington, D.C., mailed a letter from the J.W. Marriott to Bruce Enger, that Mrs. Thorn later also admitted to Agent Born that she knew that the defendant had purchased passwords for access to e-mail accounts from an Internet site called yourhackers.com or myhackers.com., that Mrs. Thorn said that at the defendant's request, Thorn allowed the defendant to use Thorn's credit card to pay for the service that would allow the defendant to gain access to the e-mail accounts, and that the defendant also told Sharon Thorn that she had previously used her own credit card to pay for passwords, but she needed to hide a paper trail by using Thorn's credit card; Thorn agreed to this. This evidence was on the motion to suppress, not at trial. JA 258. Clearly, S.A. Born could not testify at trial about Sharon Thorn's out of court statements and when called to testify in the defense case, Sharon Thorn asserted privilege. Tr. 12/10/08 at 152-153.

falsely accused. *United States v. Calandra*, 414 U.S. 338, 343 (1974) (grand jury historically protects citizens against unfounded criminal prosecutions). The Fifth Amendment grand jury right is intended to serve "a vital function . . . as a check on prosecutorial power." *United States v. Cotton*, 535 U.S. 625, 634 (2002). The grand jury's historic functions include "both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions." *United States v. Calandra*, 414 U.S. 338, 343 (1974). Accordingly, the grand jury is "meant to be an **independent** check on the ability of the government to bring criminal charges against individuals." *In re U.S.*, 441 F.3d 44, 57 (1st Cir. 2006); *see also United States v. Suarez*, 263 F.3d 468, 481 (6th Cir. 2001) (grand jury is a "defendant's main protection against the ringing of unfounded criminal charges"); See generally SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 1:5 (2d ed. 1997).[2] Here, with the presentation of a summary of the government investigation, there is no independence.

Prosecutorial abuse of the grand jury results in relief when the abuse is prejudicial to the defendant. *See Bank of Nova Scotia v. United States*, 487 U.S.

[2] *See also* Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 67-68 (1995); R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 362-63 (2000).

250, 254 (1988); *see also United States v. Derrick*, 163 F.3d 799, 808 (4th Cir. 1998) (holding that an indictment may not be dismissed based on prosecutorial misconduct, absent a showing of prejudice to the defendant). "[D]ismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict' or if there is a 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Bank of Nova Scotia*, 487 U.S. at 256 (*quoting United States v. Mechanik*, 475 U.S. 66, 78 (1986)).

In *Bank of Nova Scotia*, the Court upheld the reinstatement of the indictment, noting the absence of a history of "prosecutorial misconduct spanning several cases that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process." *Id.* at 259. The alleged acts of misconduct were: (1) calling witnesses solely to assert their Fifth Amendment privilege; (2) gathering evidence for civil suits; (3) giving unauthorized oaths to IRS agents; (4) producing misleading, inaccurate summaries; (5) granting of pocket immunity; and (6) permitting two agents to read in tandem before the grand jury. *Id.* at 260. These acts were determined to be "isolated episodes" in the course of a 20-month investigation that did not affect the charging decision. *Id.* at 263. Here, where **no** other actual evidence presented to the grand jury and the proposed superseding indictment (a summary of the government's

investigation) was simply read by the Special Agent to the grand jury, this prosecutorial misconduct did rise to the level of prejudicing Mrs. Cioni's right to be indicted by the Grand Jury. Here, there can be no other conclusion than the conclusion that the grand jury's decision to indict was not free from the substantial influence of the prosecutor and agent – and thus was not independent. *See Id* at 256. As such, this court should reverse the decision of the Court below and remand this case with an order to dismiss the indictment obtained in this case.

2. Exclusion of Evidence under Federal Rule of Evidence 412

At trial, defense counsel attempted to cross examine the chief witness Bruce Enger concerning his misleading of other women with whom he had also had affairs. App 82-84. This was relevant because it went to his veracity. The court excluded this evidence under Federal Rule of Evidence 412, which simply has not applicable here.

In response, the government argues that this case involved "alleged sexual misconduct" so the Rule was applicable here. This is absurd. A **consensual** "extramarital sexual affair", such as was at issue as to Mr. Engler's bias, is not "sexual misconduct" in any meaning of expression. The Notes of the Advisory Committee support this assessment.[3] The principal purpose of Rule 412 is to

[3] Notes of Advisory Committee on proposed 1994 amendment: "Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to

protect rape victims from degrading and embarrassing disclosure of intimate details about their private lives, not to deny a defendant the right to confront an accuser concerning a consensual sexual affair. *United States v Cardinal*, 782 F2d 34 (6thCir. 1986).

