IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-4321

UNITED STATES OF AMERICA,

Appellee,

v.

ELAINE ROBERTSON CIONI,

Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia
at Alexandria
The Honorable Gerald Bruce Lee, District Judge

BRIEF OF THE UNITED STATES

Neil H. MacBride
United States Attorney

Josh Goldfoot
Senior Counsel
U.S. Department of Justice

Jay V. Prabhu
Assistant United States Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314
(703) 299-3700

Attorneys for the United States of America

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JURISDICTIONAL STATEMENT

Appellee is not "dissatisfied" with Appellant's jurisdictional statement. *See* Fed. R. App. P. 28(b).

STATEMENT OF THE ISSUES

1. Whether the district court properly admitted materials seized from the defendant's home and office, where agents relied in good faith on the magistrate judge's issuance of warrants and there was a substantial showing of probable cause?

2. Whether the district court properly denied defendant's motion to dismiss the indictment where the alleged prejudicial misconduct was that the investigative case agent used the extensively detailed indictment to guide her grand jury testimony?

3. Whether the district court properly denied defendant's motion to dismiss the indictment on double jeopardy grounds where the separate counts charged different conduct?

4. Whether the district court properly denied defendant's motion to dismiss the indictment for violations of the Commerce Clause where Congress has long authorized the regulation of interstate communications?

5. Whether the district court properly denied defendant's motion for judgment of acquittal where the evidence adduced at trial was sufficient to convict the defendant on all counts and of multiple felonies?

6. Whether the district court abused its discretion in excluding testimony about a victim's past sexual conduct when two instances of similar testimony had already been elicited?

7. Whether the district court erred in allowing the defendant to proceed without counsel at sentencing, where she made an intelligent and calculated decision to fire her counsel and not hire a replacement?

8. Whether the sentence of the district court properly considered all the sentencing factors under 18 U.S.C. § 3553(a) where the parties raised all sentencing factors in argument, the court recognized there were factors other than the guidelines, and the court specifically addressed multiple factors before it pronounced sentence?

STATEMENT OF THE CASE

A four-count indictment against the defendant was returned by a grand jury in the Eastern District of Virginia on June 12, 2008. On September 11, 2008, a six-count superseding indictment was returned, JA26-42, charging the defendant with violating 18 U.S.C. § 371 (conspiracy)(Count One); 47 U.S.C. § 223 (harassing phone calls)(Count Five); 18 U.S.C. § 2701 (accessing stored communications)(Counts Three and Six); and 18 U.S.C. § 1030 (unauthorized access to a protected computer)(Counts Two and Four). After the government

dismissed Count Three of the superseding indictment, the defendant's trial on the five remaining counts began on December 8, 2008. JA13-14. Before trial, defendant filed various pre-trial motions, including a motion to suppress and a motion to dismiss Counts 1-4 of the superseding indictment. JA6-10. These were denied. JA9-11(Docket#47, 64); *see also* JA53-74. On December 15, 2008, the jury convicted the defendant on the five felony counts. JA107. The defendant's post-trial motion for a judgment of acquittal was denied on January 9, 2009. JA111. On March 6, 2009, the court (the Honorable Gerald Bruce Lee) sentenced the defendant to serve 15 months of imprisonment for each of the five counts of conviction, which she was to serve concurrently. JA207-212. This appeal followed.

STATEMENT OF FACTS

In July 2005, the defendant Elaine Cioni began an extramarital affair with her former supervisor at Long & Foster Realty, Bruce Enger. Trial Transcript (hereinafter "TT")(12/9/2008)20-21.[1] When the defendant moved to Tennessee in 2006 and the nature of the relationship necessarily changed, she and Enger, each

[1] The defendant did not include the full trial transcripts in the Joint Appendix. The government's citations to trial events will be to the underlying transcripts.

of whom was married to another person, continued to talk on the phone and by e-mail and occasionally met in person. *See id.* at 19-22.

In early 2007, however, Enger started receiving mysterious harassing telephone calls. *See* TT(12/8/08)64-73. Enger initially believed that the distorted male voice on the calls belonged to a disgruntled former male employee, Craig Scott,[2] *see id.* at 72; he was wrong. As an investigation ultimately revealed, the defendant and, to a lesser extent, her best friend Sharon Thorn were responsible for hundreds of harassing calls made to Enger, his wife Maureen, and his business associates. *See* Gov't Exhibit 1-3. The calls usually contained extremely personal information and often boasted of reading Enger's e-mail. *See* TT(12/8/2008)68,72,73; TT(12/9/2008)6,13.

Bruce Enger primarily received harassing telephone calls on his cell phone/ Blackberry, home telephone, and his office phone, TT(12/8/2008)65-66, while

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[2] Craig Scott had motive since he was fired by Bruce Enger, *see* JA215-226; he had access to Enger's computers from which he could obtain e-mails, *id.;* the voice on the calls was "similar enough" to Scott's voice, TT(12/8/08)73-74; and many details in the calls suggested Scott's involvement. *See id.* at 72-73. For example, the caller brought up a Long & Foster employee whom Craig Scott was accused of harassing during one conversation. TT(12/9/08)6. Further, the defendant, during e-mails with Enger, feigned support for him, asked about details and status of the investigation, and discussed Craig Scott's culpability and arrest. *See* Gov't Exhibit 26. The Engers also referred to the caller as "Craig" on many calls and were not corrected by the defendant. *See, e.g.,* TT(12/8/08)72; TT(12/9/08)78.

Maureen Enger received calls on her cell phone, TT(12/9/2008)73. The family changed their phone numbers multiple times but the defendant "would figure out the new phone numbers" by monitoring their communications. *See* TT(12/8/2008)73-74.

The harassing calls generally appeared to come from numbers with which Bruce Enger was familiar, such as his wife's or daughter's cell phones, his mother's home number, his dead uncle's home number, or his own home phone. However, when he answered, the caller was not his wife, daughter, or mother, but rather an unknown male. *See* TT(12/8/08)70,82. The caller, whose voice was digitally altered, would make statements about Mr. Enger's private life, movements, and work, as well as making threats. *See id* at 68-73, 77-78; TT(12/9/2008)6-8,13.

Kiersten Camera, Bruce Enger's assistant from August 2006 through May 2008, recalled answering his work phone several times a day where the defendant did not identify herself and the Caller ID would show Enger's former cell phone number. TT(12/8/09)126. She also recalled seeing the number of a dead relative of Mr. Enger's appear on the Caller ID. *Id.* at 124. She also answered a call to Mr. Enger where the apparent source was her own home phone number. *Id.* at 125-26. Ms. Camera described Mr. Enger as being visibly upset by the

"threatening" calls and he expressed concern to her about them as well as notes he was receiving. *Id.* at 128.

In terms of threats, Bruce Enger made contemporaneous notes of many of the calls he received. For one call, he wrote that the caller "said he is going to hurt me and hurt my wife." TT(12/9/08)6; Gov't Exhibit 27. In another call, Enger told the caller that the calls were "pretty damn irritating" and he demanded that the caller "stay away from my family." *Id.* at 75; Gov't Exhibit 1-12. In yet another, he asked why the caller was calling his son's "football team mom and scaring the hell out of [his] wife." Gov't Exhibit 1-8. In the same call, Enger says the caller's "threatening to hurt my wife, hurt my family and so forth is just getting way way way outta control." *Id*.

Maureen Enger described the calls she received as annoying, unsettling, and scary. TT(12/9/08)73. She heard "a garbled man's voice, kind of scarey [sic] sounding." *Id.* at 76. Mrs. Enger said the calls made her "skittish, nervous, more aware of going out, taking my son out, taking him to football, just nervous all the time, kind of watching." *Id.* at 75.

Mrs. Enger received a call on her cell phone on October 21, 2007. TT(12/9/08)77-78 (referencing Gov't Exhibit 1-5). The call appeared to be from her college-aged daughter's cell phone, but, when she answered, Mrs. Enger heard

a digitally altered male voice that could have been a kidnapper, but was, instead, the defendant using a voice changer and technology to change the caller ID. *See* JA274. After private investigators failed to gather sufficient evidence against him, the Loudoun and Fairfax County police investigated Craig Scott for the harassing calls and the alleged access to Bruce Enger's e-mail. *See* JA215-226. At the time, Bruce Enger and his neighbors were concerned about their security; his wife had often been reduced to tears. TT(12/8/09)77; *see also* TT(12/9/08)8-9. They even distributed pictures of Craig Scott and his car. TT(12/9/08)9. Mr. Enger indicated: "We were all on the watch for someone coming through our neighborhood or coming to the house, not to mention the fear every time the phone rang." *Id.* Mr. Scott was eventually charged locally with making the harassing telephone calls and accessing Bruce Enger's e-mail, TT(12/11/08)52, but the charges were ultimately dismissed due to lack of evidence.[3] TT(12/10/08)42.

In September 2007, the Federal Bureau of Investigation was asked to take on the investigation and Special Agent Brenda Born was assigned to the matter. TT(12/9/08)122. Agent Born reviewed the records involved and, after a

[3] Craig Scott wrote a letter to the district court in advance of the defendant's sentencing in which he outlined the personal impact attributable to defendant's attempts to blame him for her conduct. JA199.

significant investigation, determined that the calls ultimately came from telephones associated with the defendant and Sharon Thorn. *See id.* at 125-160. Born established the defendant and Thorn used an Internet-based service known as Spoofcard to hide the originating number of their calls and disguise their voices. *See id.* at 130-134.