The government then goes on to argue that if this was error, it is harmless error because it is cumulative. This cannot be true, especially as to Count 5 (harassing phone calls) when Mr. Engler is the sole witness to the majority of the *unrecorded* calls, so his veracity is central to the jury's determination on that count.

3. Motion for a Judgment of Acquittal

Under this Court's de novo review of the district court's denial of a motion, made pursuant to Rule 29 of the Federal Rules of Criminal Procedure, for judgment of acquittal, *United States v. Alerre*, 430 F.3d 681, 693 (4th Cir. 2005)

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expand the protection afforded alleged victims of sexual misconduct. Rule 412 applies to both civil and criminal proceedings. The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact finding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders…Rule 412 does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a "victim of alleged sexual misconduct".

this Court should reverse the ruling of the trial court and enter judgment of acquittals on all counts.

As to Count 1, the conspiracy count, the government offered no evidence of an agreement between the defendant and any other person to access protected computers owned by AOL or any other internet service provider and obtain emails – the only evidence presented was that Mrs. Cioni used Sharon Thorn's paypal account – not that Mrs. Thorn even knew what Mrs. Cioni was using the account for. Nor did the government offer any evidence of an agreement between the defendant and any other person to do so in furtherance of the offense of accessing AOL or any other internet service provider to obtain unopened emails – again, Mrs. Thorn did not testify and Mrs. Cioni testified that Mrs. Thorn just allowed her to use her paypal account (and credit cards) as needed. Tran. 12/11/2008 at 29-30. While she testified that Mrs. Thorn made some calls, there was no evidence that Mrs. Thorn accessed any emails or even knew that Mrs. Cioni did. As such, the Court should enter a judgment of acquittal on Count 1.

The evidence on Counts 1, 2 and 4 was insufficient to establish that Mrs. Cioni violated §1030(A)(2)(C) in furtherance of a violation of § 2701, as it was charged in the indictment. The government offered no evidence that the defendant acted with the intent or purpose to gain access to "unopened emails" – a necessary element of § 2701. The term "in electronic storage" is narrowly defined in 18

U.S.C. § 2510(17) and refers only to temporary storage, made in the course of transmission, by a provider of electronic communications service. If the communication has been accessed, i.e., opened, by a recipient, it is no longer in "electronic storage." *Fraser v. Nationwide Mutual Insurance Co.*, 135 F. Supp. 2d 623, 634-638 (E.D. Pa. 2001). The government offered no evidence that any of the emails that the defendant accessed or attempted to access had not be previously read (opened) by their intended recipients. As such, the Court should enter judgment of acquittal on counts 1-2, 4 and 6.

As to Counts 1, 2, 4 and 6, the government presented no evidence that Ms. Cioni's access or attempted access was not authorized by the owners of the "protected computers" and "electronic communications services," who are the internet service providers and not the email account holders. As to the conduct in Count 2 and 4 charged in the Count 1 conspiracy, there was no evidence that Sharon Thorn, the alleged coconspirator, knew that what Mrs. Cioni was purchasing, i.e. purchasing passwords for electronic mail accounts, during the timeframe of the conspiracy. And for Count 4, there was no evidence that Mrs. Thorn was aware of Mrs. Cioni's attempt to access Mrs Freeman's AOL account in 2008, 2 years after Mrs. Cioni used Mrs. Thorn's paypal account in 2006. There was no evidence that Mrs, Cioni even attempted to purchase a password in 2008.

Count 4 charges a single attempt on March 10, 2008, not the conduct in 2006 that Mrs. Cioni testified about, wherein she stated she access Mrs. Freeman's account in November and December 2006 after purchasing her password unknown to Mrs. Thorn; in its brief, appellee cites to her testimony concerning 2006 conduct in support of their argument on this count, which charged her with an attempt in March 2008 *See Appellee Brief* at 49, citing Tr. 12/11/08 at 26-27. The government also now argues, which it did not below, that by merely accessing the inbox of the electronic mail, Ms. Cioni was able to obtain information in violation of the statute. *Appellee Brief* at 49-50. There was no evidence that she obtained the inbox of the electronic mail – merely that there was a *failed* attempt on that date to access the account – there was simply no evidence that anyone attempted to see the inbox or did see the inbox in 2008 period, much less March 10, 2008. The failed attempt to gain entry on March 10, 2008 to the AOL account from an IP address that may have been used by Mrs. Cioni is not synonymous with attempting to access the inbox of the electronic mail for the AOL account and accessing it, which she did do, and testified to, in 2006. Tr. 12/11/08 at 26-27.

As to Counts 2 and 4, Mrs. Cioni was charged by indictment with a violation of §1030(a)(2)(C) and the felony enhancement of § 1030(c)(2)(B)(i), see App 37 and 39, not (ii) as the government uses to support their argument. Subsection (ii) states that for this enhancement, "the offense was committed for purposes of

commercial advantage or private financial gain". Senate Report No. 104-357 described the proposed amendments to subsection 1030(a)(2)(C) as "intended to protect against the interstate or foreign theft of information by computer" extending the coverage of § 1030(a)(2) to information held on federal government computers and to computers used in interstate or foreign commerce or communications, if the conduct involved and interstate or foreign communication. The Senate Report also clarifies the drafters' intention with respect to how the offense is punished. Specifically, the Senate Report states:

> The seriousness of a breach in confidentiality depends, in considerable part, on the value of the information taken, or what is planned for the information after it is obtained. Thus the statutory penalties are structured to provide that obtaining information of minimal value is only a misdemeanor, but obtaining valuable information, or misusing information in other more serious ways is a felony.
>
> The sentencing scheme for section 1030(a)(2) is part of a broader effort to ensure that sentences for section 1030 violations adequately reflect the nature of the offense. Thus, under the bill, the harshest penalties are reserved for those who obtain classified that could be used to injure the United States or assist a foreign state. Those who improperly use computers to obtain other types of information – such as financial records, nonclassified Government information, and information of nominal value from private individuals or companies – face only misdemeanor penalties, unless the information is used for commercial advantage, private financial gain or to commit any criminal or tortious act. For example, individuals who intentionally break into, or abuse their authority to use, a computer and thereby obtain information of minimal value of $5,000 or less, would be subject to a misdemeanor penalty. The crime becomes a felony if the offense was committed for purposes of commercial advantage or private financial gain, for the purpose of committing any criminal or

> tortious act in violation of the Constitution or laws of the United States or of any State, or if the value of the information exceeds $5,000.
>
> The terms 'for purposes of commercial advantage or private financial gain' and 'for the purpose of committing any criminal or tortious act' are taken from the copyright statute (17 U.S.C. 506(a)) and the wiretap statute (18 U.S.C. 2511(1)(d)), respectively, and are intended to have the same meaning as in those statutes."

S.R. 104-357.

Congress has made clear its intention that the violations of §1030 not be punished as a felony where the crime charged is accessing (or attempting to access) personal email accounts and obtaining (or attempting to obtain) personal email in furtherance of the interception itself, i.e., accessing (or attempting to access) personal email accounts and obtaining (or attempting to obtain) opened or unopened personal email,[4] which is the alleged conduct in this case, for Counts 1, 2, 4[5] and 6.

[4] The Department of Justice's own manual on prosecuting computer crimes confirms that the criminal or tortious act used to enhance a penalty must be a *separate* act: "Naturally, the 'in furtherance of any criminal or tortious act' language means an act *other than* the unlawful access to stored communications itself." Computer Crime & Intellectual Property Section, U.S. Dep't of Justice, *Prosecuting Computer Crimes* 82 (Feb. 2007) (*citing Boddie v. American Broadcasting Co*., 731 F.2d 333, 339 (6th Cir. 1984)). In addition, the Department notes in its manual that "the 'in furtherance of" language is taken from the Wiretap Act, see 18 U.S.C. § 2511(2)(d), and that at least one appellate court has stated that this enhancement is operative only when a prohibited purpose is the subject's *primary* motivation or a determinative factor in the subject's motivation. *Id*. at 82 (citing *United States v. Cassiere*, 4 F.3d 1006, 1021 (1st Cir. 1993)). An offender's