Spoofcard kept detailed records of the calls made (which showed the actual phone numbers used), billing records,[4] and, if the users chose, recordings of the calls. TT(12/8/08)43. Agent Born examined all the available recordings and details for the calls made to the Enger family and their associates from the six Spoofcard accounts used by the defendant. *See* Gov't Exhibits 1, 1-1. Agent Born determined that there were over 300 relevant calls made from defendant's phones[5] where the caller ID and voice of the caller were changed and the caller did not disclose her identity. *See* Gov't Exhibit 1-3; TT(12/10/08)118. More than 80 of these calls went to Mr. Enger's work phone, 150 went to his cellphone/Blackberry,

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[4] In the Spoofcard records, the defendant admitted she knew there was a law enforcement investigation going on at the time, that she wanted all records associated with her account deleted, and that she personally deleted some recordings that were in her account. TT(12/8/08)63 (citing Gov't Exhibit 1-1). She wrote: "Even though I was just spoofing for fun, someone didn't think it was funny and lied to the police and said that the spoof caller was threatening to harm the family." TT(12/8/08)63.

[5] Spoofcard calls made from Mrs. Thorn's phones were not included in the summary. TT(12/10/08)119.

19 to his residence, and 24 to his wife's cell phone. *Id; see also* TT(12/8/08)80-82; Gov't Exhibit 27. Spoofcard records also showed the defendant improperly accessed Bruce Enger's voicemail and reviewed (and sometimes deleted) messages. *See* Gov't Exhibit 1-2.

Though the calls generally referred to reading Bruce Enger's e-mail, Agent Born discovered the defendant also accessed or attempted to access the e-mail accounts of his wife Maureen; the two Enger children; Bruce's former assistant when he lived in Arizona, Patricia Freeman; Catherine Read, a friend of the defendant's who also had worked at Long & Foster; and Sharon Weiner, a crew member on a two-week cruise the Engers had taken. *See* TT(12/9/08)91-92, 103-104, 182-197; TT(12/10/08)4-20, 22-24, 133. The defendant and her co-conspirator Thorn also mailed envelopes to the Engers containing copies of e-mails from several of these e-mail accounts and specific personal information that had been gained from their intrusions into the family's privacy. TT(12/9/2008)11-12, 15-19; Gov't Exhibits 20-23, 34.

As part of her investigation, Agent Born made an undercover telephone call to defendant posing as Spoofcard staff. TT(12/10/08)24-25. She asked defendant if she had opened the accounts with her credit card; defendant claimed she did not authorize the charges. *Id.* at 25-26. A few days later, Born called defendant and

identified herself as a FBI agent. *Id.* at 26-27. She said she was investigating credit card fraud on the Spoofcard account; defendant replied that she did not know anything about the calls in the account and had never used Spoofcard. *Id.* at 27.

Agent Born then travelled to Tennessee where she interviewed defendant and Sharon Thorn. JA228-29. Sharon Thorn indicated the defendant told Thorn she was using Spoofcard to call Bruce Enger. JA258; *see also* TT(12/10/08)108. Thorn also stated that the defendant admitted she was reading Bruce Enger's and his daughter Ashley's e-mail. JA258. Thorn further claimed the defendant, while on a trip to Washington, D.C., mailed a letter from the J.W. Marriott to Bruce Enger. *Id.* This envelope was later found to contain Enger's private e-mails. TT(12/9/2008)16-17.

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. JA258. 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. *Id.* at 259; *see also* TT(12/9/08)166-182; Gov't Exhibit 3-3. 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. JA259.

In Tennessee, Agent Born also interviewed the defendant. Born asked defendant whether she had used Spoofcard to call Bruce Enger, and defendant responded she knew about Spoofcard but she did not use it. TT(12/10/08)129. Agent Born then played two calls recorded by Spoofcard featuring the defendant's voice. *Id.* The defendant admitted it was her voice but denied ever using Spoofcard. *Id.* Defendant further stated she was "99% sure" who was behind the calls but refused to say who. *Id.* Agent Born asked defendant whether Sharon Thorn had sent mail to Bruce Enger from the J.W. Marriott and the defendant replied "maybe." *Id.* at 24. Some time later, on the telephone, the defendant told Agent Born she never accessed the e-mail accounts of the Enger family. *Id.* at 32.

Following the interviews, Agent Born increased her focus on intrusions into the e-mail accounts associated with the Enger family and their associates. Born procured records for multiple e-mail accounts and found additional accesses and attempted accesses into these accounts from locations associated with the defendant. TT(12/9/08)5-24. Agent Born was also able to locate evidence of payments to "yourhackers" from the defendant and Mrs. Thorn for passwords for a number of e-mail accounts. *See* TT(12/9/08)176-178. Paypal records showed that

the defendant and her co-conspirator Thorn purchased e-mail passwords for at least the Engers, their daughter, and Ms. Freeman. *See* Gov't Exhibit 3-3.

On May 22, 2008, agents executed two search warrants: one at the defendant's office at Chattanooga State Technical Community College and one at her residence in nearby Hixson, Tennessee. JA231-264. The warrants were signed on May 21, 2008 by a United States Magistrate Judge in the Eastern District of Tennessee. *Id.*

After the search warrants were executed, the defendant contacted Mr. Enger through an e-mail in which she wrote: "YOu [sic] need to get a restraining order. Or I will provoke the need for one from L&F." Gov't Exhibit 33.

During her investigation of the defendant, Agent Born procured records that established that: the Internet connection at the defendant's residence accessed Patricia Freeman's AOL account and attempted to access Bruce Enger's AOL account, TT(12/10/08)5; that a computer at defendant's office accessed the Engers' daughter's Google account, *id.* at 11; that a computer at defendant's office had attempted to access the Engers' elementary school-age son's AOL account, *id.* at 7; numerous accesses into Maureen Enger's AOL account from the defendant's home, office, and even a cruise ship on which she was vacation, TT(12/9/08)182-197; and defendant's home and office Internet connections accessed Sharon

Weiner's Hotmail account at least 36 times, TT(12/10/08)24. Additional logs of accesses to the relevant accounts in the case were no longer available from the Internet service providers. *Id*. at 61.

In reviewing the computer from the defendant's office, Agent Born also discovered detailed evidence of defendant's repeated accesses into the e-mail accounts of the Enger family and their associates. *See, e.g.,* TT(12/10/08)14-20. On the defendant's work computer, for example, Agent Born found images of the sent folder and the inbox for Catherine Read's Yahoo accounts, as well as images of Sharon Weiner's Hotmail inbox. *Id.* at 14-15. On the same computer, Born also found fragments of e-mails between Maureen Enger and her daughter, the daughter and Bruce Enger, and an e-mail confirmation from yourhackerz.com involving the purchase of Bruce Enger's AOL password. *Id.* at 17-20. Agent Born also discovered fragments from the yourhackerz.com website on the work computer. *Id.* at 19.

Both of the Engers testified that their AOL and work e-mail accounts had passwords that would protect their accounts from unauthorized access; neither of the Engers[6] had given their e-

[6] Indeed, in October 2006, Mr. Enger had some issues with e-mails in his AOL account appearing as read when he had not read them. TT(12/9/08)33-34. At the time, he confronted the defendant about it and she admitted breaking into his AOL

mail passwords to the defendant or otherwise authorized her access to the family's e-mail accounts. TT(12/9/08)28,35,79. Similarly, Patricia Freeman testified she had an AOL e-mail account with a password she did not disclose to the defendant and she had not authorized the defendant to access her e-mail account *Id.* at 113, 118. Sharon Weiner had a Hotmail account for which she had a password, which she did not share with anyone, and she never authorized the defendant to access her account. *Id.* at 95,101. Catherine Read had Yahoo e-mail accounts for both her personal and business communications; these accounts had a password that she had not given to anyone. *Id.* at 135-136.

Most of the e-mail accounts the defendant accessed without authorization had problems, which were contemporaneous with the defendant's conduct. Patricia Freeman received a notice from AOL that "someone's trying to access your account from another location." *Id.* at 114. In 2007, after being unable to log into her account, she was notified that her password was invalid and she had to change it. *Id.* at 115. Similarly, Sharon Weiner recalled that she had previously had some problems accessing her account and had received an "invalid password" message, *id.* at 100, and Catherine Read also remembered problems she had accessing e-mail between April and June 2008, *id.* at 141-42. Though she did not

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account without authorization. *Id.* at 33-35.

recall having any problems with her own account, Maureen Enger remembered that she had blamed her then 12-year old son with changing the parental controls on his attached-AOL account. *Id.* at 80.[7]

The relevant government witnesses all recognized the images of accounts, *see, e.g.,* TT(12/10/08)137-140; e-mail messages, *see, e.g.,* TT(12/9/08)116-118, and fragments, *see* TT(12/9/08)81-82, recovered from the defendant's work computer in which they were involved and testified that they had not given them to the defendant. The same was true of the personal e-mails that were contained in the letters sent through the mail to the Engers by the co-conspirators.