In addition to protecting against subsequent prosecutions for the same offense, the Double Jeopardy Clause protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); U.S. Const. amend. V. By extension, the Double Jeopardy Clause protects against duplicitous and enhanced punishments for the same offense. The mere fact that two convictions are authorized by different statutory provisions does not establish clear legislative intent that Congress specifically authorized cumulative punishment for the same conduct. See *Rutledge v. United States*, 517 U.S. 292 (1996); *Williams v.*

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motivation is not the end of the inquiry: *when* the offender formed the requisite motivation is central to whether the "in furtherance of" enhancement applies. The motivation must have been formed in anticipation of committing the additional crime, and sustained long enough to have caused harm." For example, the manual states, "in *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956 (7th Cir. 1982), the Government alleged that the defendant intercepted a telephone call in order to "commit an act that is criminal or tortious under federal or state law." *Id*. The Seventh Circuit held that even if the Defendant formed the requisite intent to use the intercepted tape recording, his failure to actually use the recording was what mattered, because his wrongful intention was not sustained. We doubt [] that a tape recording which was never used could form the basis for liability . . . . It would be a dryly literal reading of the statute that found a violation because at the moment of pressing the "on" button a party to a conversation conceived an evil purpose though two seconds later he pressed the "off" button and promptly erased the two seconds of tape without even playing it back. A statute that provides for minimum damages of $1000 per violation must have more substantial objects in view than punishing evil purposes so divorced from any possibility of actual harm. *Id*. at 959-60 (emphasis added). See also *Stockler v. Garrett*, 893 F.2d 856 (6th Cir. 1990) (holding that 'interception' and not 'use' is all that is required to violate Wiretap Act, but failing to abrogate Boddie's holding that the criminal or tortious purpose must be 'other than" the interception and/or use).'"

[55] In Count 4, Mrs. Cioni is charged with the attempt.

Singletary, 78 F.3d 1510 (11th Cir. 1996) (no clear indication of legislative intent to authorize cumulative conviction and sentences because no clear language in statute and no indication from state courts or legislature as to how to interpret state law). Therefore the felony enhancements in Counts 1, 2, and 4 should be dismissed as a matter of law.

4. Sentencing Issues

Mrs. Cioni did not forgo her right to counsel, as the government argues. Like in *Venable*, Mrs. Cioni was dissatisfied with counsel – and in fact, unlike in *Venable,* trial counsel for Mrs. Cioni herself first moved to withdrawal as counsel after trial.[6] *United States v Venable*, 373 Fed. Appx. 402 (4th Cir. 2010); Docket Entry 148. Here, after trial, counsel for Mrs. Cioni withdrew citing "irreconcilable differences which have now and will in the future prevent the undersigned from providing Ms. Cioni with constitutionally guaranteed effective assistance of counsel." Docket Entry #148, *Motion to Withdraw as Attorney* at 2.

Simultaneously, Mrs. Cioni also requested to proceed *pro se*. Docket Entry #149, *LETTER MOTION to proceed pro se*. At a hearing on this motion, *after dismissing trial counsel*, App. 127, the trial court inquired of Mrs. Cioni's understanding of the sentencing guidelines, to which Mrs. Cioni indicated that the

[6] In *Venable*, standby counsel later moved to withdraw but this was not based on Mr. Venable's first concerns and after the Court had already determined that Mr. Venable would be proceeding to trial without counsel.

real reason she wanted to go forward without an attorney was because she could not afford to retain one, that her family was practically broke[7] and she could not work any longer with trial counsel. App 129. Mrs. Cioni wanted counsel.[8] App. 129. The trial court found that since she had money in her 401(k), she would not be declared indigent, App. 130, when previously the court had appointed counsel to Mrs. Cioni, App 49-52. The court refused to appoint counsel for sentencing

[7] Without counsel, Mrs. Cioni did not provide all necessary information to the PSI writer about an additional approximately $122,000 worth of debt, including $90,000 due to trial counsel.