After the government rested its case and the defendant presented her unsuccessful Rule 29 motion, the defense called Sharon Thorn as its first witness. Mrs. Thorn was the long-time best friend of the defendant and was an unindicted co-conspirator.[8] Mrs. Thorn invoked her Fifth Amendment right not to incriminate herself. TT(12/10/08)152-153.

The defendant Elaine Cioni then took the stand. Contrary to her out-of-court statements, the defendant admitted making a significant number of spoofed

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[7] AOL records showed that someone in Tennessee, using an Internet connection associated with the defendant, changed the parental control on the 12-year old's account. *See* Gov't Exhibit 2-4.

[8] Sharon Thorn was identified as "ST" in the superseding indictment.

calls to Mr. Enger. TT(12/10/08)187. But the defendant denied ever making any threats against the Engers. *Id.* at 187-88. The defendant also admitted accessing e-mail for Bruce Enger, Maureen Enger, Ashley Enger, Sharon Weiner, Catherine Read, and Patricia Freeman. TT(12/9/08)194. The defendant additionally admitted that she opened a Spoofcard account in December 2006. TT(12/10/08)185-86. She further stated she tried to destroy the evidence of her conduct. *Id.* at 189. The defendant and Sharon Thorn used each other's spoofcard accounts, TT(12/9/08)42, though the defendant claimed that some particular calls were made without her knowledge. TT(12/10/08)193.

The defendant admitted making the call to Maureen Enger, *see* Gov't Exhibit 1-5, that appeared to be from her daughter's cell phone and hearing the fear in Mrs. Enger's voice. TT(12/10/08)188-9. She admitted that, on the calls, the Engers were clearly annoyed and angry. TT(12/9/08)49. The defendant also testified that she had read e-mails between Ms. Freeman and Mr. Enger about a greeting card she received that appeared to be from him but was actually from computer hackers hired by the defendant. *See id.* at 32. The defendant also specifically admitted reading an e-mail between Maureen Enger and a fellow soccer mom. *Id.* at 33.

The defendant admitted that she sent Bruce Enger the J.W. Marriott letter from a post office box in Georgetown. *Id.* at 38. The defendant further admitted that she accessed voicemails on Mr. Enger's Blackberry, heard new voicemails, and deleted them, including voicemails from herself and Maureen Enger. TT(12/11/08)40-41.

SUMMARY OF ARGUMENT

Given the totality of the evidence, the magistrate and district court judges properly found that there was probable cause for the search warrants for the defendant's home and residence in Tennessee. Even if they were in error in finding probable cause, the agents relied in good faith on the magistrate judge's issuance of warrants and, therefore, the defendant's motion to suppress was properly denied.

The district court's denial of the defendant's motion to dismiss the indictment for an alleged grand jury violation was proper where the only alleged prejudice was that the case agent testified that each paragraph of the indictment accurately reflected the government's investigation.

The district court properly denied defendant's motion to dismiss the indictment on 1) double jeopardy grounds where Congress provided for enhanced

penalties; and 2) for violations of the Commerce Clause where Congress clearly has the power to regulate interstate communications.

The district court properly denied defendant's motion for judgment of acquittal where the evidence at trial was more than sufficient to support the defendant's conviction on all counts and of multiple felonies.

The trial court did not abuse its discretion in excluding testimony under Rule 412 about a victim's past sexual conduct when two instances of similar testimony had already been elicited, and the testimony could also have been properly excluded under Rules 403 and 611. Even if it was improper, the testimony clearly would not have affected the outcome of the trial and, therefore, amounts to harmless error.

The court below correctly granted defendant's request to proceed without counsel at sentencing where she made an intelligent and calculated decision to fire her counsel and not hire a replacement.

The sentencing court properly considered all the sentencing factors under 18 U.S.C. § 3553(a) where the parties raised all sentencing factors in argument and briefing, the court recognized there were factors other than the guidelines, and the court addressed the factors before it sentenced the defendant.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED FROM HER OFFICE AND RESIDENCE SINCE THE WARRANTS WERE SUPPORTED BY PROBABLE CAUSE AND WERE OBTAINED IN GOOD FAITH

Defendant claims that probable cause was lacking in the warrant applications for both her home and office, and, alternatively, that the "affidavits intentionally misled the authorizing court and/or demonstrated a reckless disregard for the truth." Def.Br. at 25-28. These claims are without merit.

In challenging the warrants in the case below and again before this Court, the defendant has the burden of either establishing that the totality of the circumstances does not provide a "substantial basis for concluding that probable cause existed," *see Illinois v. Gates,* 462 U.S. 213, 238-39 (1983), and, even if there was not sufficient probable cause, establish that the officers acted in bad faith because they presented the magistrate with deliberately false statements or had a reckless disregard for the truth, *see United States v. Jones*, 913 F.2d 174, 176 (4th Cir. 1990). These were burdens that the district court expressly found that the defendant did not meet, JA73, and there is ample evidence in the record below to support this conclusion.

A. Standard of Review

Although this Court reviews *de novo* the denial of a motion to suppress, the issuing magistrate's determination of probable cause is entitled to great deference. *See United States v. Leon*, 468 U.S. 897, 914 (1984); *United States v. Robinson,* 275 F.3d 371, 380 (4th Cir. 2001). That determination is upheld as long as there is a "substantial basis for concluding that probable cause existed" which is determined by looking at the totality of circumstances. *Gates,* 462 U.S. at 238-39. This Court reviews *de novo* whether a defendant has made a substantial preliminary showing under *Franks v. Delaware*, 438 U.S. 154 (1978) that the affiant knowingly and intentionally omitted facts from a magistrate judge or acted with reckless disregard for the truth. *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008).

B. The Two Search Warrants in Tennessee Were Supported by Probable Cause

Probable cause decisions are based on the "totality of the circumstances" of each case. *Maryland v. Pringle*, 540 U.S. 366 (2003). The probable cause standard does not "require officials to possess an airtight case before taking action. The pieces of an investigative puzzle will often fail to neatly fit, and officers must be given leeway to draw reasonable conclusions from confusing and contradictory

information. . . ." *Taylor v. Farmer*, 13 F.3d 117, 121 (4th Cir. 1993). Probable cause requires only "a fair probability that evidence of a crime will be found in a particular place." *United States v. Wright*, 696 F. Supp. 164, 170 n.7 (E.D. Va. 1988) (citing *Gates*).

Here, the affidavits detailed probable cause to believe that evidence and instrumentalities of the defendant's violations of law would be discovered at her office and residence. The affidavits included a number of facts provided to the government by Sharon Thorn: the defendant admitted to Sharon Thorn that she was reading both Bruce Enger's and his daughter Ashley's e-mail, JA241, 258; that the defendant was using Spoofcard to call Mr. Enger, JA241, 258; and that the defendant had mailed an envelope containing private e-mails involving Mr. Enger from the J.W. Marriott, JA241, 258. The affidavits also indicated that Thorn told investigators that the defendant had purchased passwords for Enger family e-mail accounts over the Internet using Thorn's credit card, and the defendant also admitted to Thorn that she had previously used her own credit card but wanted to hide a paper trail of her conduct. JA241-242, 258-259. This information, when combined with evidence of multiple accesses into these accounts, as demonstrated by Internet Protocol addresses in the affidavits linking this illegal conduct to the defendant's home and office, JA242-243, 259-260, would have reasonably led to

the belief that the defendant was accessing the Enger family's e-mail in violation of the law.

The scope of the affidavits were, by their own terms, limited to materials that the affiant had selected as relevant to the defendant's alleged illegal conduct. The probable cause decision in this case was reasonable and justified. Nothing offered by the defendant undermines that conclusion, and the totality of circumstances provide a "substantial basis for concluding that probable cause existed." *See Gates*, 462 U.S. at 238-39.

Defendant nonetheless argues that the affidavits lacked probable cause to believe she had violated 18 U.S.C. § 2701 because they did not specifically allege that the e-mails and voicemails were "unopened." *See* Def.Br. 27-28. From the totality of the statements in the affidavits, however, it was reasonable for the magistrate judge to have concluded, and for the district court to agree, that there was probable cause to believe the defendant was unlawfully accessing electronic communications in storage. Certainly, there was no reason to suspect that, particularly given her repeated access to the accounts, that the defendant was limiting her intrusion to already-opened communications. At any rate, the district court correctly noted, whether the e-mail was un-opened "may be a matter of proof

for trial," but "all the other facts that are described in great detail in the affidavit" established probable cause. JA73.

C. The Alleged Omissions Cited by the Defendant Do Not Undermine the Magistrate's Finding of Probable Cause

Below, defendant further alleged the affidavits in this case were intentionally misleading or demonstrated a reckless disregard for the truth and therefore requested a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). *See* Def.Br. 25. Under *Franks*, a defendant can obtain an evidentiary hearing on an affidavit's integrity by making "a substantial preliminary showing that a false statement knowingly and intentionally or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." *United States v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990) (quoting *Franks*).[9] This substantial showing "must be accompanied by an offer of proof" that should include "[a]ffidavits or sworn or otherwise reliable statements of witnesses." *Id.* (citing *Franks*). "The burden of making the necessary showing is thus a heavy one to

[9] As the defendant's argument centers on facts that were allegedly "withheld," it should be noted that "[a] *Franks* hearing is also warranted if the defendant makes a substantial showing that the "affiant[] omit[ted] material facts with the intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading." *United States v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990). The defendant made no such showing.

bear." *Tate*, 524 F.3d at 454. And, indeed, when a defendant relies on omissions, the "burden increases yet more." *Id.*

As the district court properly found, the defendant did not meet this "heavy burden" because she did not provide "sufficient proof to challenge that there was some intentional misleading of the magistrate judge or reckless disregard for the truth." JA72-73. In fact, defendant made no offer of proof of an intent to mislead or recklessly disregard the truth, such as the submission of original affidavits or sworn statements of witnesses,[10] in order to establish a substantial showing under *Franks*. *See* JA6 (Docket#21). Absent any showing, let alone a "substantial" one, the defendant was not entitled to an evidentiary hearing.

Even if there had been an evidentiary hearing, none of the omissions noted by the defendant would have affected the magistrate judge's findings of probable cause. For example, defendant states that the affidavits omitted the fact that she asked Spoofcard to close her accounts in November 2007.[11] Def.Br. 25-26. The

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[10] The defendant's submission was primarily the search warrant affidavits, but also included investigative summaries written by persons other than the affiant, a release for Bruce Enger's AOL records, and letters from Long & Foster's attorney outlining their independent investigation. JA213-265. None of these additional materials was materially inconsistent with the affidavits.

[11] The defendant neglects to mention that she asked Spoofcard to delete all of her incriminating account records despite knowing of the FBI's investigation at the time. TT(12/8/10)63.

affidavits, however, do note both the request to close the accounts (and to delete the records), JA238, 255; they merely omit the precise date of the closing. If the magistrate judge thought this was important to the probable cause determination, she could have asked about the timing; the omission of the date was obvious and cannot be misleading.

More importantly, the date of closing the Spoofcard accounts in the defendant's name did not affect the defendant's ability to use other accounts to hide her identity during harassing telephone calls – whether she used Sharon Thorn's accounts or other methods that were not discovered at the time. Furthermore, it had no bearing on the existence of probable cause with regard to unlawful access to electronic communications because that crime was not tied to her use of Spoofcard.

As the defendant notes, *see* Def.Br. 26, the affidavits did not specify dates for several other assertions of unlawful conduct (although they do note that the conduct began in March 2007, JA235, 252, thus establishing approximately a one-year period for all of the events described). Given this, defendant fails to explain how omission of specific dates could have been materially misleading, much less intentionally so. Despite the defendant's repeated claim that facts were withheld from the magistrate judge, there is no proof that the affiant deliberately kept

anything out of the affidavits to mislead the judge. Nor is there a suggestion that the affiant used the date of one act to imply that others had occurred more recently than was known to be true. The affiant instead included facts for the specific limited purpose of establishing probable cause for the search warrants; the magistrate judge found that probable cause was satisfied, and that finding should not now be disturbed.

Finally, if defendant's allegations are taken at face value and the affidavits are rewritten to include all the precise dates she alleges was omitted, they would still establish probable cause. *See United States v. Blatstein*, 482 F.3d 725, 730-31 (4th Cir. 2007). Where alleged misrepresentations or omissions do not "in any way alter[] the probable cause calculus," *Franks* is inapplicable. *United States v. Friedemann*, 210 F.3d 227, 229 (4th Cir. 2000). This is true even if the affiant acted with deliberate intent or recklessly. *Id.*

Here, even if the affidavits executed in May 2008 had specified certain dates (such as "when" Thorn "believed" defendant was making her calls to Enger or "when" precisely two e-mails that came from Bruce Enger's Long & Foster account were sent to the Engers, Def.Br. 25-26), there was still probable cause to believe that electronic evidence remained on the computers at the defendant's work and residence in May 2008 where the defendant had repeatedly accessed

other people's e-mail accounts and had done so as recently as March 25, 2008. JA243, 260. The defendant has not suggested that the magistrate judge acted unreasonably in approving a warrant based on an affidavit that did not establish specific dates (within the one-year window) for each illegal act. Thus, it would have been entirely reasonable, even if the "omitted" dates cited by defendant were read into the affidavits, for the magistrate judge to have approved the warrants anyway.

With regard to staleness, defendant has not suggested why the dates of her alleged crimes demonstrated that no evidence would be found at her home or workplace; she merely suggests that some of the acts had occurred approximately six months before the search, Def.Br. 26, and ignores more recent details such as her access into Ashley Enger's Gmail account in late March 2008. JA243, 260. But "'the vitality of probable cause cannot be quantified by simply counting the number of days between the occurrence of the facts supplied and the issuance of the affidavit.' Rather, we must look to all the facts and circumstances of the case, including the nature of the unlawful activity alleged, the length of the activity, and the nature of the property to be seized." *United States v. McCall*, 740 F. 2d 1331, 1336 (4th Cir. 1984) (citations omitted). At any rate, the nature of activity

described in the affidavits was sufficient to support the magistrate judge's finding of probable cause.

With regard to some of the other facts defendant suggests were withheld, such as that 26 of the spoofed calls were *from* telephone numbers associated with Cioni *to* telephone numbers associated with Cioni, *see* Def.Br. 26, their inclusion would have had no effect on probable cause. At most, those calls demonstrate that defendant herself was in control of the Spoofcard accounts, knew how to use them, and confirm her identity as the person who was using those accounts to terrorize and harass the Enger family.

As to the suggestion that Mr. Enger had supposedly "forgiven" the defendant for accessing his personal e-mail account after the fact, *see* Def.Br. 27, even if true,[12] this statement does not defeat probable cause to believe she had unlawfully accessed his e-mail accounts. Moreover, it has no relevance to the other victims whose e-mails she read without their knowledge and who did not have the opportunity to provide their forgiveness. If this statement had been included in the affidavit, it would have, if anything, increased the evidence of the

[12] This claim is complicated by the fact that the defendant bought the password to Mr. Enger's AOL account again in 2007. *See* JA29-30.

defendant's knowledge and motive to access e-mail accounts, since she had already admitted what she had done once.

Further, the allegedly omitted statement that Mr. Enger had "stopped complaining" about receiving harassing calls at some point before the affidavits were signed, s*ee* Def.Br. 25, also does not undermine the probable cause supporting the warrants or demonstrate that the magistrate judge was misled. First, the warrants explicitly talked about the calls in the past tense. JA233, 250 ("made harassing telephone calls"). Second, the affidavits gave a November 2007 timeframe for Spoofcard calls, JA237, 254-255, and did not suggest that they were continuing as of the date of the warrant applications.[13] Third, whether Mr. Enger was still complaining about calls or not, there was still probable cause to believe that evidence related to the calls would be found at the defendant's home and office.

[13] In fact, the warrant applications noted that the defendant had been confronted by the FBI about the charges in March 2008, JA240,257, so it seems particularly unlikely that the magistrate was misled into believing that they were ongoing.

D. Even If There Was Insufficient Probable Cause Supporting Warrants, the *Leon* Good Faith Exception Precludes Exclusion of the Evidence Seized Pursuant to Validly Issued Warrants, and the Trial Court's Finding that the Exception Applied Was Supported by the Record

As an independent ground justifying the denial of the motion to suppress, the district court alternatively found "that the good faith exception under *United States versus Leon* would apply here. And there has not been sufficient showing that there was not good faith by the officers here in executing the search warrants." JA73; *see also* JA9 (Docket#47).

The trial court's "good faith" finding was explicitly based on *Leon*, where the Supreme Court recognized the application of the "exclusionary" rule was not suitable in situations, as here, where law enforcement acts appropriately with an objectively good faith reliance on a facially valid warrant. In *Leon*, the Court found that if certain conditions were met, and the police searched an area with a facially valid warrant, then the evidence seized pursuant to that warrant should not be excluded. These conditions are as follows: was the magistrate given truthful information by the officer; did the magistrate exercise his duty by acting as a detached and neutral judicial officer; and could the police reasonably presume the warrant to be valid. *United States v. Leon*, 468 U.S. at 923.

As the court below correctly found, the government in this case satisfied the conditions established by *Leon*. *See* JA73. First, there is nothing in the record that demonstrates the affiant did not tell the truth to the magistrate judge. At the hearing on the motion to suppress, the defendant raised the same alleged omissions that she raises before this Court, *see* Def.Br. 25-28, and yet the district court still found that there was no police misconduct, s*ee* JA73; the government submits there is no basis for this Court to find otherwise.

Second, the magistrate judge read the affidavits, understood the matter before her, acted as a detached and neutral judicial officer, and authorized the searches of the defendant's residence and office. The magistrate judge simply did not rubber stamp the officer's requests. As recognized by the district court, the magistrate judge demonstrably examined the affidavits in detail, as shown by the interlineations added at the magistrate judge's request. *See* JA72.

Third, warrants signed and issued by magistrate judges are presumed to be valid. *See, e.g., Franks v. Delaware*, 438 U.S. at 171; *Jones*, 913 F.2d at 176. Here, the magistrate judge signed and issued these warrants, and therefore, under *Franks*, they are presumed to be valid. Defendant has not suggested that the warrants lacked the indicia of probable cause such that the officers acted unreasonably in believing them to be valid, *see Leon*, 468 U.S. at 923, and

therefore the evidence obtained under the warrants should not be suppressed, even if this Court decided that magistrate and district court judges were in error.

II. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS THE INDICTMENT DUE TO A LACK OF ANY GRAND JURY ISSUES

A. Standard of Review

This Court reviews a district court's ruling on a motion to dismiss an indictment *de novo*. *See United States v. Loayza*, 107 F.3d 257, 260 (4th Cir. 1997).

B. Defendant Has Yet to Present Any Evidence of Prosecutorial Misconduct or Constitutional Error that Would Require Dismissal Of the Superseding Indictment

A presumption of regularity attaches to grand jury proceedings,[14] and an indictment returned by a legally constituted and unbiased grand jury, if valid on its face, is sufficient to call for a trial of the charges on the merits. *Costello v. United States*, 350 U.S. 359, 363 (1956). Here, the presumption of regularity has not been defeated by the defendant's bald claim that it was somehow improper to have the lead investigative agent (Special Agent Born) review the superseding indictment

[14]*See, e.g., United States v. Leverage Funding Systems, Inc.,* 637 F.2d 645 (9th Cir. 1980), *cert. denied,* 452 U.S. 961 (1981)*; In re Grand Jury Proceedings,* 486 F.2d 85, 92 (3d Cir. 1973).

paragraph-by-paragraph and ask her, under oath, if it was consistent with the government's investigation of the defendant. *See* Def.Br. 30-31.

The court below properly found that there was not a sufficient "showing here that evidence was intentionally not presented to the grand jury or that there was some misconduct before the grand jury that would violate the defendant's rights here under the Fifth Amendment or that would be sufficient to meet the particularized showing that is required to get access to information before the grand jury."[15] JA71. There is nothing in the record that undermines this conclusion. Simply put, there is nothing untoward about an agent using a lengthy and detailed indictment as a roadmap for her testimony before the grand jury. Certainly, defendant has never articulated the impropriety stemming from a case agent's sworn testimony that her investigation revealed the criminal conduct described in the government's indictment.

"A defendant is entitled to dismissal of an indictment only whe[n] actual prejudice is established." *United States v. Feurtado*, 191 F.3d 420, 424 (4th Cir.1999) (citing *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988)).

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[15] A "defendant seeking disclosure of grand jury information under Rule 6(e)(3)(E)(ii) bears the heavy burden of establishing that 'particularized and factually based grounds exist to support the proposition that irregularities in the grand jury proceedings may create a basis for dismissal.' " *United States v. Nguyen*, 314 F. Supp. 2d. 612, 616 (E.D. Va. 2004).

Prejudice may be established by "proof that the grand jury's decision to indict was substantially influenced, or that there is 'grave doubt' that the decision to indict was substantially influenced, by testimony which was inappropriately before it." *Id.* As the district court correctly found, defendant adduced no evidence that the grand jury's decision was substantially influenced in an improper manner.

III. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS THE SUPERSEDING INDICTMENT ON DOUBLE JEOPARDY GROUNDS

A. Standard of Review

This Court reviews *de novo* a claim that charges in an indictment are multiplicitous. *United States v. Leftenant,* 341 F.3d 338, 343 (4th Cir. 2003).

B. Counts 2 and 4 are Not Multiplicitous Because Congress Provided For Enhanced Punishment

The defendant argues that Counts 2 and 4 are multiplicious, in violation of the Double Jeopardy Clause, "in that each count charged her twice with a single offense." Def.Br. 31. To the contrary, each count charged her once with a single offense, and put her on notice that higher statutory maximums applied because her conduct furthered the violation of other statutes.

"[T]he guarantee against multiple punishments serves simply to ensure that the defendant's sentence is authorized by Congress. If the punishment is

authorized by statute, there can be no double jeopardy violation." *United States v. Martin,* 523 F.3d 281, 290 (4th Cir. 2008). "Because the substantive power to prescribe crimes and determine punishments is vested with the legislature . . . the question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent." *Ohio v. Johnson,* 467 U.S. 493, 499 (1984).

Counts 2 and 4 charged violations of Section 1030(a)(2), which prohibits accessing computers without authorization and obtaining information from them.[16] A first offense of Section 1030(a)(2) is a felony in three situations, listed in § 1030(c)(2)(B), and a misdemeanor otherwise. A first violation of § 1030(a)(2) has a five-year maximum sentence if "the offense was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." 18 U.S.C. § 1030(c)(2)(B)(ii).

Thus, Congress explicitly authorized increasing the statutory maximum punishment when one course of conduct has the effect of both violating Section

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[16] Specifically, Count 2 charged that defendant acted "in furtherance of criminal and tortious acts committed in violation of the laws of the United States; that is, CIONI" downloaded "ME's unopened electronic communications" from AOL, "in furtherance of a violation of Title 18, United States Code, Section 2701." JA37. Count 4 charged that the defendant acted "in furtherance of criminal acts committed in violation of the laws of the United States; that is, CIONI" downloaded "PF's electronic mail account," and this was "in furtherance of violations of Title 18, United States Code, Section 2701." JA39.

1030(a)(2) and also furthers another federal crime. Section 1030(c)(2)(B)(ii) is, in other words, comparable to a case where "a legislature specifically authorizes cumulative punishment under two statutes." *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983). Thus, this is a case where "the statutory language allows" increased punishment, so therefore "there is no double jeopardy problem and we need not go any further." *Martin,* 523 F.3d at 290-91.

Defendant argues Counts 2 and 4 simultaneously charge defendant with violating both Sections 1030 and 2701. Def.Br. 35-36. This misreads the unambiguous indictment: Counts 2 and 4 each charge defendant with violating 18 U.S.C. § 1030(a)(2)(C) only, but also notify her that the higher statutory maximum set out in 18 U.S.C. § 1030(c)(2)(B)(ii) applied. The indictment mentioned Section 2701 only because that statute was part of a "fact (other than prior conviction) that increases the maximum penalty for a crime," which therefore "must be charged in an indictment." *Apprendi v. New Jersey,* 530 U.S. 466, 476 (2000). Though identifying that statutory enhancement, the indictment concludes with the traditional charging statement that the defendant's conduct was "in violation of Title 18 United States Code, Sections 2, 1030(a)(2)(C)." JA37, 39.

C. Sections 1030(a)(2)(C) and 2701 Had, at the Time of the Defendant's Conduct, Different Elements

While not disputing that Congress explicitly authorized "cumulative punishment" in section 1030(c)(2)(B)(ii), defendant and *amicus* nonetheless claim that Congress did not intend to increase the statutory maximum punishment in cases such as this one, where a defendant's conduct both violates Section 1030 and also furthers a violation of Section 2701. They argue that Section 1030(a)(2) and Section 2701 have identical elements and thus are the same offense under *Blockburger v. United States,* 284 U.S. 299 (1932). Defendant argues that those two statutes are "technically indistiguishable," Def.Br. 35, and *amicus* goes even further, calling them "one and the same." Amicus Br. 9.

Contrary to the defendant and *amicus*'s arguments, Section 1030(a)(2)(C) and Section 2701 each had an element the other did not. In their analysis of the statutory elements, both the defendant and *amicus* cite the modern version of Section 1030(a)(2)(C). Def.Br. 35; Amicus Br. 6. However, at the time the defendant was charged, Section 1030(a)(2)(C) required proof that the illegal access was accomplished by means of an interstate communication. Specifically, the statute, before September 26, 2008, read:

> (a) Whoever– . . . (2) intentionally accesses a computer without authorization or exceeds authorized access, and

> thereby obtains-- (C) information from any protected computer **if the conduct involved an interstate or foreign communication**; . . . shall be punished as provided in subsection (c) of this section.

See Pub.L. 110-326, Title II, § 203, Sept. 26, 2008, 122 Stat. 3561 (emphasis added).

Thus, even if the indictment charged separate violations of both Section 1030 and 2701 (which it did not), at the time of the conduct charged in Count 2 (November 20, 2006) and Count 4 (March 10, 2008), Section 1030(a)(2)(C) required proof that the defendant used an interstate communication to commit the crime, which was an element that Section 2701 did not have; while, Section 2701 had elements that Section 1030(a)(2) did not (*e.g.,* that a "wire or electronic communication" be obtained, "while it is in electronic storage."). Therefore, "proof of each crime requires proof of an additional fact which the other does not," *United States v. Chandia,* 514 F.3d 365, 372 (4th Cir. 2008), and the Double Jeopardy Clause would not be violated even if both statutes had been charged.[17]

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[17] The defendant also vaguely argues that Count 1 – which charged conspiracy under 18 U.S.C. § 371 – was multiplicitous. Def.Br. 41. Count 1 charges a conspiracy, and states that one object of the conspiracy was the attempted illegal access of Patricia Freeman's e-mail account, in violation of Section 1030(a)(2) and in furtherance of a violation of Section 2701. JA32-33. To the extent that Defendant is challenging the indictment for citing both statutes, the government repeats its arguments regarding Counts 2 and 4. To the extent that the defendant is arguing that charging her with both conspiring to attack Ms. Freeman's account and actually

IV. THE DISTRICT COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON COMMERCE CLAUSE GROUNDS.

A. Standard of Review

This Court reviews "*de novo* the district court's denial of a motion to dismiss an indictment where the denial depends solely on questions of law." *United States v. Hatcher,* 560 F.3d 222, 224 (4th Cir. 2009).