[8] In *Faretta v. California*, 422 U.S. 806 (1975), the Supreme Court held that a criminal defendant cannot be forced to have a lawyer if he does not wish it, but that before the defendant relinquishes his right to counsel the trial judge must ensure that the defendant understands the "dangers and disadvantages" of representing himself. Government counsel claims that since Mrs. Cioni was competent to stand trial and no issues were made with regard to that, that she must have been also competent to represent herself. *See* Appellee Brief at 58. The Supreme Court differs. In *Indiana v. Edwards*, 554 U.S. 164 (2008), ruled that the standard for competency to stand trial was not linked to the standard for competency to represent oneself. For the Court, it was "common sense" that a defendant's mental illness might impair his ability to accomplish these tasks—tasks that any lawyer must if he is to press his client's case effectively. "A right of self-representation at trial will not affirm the dignity of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel." Moreover, the Court separated the standards for competency to stand trial and for competency to represent oneself out of a concern for the fairness of the trial process. Criminal trials "must not only be fair, they must appear fair to all who observe them." "No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands hopeless and alone before the court." For these reasons, the Constitution allows trial courts to "take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." *Id.*

and forced Mrs. Cioni to go forward without counsel.[9] App 131-132. This was not a valid waiver of Mrs. Cioni's right to counsel for sentencing and the sentence in this matter should be vacated and the matter remanded for a sentencing hearing with counsel for Mrs. Cioni. Here, there was no knowing and intelligent waiver of that right, in fact she wanted counsel and did not want to waive it, and therefore the sentence in this matter should be vacated and the matter remanded for a full resentencing with counsel to assist Mrs. Cioni.

The lack of counsel affected the sentencing process as well. After the final draft of the Presentence Investigation Report was prepared, the United States filed

[9] The government contends that Mrs. Cioni was a well educated and sophisticated professional that knew of her right to be represented by counsel. Government's Brief at 57. This is all true. She also was the defendant who could not conduct herself appropriately in court at trial, wanted previously to represent herself *pro se* but chose not to represent herself because she was "emotionally unable to represent herself". App 78-81; 12/10/2008 at 197-8. [The court even ordered her to have mental health treatment while on supervised release]. Furthermore, she made abundantly clear that she could not work with trial counsel (and clearly trial counsel could not work with her), she wanted counsel for sentencing and she felt she could not afford it. She tells the Court that she will be flat broke in 2 months and while married, has a 401(k) she does not want to use – which also she might not even be able to use since her husband would have standing to the fund. Clearly, there was not going to be a rapid resolution of her economic situation in order to obtain counsel for sentencing and rather than err on the side of allowing her to go forward without representation, the Court should have appointed counsel, or at least had her submit an affidavit [Financial Affidavit, (Form CJA 23)], *see* 18 U.S.C. § 3006A(b), and make a formal determination of her ability or inability to retain counsel. Having done neither and yet requiring Mrs. Cioni to go forward without counsel, the procedure violated her right to counsel, without a knowing and intelligent waiver.

its sentencing memorandum, Mrs. Cioni filed an objection to the findings of the report and filed a request for a hearing, Docket Entry #167 and asked for leave to subpoena witnesses to sentencing, Docket Entry #170.[10] She also requested to be able to present evidence at the sentencing hearing itself. App. 152. Mrs. Cioni, proceeding *pro se*, had insufficient time to respond to a significant change in the guidelines (offense level 8 (facing 0-6 months) versus offense level 14 (facing 15-21 months) prior to sentencing thus she moved for more time. The court erred by not allowing Mrs. Cioni to present this evidence, which then became a violation of Federal Rule of Criminal Procedure 32 (which provides that a sentencing court must, for any disputed portion of the presentence report or issue in controversy, rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing) when he considered this evidence in elevating the guidelines. Mrs. Cioni was unable to maintain her composure at sentencing, similar to prior hearings and therefore unable to represent herself adequately or make the appropriate objections and requests for the record.

[10] Also, there were two drafts of the PSI before the final one, the last two being after the deadline for the final PSI. The government filed its objections 4 days after objections were due. App. 330.

CONCLUSION

For the foregoing reasons, Mrs. Cioni respectfully requests that this Court vacate the pretrial orders and vacate her convictions and remand this matter for a new trial consistent with the issues raised herein. In the alternative, Mrs. Cioni asks that the sentence in this matter be vacated and that the Court remand her case to the district court for resentencing with the appointment of counsel to assist her. Finally, Mrs. Cioni asks in the alternative that the felony counts be vacated on all counts and that this matter be remanded for entry of misdemeanor convictions.

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE

This brief has been prepared on in 14-point Times New Roman font. This brief contains 5,054 words and complies with the 7,000 word limitation pursuant to Rule 32.

/s/
_____
JENIFER WICKS

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2010, a copy of the foregoing was served by electronic mail on:

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/s/
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JENIFER WICKS