B. Congress Had the Authority under the Commerce Clause to Regulate Interstate Electronic Communications.

The defendant argues that three of "the statutes as charged," specifically, 18 U.S.C. Sections 1030 & 2701, and 47 U.S.C. Section 223, do "not reflect a legitimate federal interest" sufficient to invoke Congress's Commerce Clause power. Def.Br. at 38.

The notion that Congress may, pursuant to the Commerce Clause power, regulate interstate electronic communication has been well-settled since at least 1877, when the Supreme Court held that the Commerce Clause gave Congress the authority to regulate telegraphs. *See Pensacola Tel. Co. v. Western Union Tel. Co.,* 96 U.S. (6 Otto) 1, 10 (1877) ("it cannot for a moment be doubted that this

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attempting to attack the account is multiplicitous, as the Supreme Court has held, the 'settled principle' [is] that 'the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses.'" *United States v. Chandia,* 514 F.3d 365, 372 (4th Cir. 2008) (*quoting Callanan v. United States,* 364 U.S. 587, 593 (1961)).

powerful agency of commerce and intercommunication comes within the controlling power of Congress"). Moreover, Congress has the "authority to regulate and protect the instrumentalities of interstate commerce," *Gonzales v. Raich,* 545 U.S. 1, 16 (2005).

The defendant challenges three statutes that all invoke this constitutionally-permissible congressional authority. Section 1030 applies only to "protected" computers, which, as relevant here, include computers "used in or affecting interstate or foreign commerce or communication." 18 U.S.C. § 1030(e)(2)(B). Section 2701 protects only "electronic communication[s]," which are defined to include only those communications that are "transmitted in whole or in part by a . . . system that affects interstate or foreign commerce." 18 U.S.C. § 2510(12). Section 223(a)(1)(C) explicitly requires proof of a phone call "in interstate or foreign communications." 47 U.S.C. § 223(a)(1). Consequently, the district court did not err by rejecting the defendant's Commerce Clause challenge.

V. THE EVIDENCE SUPPORTED THE DEFENDANT'S CONVICTIONS ON THE FIVE REMAINING COUNTS OF THE SUPERSEDING INDICTMENT

A. The Government's Evidence Showed an Agreement and the Conviction on Count 1 Should Be Affirmed

Defendant argues that there was "no evidence of agreement" for Count 1. Def. Br. 40. She is wrong. The evidence showed Sharon Thorn conspired with

the defendant by helping her pay for passwords so that the defendant could get into accounts that would allow her to access unopened e-mails belonging to the Enger family and their associates. As trial court stated in its post-trial ruling: "the evidence was more than sufficient to establish, through direct and circumstantial evidence that the co-conspirator Sharon Thorn who is a close friend of the defendant who allowed the defendant to use her paypal account to purchase passwords from computer hackers – from hackers.com and that this was sufficient to establish there was a conspiracy and the conspiracy involved two or more persons." TT(1/9/09)22. The evidence at trial further showed that Internet hackers conspired with defendant to provide the means to access e-mail accounts that would allow defendant to access the unopened e-mails.

B. The Government's Evidence Showed Defendant's Access Was Unauthorized and her Convictions on Counts 1, 2, 4, and 6 Should Be Affirmed

Defendant argues that the authorization to access a protected computer in order to obtain information must come from the Internet service provider, such as AOL, rather than the user of the account. *See* Def.Br. 41. This claim is fatally undermined by the established fact that each user defines the passwords that control access to their e-mail account. But, even assuming defendant's premise

were correct, it would clearly be exceeding a provider's authorization to access another subscriber's account with a password purchased from Internet hackers.

None of the defendant's victims gave her the passwords to their e-mail accounts or authorized the defendant to access their accounts and read their e-mails. *See* TT(12/9/08)28, 35, 79 (Engers); *id.* at 113, 118 (Freeman); *id.* at 95, 101 (Weiner); *id.* at 135-136 (Read). Instead, the evidence showed that the defendant purchased passwords for the Engers, their daughter, and Patricia Freeman from Yourhackers. *See* Gov't Exhibit 3-3. Indeed, on the stand, the defendant admitted that she bought passwords for Maureen Enger, Ashley Enger, Patricia Freeman, and Catherine Read from Yourhackers. TT(12/11/08)27-36. She further claimed she guessed the password for Sharon Weiner's Hotmail e-mail account. *Id*. at 34.

By using Spoofcard to impersonate Bruce Enger (through the use of his phone number), the defendant also was able to access Mr. Enger's voicemail without authorization. To his voicemail provider, it appeared that Mr. Enger was calling in to check his messages, so the defendant could never have received authorization from the provider.

C. The Government's Evidence Showed Defendant's Access to Her Victim's Voicemail Was In Furtherance of Harassing Phone Calls and her Conviction on Count 6 Should Be Affirmed

Defendant argues the government "presented no evidence that [defendant's] access to voicemail was in furtherance of harassing phone calls." Def.Br. 40-41. She is wrong. The evidence at trial showed defendant taunted Bruce Enger and his family with facts (such as recent travel) she learned from repeated accesses to his voicemail, *see* Gov't Exhibits 1, 1-2, and regularly intimated that Enger was under surveillance, *see* Gov't Exhibits 1-9, 1-20, 1-21. Thus the evidence showed her unlawful access to Bruce Enger's voicemail facilitated the harassing phone calls by supplying ammunition that made the calls sound more threatening. *See also* JA230 (Gov't Exhibit 1 contained a recording of the defendant saying in a call that she had listened to Bruce Enger's voicemail); TT(12/11/08)165-166.

The jury had a choice whether or not the government proved beyond a reasonable doubt that defendant's access to Bruce Enger's voicemails was in furtherance of harassing phone calls and they definitively concluded that it did. JA110. The trial court also found that there was sufficient circumstantial evidence that the conduct was in furtherance of the harassing phone calls. TT(1/9/09)24.[18]

[18] The defendant's arguments on sufficiency of the evidence do not affect her felony conviction on Count 5 (harassing phone calls), and therefore they are not addressed herein.

D. Felony Enhancements for Counts 1 and 4 Were Sufficiently Proved, but Not for Count 2

Count 1 charged conspiracy under 18 U.S.C. § 371 and charged that an object of that conspiracy was a felony violation of 18 U.S.C. § 1030(a)(2)(C). Counts 2 and 4 charged violations of a single statute, 18 U.S.C. § 1030(a)(2)(C). A first violation of Section 1030(a)(2) has a five-year maximum sentence if "the offense was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." 18 U.S.C. § 1030(c)(2)(B)(ii). The charges in Counts 1, 2, and 4, therefore, were all potentially punishable as felonies due to application of the "in furtherance" enhancement; otherwise, they are misdemeanors.

Contrary to defendant's suggestion, Def.Br. 42, a plain reading of Section 1030(c)(2)(B)(ii) suggests that the "offense" and "criminal . . . act" are two different courses of conduct. The statute contemplates that the "offense" must be "committed" in "furtherance" of the "criminal . . . act." The plain meaning of "furtherance" suggests that one can only "further" something that has not yet occurred.[19]

[19] When writing criminal statutes, Congress has consistently used the phrase "in furtherance of" to describe furthered acts that have not yet occurred. Section 924(c)(1)(A), for example, enhances sentences for crimes of violence or drug trafficking crimes when the defendant "in furtherance of any such crime, possesses

"[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey,* 530 U.S. 466, 476 (2000). Here, one such fact was the allegation in the superseding indictment that the defendant's conduct, in addition to violating 18 U.S.C. § 1030(a)(2)(C), also furthered a violation of 18 U.S.C. § 2701 and therefore could potentially enhance the defendant's maximum penalty.

1. Count 1

Count 1 charged conspiracy under Title 18, United States Code, Section 371. An indictment charging a conspiracy under Section 371 must identify the "offense against the United States" that is the subject of the conspiracy. 18 U.S.C. § 371; *see also United States v. Kingrea,* 573 F.3d 186, 192 (4th Cir. 2009). Count 1 charged that the "offense against the United States" was violation of the federal computer intrusion statutes; specifically, 18 U.S.C. § 1030(a)(2)(C). JA27.

Defendant's argument assumes that the object of the conspiracy was to obtain unread e-mail in furtherance of obtaining unread e-mail. *See* Def.Br. 42. The superseding indictment, however, charged more than that. The superseding

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a firearm." 18 U.S.C. § 924(c)(1)(A). It would not make sense to speak of possessing a firearm as "furthering" a violent crime that already occurred, or that occurred simultaneous with the possession.

indictment begins with a general description of the "object" of the conspiracy, JA27, and then provides more detail about exactly what information was obtained and from where. Specifically, the indictment describes how the co-conspirators "purchased passwords to e-mail accounts belonging to a number of individuals associated with BE from illegal computer hacking groups on the Internet." JA28. Hackers obtained these passwords in violation of 18 U.S.C. § 1030(a)(2)(C). Using those passwords, the co-conspirators were able to access victims' e-mail accounts and obtain access to unread mail. The evidence in the case established multiple victims, described in great detail in Count 1, whose "inbox" information was obtained or attempted to be obtained, without authorization, in furtherance of accessing their unopened email.

While an indictment must charge the "elements of the criminal offense forming the object of the conspiracy," *United States v. Kingrea,* 573 F.3d 186, 192 (4th Cir. 2009), it need not do so in a single paragraph. All paragraphs in Count 1, taken together, properly put the defendant on notice of the nature of the conspiracy charged, and the evidence amply supported the felony conviction under Count 1.

The jury, *see* JA107-111, and the trial court in its ruling on defendant's motions, *see* TT(1/9/09)23-24, were aware that they had to consider whether the government had proven beyond a reasonable doubt that the defendant's Section

1030(a)(2) violations were "in furtherance of" a violation of Section 2701. And, with respect to Count 1, the jury and the district court properly concluded that the circumstantial evidence of the defendant's intent was sufficient to convict her of conduct in furtherance of a violation of 2701 and therefore found that Count 1 was punishable as a felony.

2. Count 2

Count 2 charged that the defendant accessed AOL computers without authorization, and thereby obtained "information (i.e. ME's unopened electronic communications)." JA28. The evidence presented at trial more than supports a conviction under this count: it showed that the defendant did, in fact, access AOL using a hacker-provided password and obtained unopened e-mail. However, there was no evidence that the defendant committed this offense "in furtherance of any" separate and distinct "criminal or tortious act in violation of the Constitution or laws of the United States or of any State." 18 U.S.C. § 1030(c)(2)(B)(ii).

To explain: Count 2 properly charged a felony, but the evidence did *not* support a felony conviction because the precise wording of Count 2 included "unopened" mail as part of the information obtained in violation of Section 1030. Had the defendant obtained "information (i.e. ME's unopened electronic communications)," and then used ME's unopened electronic communications in

furtherance of a separate access and a separate download of unopened electronic communications in violation of Section 2701, then the defendant's conduct may have been a felony violation of 18 U.S.C. § 1030(a)(2)(C).

However, because the only "criminal . . . act" proven at trial that might have been a violation of 18 U.S.C. § 2701 was the same criminal act charged as the "offense" in Count 2 – *i.e.,* the defendant's unauthorized access to AOL using a hacker-provided password, to obtain unopened e-mail – there was not sufficient evidence to prove that the defendant's Section 1030 offense was "in furtherance of" criminal acts that violated Section 2701. The government thus respectfully suggests this Court remand Count 2 to the district court with instructions to amend the judgment to reflect that the conviction under that count was a misdemeanor.

3. Count 4

In contrast to Count 2, Count 4 did not expressly include unopened e-mail in the information that was associated with the defendant's Section 1030(a)(2)(C) violation; instead, it alleged that the defendant obtained "information contained in PF's electronic mail account." JA39. The defendant repeatedly obtained Patricia Freeman's AOL "inbox" screens, s*ee, e.g.,* TT(12/10/08)5; TT(12/11/08)27*,* after purchasing her password from Internet hackers, TT(12/11/08)27-28. By repeatedly obtaining Ms. Freeman's inbox screens without authorization, the

defendant was able to obtain access of the latest unread e-mail, in furtherance of a violation of Section 2701. Thus, the inbox screens were "information," distinct from the communications that were the subject of the Section 2701 violation, and obtaining that information furthered the crime of obtaining the unread e-mail.[20]

As with Count 1, the jury, *see* JA109, and the judge properly found that the facts at trial showed beyond a reasonable doubt that a violation of Section 2701 was furthered by the defendant's conduct under the circumstances and was sufficient to convict her of a felony under Count 4.

VI. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING TESTIMONY OF A VICTIM'S PAST SEXUAL CONDUCT

A. Standard of Review

An appellate court reviews a district court's decision to exclude evidence for an abuse of discretion. *See United States v. Fulks,* 454 F.3d 410, 434 (4th Cir. 2006). This Court "will not vacate a conviction unless we find that the district court judge acted arbitrarily or irrationally." *United States v. Ham,* 998 F.2d 1247, 1252 (4th Cir. 1993).

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[20] An e-mail inbox as conceptually distinct from the e-mail it catalogs. The contents of a communication, as opposed to information about who sent the communication and when, are frequently treated as conceptually distinct information that receives, for example, different protection from privacy laws. *See, e.g.,* 18 U.S.C. § 2703 (setting out more stringent standards for obtaining "contents" of communications).

B. Analysis

At trial, counsel for defendant asked Bruce Enger a series of questions about his affair with the defendant and with another witness in the case. JA82-83. Counsel for defendant then began to ask questions about "other" affairs. JA 84. The government objected "on relevance grounds." *Id.* The court sustained the objection "under 412." JA85. The defendant argues this was error because her prosecution was not for sexual misconduct. Def.Br. 39.

Rule 412 applies to "any civil or criminal proceeding involving alleged sexual misconduct." Fed. R. Evid. 412(a). The superseding indictment did not charge sexual misconduct, but the evidence showed that the defendant and Mr. Enger had a consensual extramarital sexual affair. Given the broad scope of Rule 412, the district court did not abuse its discretion in precluding the questioning.

At any rate, any error was surely harmless. First, the evidence was cumulative. The defendant argues only that the proffered evidence was relevant to Mr. Enger's veracity. Def.Br. at 39. However, the district court had already permitted the jury to hear about two extramarital affairs involving Mr. Enger. Additional evidence about other affairs would have been cumulative, or that the question was unduly harassing or embarassing. *See* Rule 611(a)(3); *see also Hider v. Gelbach,* 135 F.2d 693, 696 (4th Cir. 1943). The district court would not have

abused its discretion by determining that asking Mr. Enger about every aspect of his sexual misconduct would have served more to humiliate and embarrass him than it would have advanced the ascertainment of truth. Finally, any error could not have affected the verdict in light of the voluminous evidence against the defendant–evidence that included inculpating herself on the witness stand.

VII. THE DISTRICT COURT PROPERLY PERMITTED DEFENDANT TO PROCEED *PRO SE* TO SENTENCING WHERE SHE FIRED HER ATTORNEY AND INVOKED HER RIGHT TO SELF REPRESENTATION

A. Standard of Review

This Court reviews *de novo* a district court's determination that a defendant properly waived the right to counsel. *See United States v. Singleton,* 107 F.3d 1091, 1097 n.3 (4th Cir.1997).

B. The District Court Correctly Found That the Defendant's Decision to Proceed *Pro Se* at Sentencing Was A Valid Waiver of the Right to Counsel

The Sixth Amendment guarantees a right to the assistance of counsel, and "the assistance of counsel cannot be limited to participation in a trial." *Maine v. Moulton,* 474 U.S. 159, 170 (1985). A defendant, "however, may choose to forgo representation," *Iowa v. Tovar,* 541 U.S. 77, 87-88 (2004), and forcing a competent defendant to present her defense through an attorney "deprive[s] [her]

of h[er] constitutional right to conduct h[er] own defense." *Faretta v. California,* 422 U.S. 806, 836 (1975).

"In order for a waiver [of counsel] to be valid, it must be shown that the defendant intentionally relinquished a known right." *United States v. Johnson,* 659 F.2d 415, 416 (4th Cir.1981). Thus, "[w]aiver of the right to counsel . . . must be a 'knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances.'" *Tovar,* 541 U.S. at 81. There is no "formula or script to be read to a defendant who states that [s]he elects to proceed without counsel." *Id.* at 88. However, some inquiry must occur "so that [the district judge] may know, and the record may demonstrate, beyond cavil, that an accused knows that [s]he has a right to employ and consult with an attorney . . . and that [s]he voluntarily and intelligently relinquishes that right." *Townes v. United States,* 371 F.2d 930, 934 (4th Cir.1966). The record here clearly shows such a knowing and voluntary relinquishment.

After arraignment, defendant hired private counsel, Nina Ginsberg. JA5. On December 4, 2008, however, the defendant filed a handwritten statement with the district court stating, "I, Elaine Robertson Cioni, wish to terminate Nina Ginsberg's services as attorney of record. I wish to proceed with my trial *pro se."*

See JA12 (Docket#93). On the same day, Ms. Ginsberg filed a motion to withdraw as counsel. *See* JA12 (Docket#80).

The district court held a hearing the next day. At that hearing, Ms. Ginsberg said, in the defendant's presence, "I don't think this is a good idea. I have tried to dissuade Ms. Cioni from proceeding on her own." TT(12/5/08)3. She added, however, that "I think she certainly is competent under *Edwards* to make that decision. And I'm confident that she can answer to the Court's satisfaction the questions that would need to be posed to her in order to permit her to proceed *pro se." Id.* The district court emphasized to the defendant that it was rare to proceed *pro se* in a felony matter, and that Ms. Ginsberg had an excellent reputation. The district court also advised that "it's just not good judgment to represent yourself," although it was her legal right. *Id.* at 11. At the end of the hearing, the defendant withdrew her request to proceed *pro se*, saying, "I realize I cannot–I'm too emotionally involved. I'll fall apart. I can't handle this. Yes, I would like her to represent me. I've demonstrated to myself I'm emotionally incapability [sic] of representing myself because I'm so emotionally involved in this matter." *Id.* at 43-44. Ms. Ginsberg represented the defendant during trial.

After the jury's verdicts, on January 9, 2009, the district court held a hearing on post-trial motions. After making substantive argument on the motions, counsel

for the defendant informed the court that "Ms. Cioni has asked me to let the Court know that she, at this point, wishes to proceed *pro se."* TT(1/9/09)12. The district court asked the defendant if she remembered their previous discussion. Defendant responded, "Yes, sir, I do. And I was talked out of it." *Id.* at 13. The defendant listed several complaints about counsel's representation, and asked for an exemption to the deadline to file a motion for new trial because "I was at the mercy of my counsel which you forced me to continue with essentially, and I didn't want to. I wanted to – I would have been better off *pro se.* I'm not one for – one dime better having counsel." *Id.* at 15.

The district court took the matter under advisement. On January 22, 2009, defendant filed a handwritten letter unequivocally asking to "exercise her right guaranteed under the Constitution of the United States to proceed *pro se." See* JA17 (Docket#147). On January 23, 2009, Ms. Ginsberg filed a motion to withdraw. That motion noted that "Ms. Cioni has competently prepared and filed a large number of *pro se* pleadings." JA17 (Docket#148).

The district court held a hearing on the motions on February 12, 2009. The court closely questioned the defendant about her desire to represent herself. She affirmed that she had "thought about this very carefully." JA128. She said she

had "extensively" done legal research. JA128. She explained she understood the need to prepare a brief concerning her position on sentencing. *Id.*

When asked if she would "prefer to go forward without a lawyer," the defendant responded, "No, I would not prefer it, Your Honor. I can't afford a lawyer," but repeated that she could not work with Ms. Ginsberg. JA129. The district court then had this exchange about finances:

> THE COURT: All right. Well, if the issue is money, you understand the Court can appoint a lawyer to represent you. You understand that.
>
> MS. CIONI: I thought I had to be flat broke.
>
> THE COURT: Well, you have to qualify as indigent. I'm not sure that you are. What you're telling me is you're not indigent.
>
> MS. CIONI: I will be in a month or two, but not now.
>
> THE COURT: Okay, so then I can't really appoint a lawyer to represent you.
>
> MS. CIONI: I don't know. Do you count 401(k) as money I have to liquidate, because I don't plan to liquidate it.
>
> THE COURT: Yes. The taxpayers would prefer that if you had put money aside for retirement and you have an emergency need to hire counsel now that you pay for that yourself and the taxpayers do not want to pay that.
>
> MS. CIONI: I have to consider my son, so I won't be liquidating.

JA129-30. The court below then found, on the record, that the defendant "made a knowing and intelligent waiver of her right to proceed without counsel under the Sixth Amendment. And I will allow her to proceed without counsel." JA 131-32.

The district court's decision was correct. The defendant is a sophisticated and well educated professional, TT(12/11/08)178, who knew, at least from her arraignment onward, that she had a right to be represented by counsel. She exercised that right up until sentencing. The trial court's questioning of her reaffirmed that she also understood she had a right to counsel during sentencing. The defendant did say that she would "prefer" to have an attorney but fired the one she had hired and then decided not to liquidate her retirement funds in order to hire a new one. The defendant now argues that the "real reason she wanted to go forward was because she could not afford to retain" an attorney. Def.Br. 46. It is true that the defendant cited financial concerns, but it is nonetheless apparent that the defendant made an intelligent decision based on all the circumstances – including her assessment of an attorney's utility to her and the significant downside of liquidating retirement funds – that she was better off without counsel.

The defendant also argues it was "bizarre to think that the Court would find that Mrs. Cioni could conduct herself appropriately and represent herself adequately" given her performance on the stand and her prior statement that she

was "emotionally" unable to do so. Def.Br. at 47 n.9. There is no serious question that the defendant was competent: her attorney affirmed her belief that the defendant was competent, TT(12/5/08)3, and the pre-sentence report, reviewing the results of psychological examinations, identified no need for court-ordered therapy, JA323. The district court's only role was to determine whether the waiver was valid – that is, knowingly and intelligently made – which it was, not whether the waiver was a wise strategy. *See Faretta*, 422 U.S. at 834.

VIII. DEFENDANT WAS SENTENCED IN ACCORDANCE WITH SECTION 3553(A)

A. Standard of Review

Gall v. United States, 552 U.S. 48 (2007), changed the standard of review for sentencing. Under *Gall*, a sentence is reviewed for reasonableness, using an abuse of discretion standard of review. *Id.* at 51. The first step in this review requires the appellate court to ensure there was no significant procedural error, such as failing to calculate, or improperly calculating, the advisory guideline range, treating the Guidelines as mandatory, or failing to consider statutory factors. *Id.* at 53; *see also United States v. Evans*, 526 F.3d 155, 160 (4th Cir. 2008).

B. Analysis

Defendant claims that the sentencing judge committed procedural error by not considering all the sentencing factors under 18 U.S.C. § 3553(a). Def.Br. 49. This position is without merit.

The arguments at sentencing noted that the district court must consider all Section 3553(a) factors. The government's sentencing memorandum specifically listed all seven factors under Section 3553(a) that the court must consider, noted that the guidelines were but one factor, and that all factors were important. JA19 (Docket#159, p. 16-18). In oral argument, the government referred specifically to a number of sentencing factors. *See, e.g.,* JA175-183.

The defendant complains that her sentence was "run by the Guidelines," Def.Br. at 49, though she also concedes that other factors were explicitly discussed. *Id.* at 50. The court below, for its part, explicitly told the defendant at sentencing that "the guidelines . . . are one factor that I am going to take into account." JA199.

Rather than being "run by the Guidelines," the record below demonstrates that the trial court extensively discussed the various Section 3553(a) factors during a lengthy sentencing hearing on March 6, 2009. Throughout, the court discussed the nature of the defendant's offenses, talked about the impact on her victims,

compared her conduct with that of others, and noted her personal characteristics. *See* JA141-205.

The sentencing court also explicitly addressed the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense. *See, e.g.,* JA203-204 ("You are a convicted felon because these are very serious offenses. Your calls and the nature of them crossed the line beyond the pale for a woman scorned. . . . [T]his one ends up in federal court because you exceeded all the beyond – beyond the pale. It was beyond a broken heart into a threat that lurked in the shadows. And for that, you must be punished."). The district court also clearly demonstrated that there was a need for deterrence of the defendant's actions. *See, e.g., id.* at 200 ("Obviously, you think this was a small matter. The federal government thinks it's a very substantial matter, so much so they brought it to federal court and charged you with several serious felonies. This was no laughing matter. This was no joke."); *id.* at 202 ("You have a very serious case of denial.").[21]

[21] *See also* JA19 (Docket#159, p. 22)("The relevant conduct has shown beyond any doubt that the Defendant is unable to control herself, is able to rationalize her conduct, and is a danger to the community. As such, the government asks the Court to make sure that the sentence it imposes protects the community.")

The court also addressed several of the excuses that the defendant raised for her conduct, including medications and alcohol. *Id.* The judge further demonstrated that he considered the defendant's mental health condition and ordered, as part of her sentence, that the defendant enter into mental health treatment. *Id.* at 205. The court below also addressed restitution and harm to alleged victims, even going as far as hearing testimony on the point. *See id* at 166-173.

In the course of argument and its sentencing statement, the district court showed that it considered the Section 3553(a) factors, and, as such, this Court should give due deference to the district court's decision. *See Gall*, 552 U.S. at 51. The defendant's assertions regarding the nature of the lower court's sentencing decision are without merit.[22]

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[22] Without citation to any material, disputed fact, defendant also claims that the court below erred because it failed to allow a hearing to resolve objections to the Presentence Report ("PSR"), JA 308-341, in violation of Federal Rule of Criminal Procedure 32. Def.Br. 47-48. Contrary to this characterization, the district court held an extended hearing on each side's objections to the PSR. *See, e.g.,* JA142 ("Let's take the government's objections up first and [then] we'll take Ms. Cioni's."). The court heard argument and evidence related to the objections of the parties to the PSR. After hearing that evidence, citing evidence from the trial, and saying that he had reviewed the submissions of the parties, the judge articulated detailed findings related to defendant's objections to the PSR and the proper guidelines' calculations. *See, e.g.,* JA172-175. Accordingly, this Court should reject defendant's undeveloped and unsupported claim that the court failed to adhere to the mandate of Rule 32.

IX. CONCLUSION

For the reasons stated, this Court should affirm the defendant's convictions and sentence. The Court, however, should remand Count 2 with instructions that the judgment be amended to reflect the conviction as a misdemeanor, rather than a felony.

Respectfully submitted,

Neil H. MacBride
United States Attorney

/s
Jay V. Prabhu
Assistant United States Attorney

Josh Goldfoot
Senior Counsel
Computer Crime & Intellectual Property Section
U.S. Department of Justice

STATEMENT WITH RESPECT TO ORAL ARGUMENT

The United States respectfully suggests that oral argument is not necessary in this case. The legal issues are not novel, and oral argument likely would not aid the Court in reaching its decision.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief does not exceed 14,000 words (specifically 13,568 words), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14-point Times New Roman typeface.

_____
Jay V. Prabhu
Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that on September 24, 2010 I filed electronically the foregoing brief with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to the attorneys listed below. I further certify that two copies of the foregoing Brief of the United States were mailed to the attorney listed below:

Jenifer Wicks, Esq.
The Law Offices of Jennifer Wicks
The Webster Building
503 D Street, NW, Suite 250A
Washington, D.C. 20001

Counsel for Elaine Robertson Cioni, Defendant-Appellant

By: /s/
Jay V. Prabhu
Assistant United States Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314
jay.prabhu@usdoj.gov