06-1708-cr

To Be Argued By:
KRISHNA R. PATEL

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-1708-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

JAMES CLARKE,
Defendant,

PATRICIA CLARKE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

KRISHNA R. PATEL
Assistant United States Attorney
SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

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STATEMENT OF JURISDICTION

The district court (Stefan R. Underhill, J.) had subject matter jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. Judgment entered on April 10, 2006, and the defendant filed a timely notice of appeal that same day. *See* Fed. R. App. P. 4(b). An amended judgment entered on August 15, 2006. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a) over the defendant's challenges to her conviction and sentence.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court abused its discretion when it refused to admit *all* of the videotaped evidence of the defendant in this case when it had already admitted a "highlights" tape of the evidence and when the defendant declined to identify specific, limited portions of the tapes to be admitted.

2. Whether the district court properly calculated the defendant's Guidelines range based on an intended loss amount as required by Sentencing Guideline § 2B1.1.

3. Whether the sentence, set at the bottom of the defendant's Guidelines range, was reasonable.

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Preliminary Statement

For approximately seven years, Patricia Clarke engaged in a pattern of fraudulent conduct to collect disability benefits from her employer, the United States Postal Service, and the Social Security Administration. A federal jury in Connecticut convicted Clarke of mail fraud and wire fraud stemming from her unlawful scheme. The

district court (Stefan R. Underhill, J.) sentenced Clarke principally to 30 months in prison.

In this appeal, the defendant challenges both an evidentiary ruling by the judge during trial and her sentence. She claims that the judge erred in refusing to admit all of the hours of videotaped evidence showing Clarke, over a nine-month period, to be a healthy and active individual during the time she was applying for and collecting two different types of disability payments. With respect to her sentence, she argues that the judge violated her Sixth Amendment rights by imposing an enhancement for intended loss and that the judge should have used the actual loss calculation instead. She also argues that the judge committed substantive and procedural errors in "slavishly" adhering to the Sentencing Guidelines and not properly taking into account other statutory factors. Finally, Clarke claims that her sentence was unreasonable and that she should have received a non-custodial sentence.

For the reasons explained below, Judge Underhill did not err, much less abuse his discretion, in refusing to admit all of the videotaped evidence. In addition, the court properly calculated Clarke's advisory Guidelines range and gave proper consideration to that range, along with all of the relevant sentencing factors under 18 U.S.C. § 3553(a), when imposing sentence. The resulting sentence, a sentence at the bottom of the Guidelines range, was reasonable, and accordingly should be affirmed.

STATEMENT OF THE CASE

On February 3, 2004, a federal grand jury sitting in the District of Connecticut returned an indictment charging the defendant with mail fraud and wire fraud. (A 1). On January 20, 2005, a federal grand jury returned a superseding indictment charging the defendant with one count of conspiracy to commit wire fraud and mail fraud in violation of 18 U.S.C. § 1349, two counts of engaging in wire fraud in violation of 18 U.S.C. § 1343, one count of mail fraud in violation of 18 U.S.C. § 1341, and a forfeiture allegation. (A 1); (A 5-20). The superseding indictment also charged Patricia Clarke's husband, James Clarke, with conspiracy to commit mail fraud and wire fraud and aiding and abetting. (A 5-20).

Evidence commenced on August 16, 2005 in the United States District Court for the District of Connecticut (Stefan R. Underhill, J.). On August 30, 2005, the jury acquitted James Clarke of all charges and acquitted Patricia Clarke of the conspiracy count. The jury returned a guilty verdict on all other counts against Patricia Clarke. (A 21 (judgment)).

On March 30, 2006, the district court sentenced the defendant principally to 30 months of imprisonment. (A 21). Judgment entered on April 10, 2006, and the defendant filed this timely appeal the same day. (A 4); (A 21). An amended judgment was entered on August 15, 2006 that clarified the amount of restitution and forfeiture. (A 4).

The defendant is currently serving her sentence.

STATEMENT OF FACTS

A. The Government's Case

Defendant Patricia Clarke ("Clarke" or the "defendant") had been employed by the United States Postal Service ("USPS") since in or about 1984. Tr. (8/16/05) at 39, 65. Her husband, James Clarke, had also been employed by the USPS since in or about 1984 and was indicted and acquitted of the charges in this case.

On or about April 8, 1993, Patricia Clarke filed a claim for worker's compensation with the Department of Labor ("DOL") for workplace injuries alleged to have occurred in February 1993. Tr. (8/16/05) at 42. DOL initially denied the claim on or about July 2, 1993, and again on May 16, 1994 after a hearing. Tr. (8/16/05) at 51-52.

On March 7, 1995, upon reconsideration, DOL accepted Clarke's claim for right shoulder and right trapezius strain. Tr. (8/16/05) at 61. At various times from March 1995 on, the defendant was restricted by her doctor, Phillip Luchini, M.D., from reaching overhead, from repetitive use of her right arm, and from lifting over twenty pounds. Tr. (8/16/05) at 77. Thereafter, the defendant was assigned modified duties, including office duties, when mail volume permitted and when such work was available. Tr. (8/16/05) at 72-73.

On or about September 12, 1996, Dr. Luchini performed surgery on the defendant's right shoulder and the defendant remained out of work thereafter. Tr. (8/16/05) at 78.

On or about February 5, 1997, Dr. Luchini released the defendant to work eight hours a day with restrictions prohibiting her from lifting over twenty pounds and from repetitive use of both hands. Tr. (8/16/05) at 78. Thereafter, as of March 20, 1997, Dr. Luchini further restricted the defendant, prohibiting her from lifting over fifteen pounds, the repetitive use of either hand, standing more than two intermittent hours per day, and using a computer for more one to two hours a day for five to ten minutes at a time. Tr. (8/16/05) at 85-86.

As a result of the defendant's restrictions, on or about April 4, 1997, USPS made a formal limited duty job offer under Title 5 U.S.C. § 8106(2) which the DOL approved as suitable. Tr. (8/16/05) at 86-88. The position was called a Rehab Clerk, and was essentially a limited administrative position. Clarke's responsibilities in this position would have included handling phone duties, sorting and updating files, assisting with in-plant surveys, and pulling reports from the time system for accounting purposes. Tr. (8/16/05) at 84-88. The limited duty position also expressly incorporated the limitations outlined by Dr. Luchini. Tr. (8/16/05) at 84-88. Clarke had thirty days to accept the position. Tr. (8/16/05) at 89.

On April 17, 1997, the defendant rejected the job offer. Tr. (8/16/05) at 89. She submitted letters from Dr. Luchini

and Dr. Abeles opining that the evening hours of the job offer should be changed to day hours. Tr. (8/16/05) at 103-06. In his letter, Dr. Luchini recommended that the hours of the limited duty position be changed to a daytime shift, and that the sorting and updating of files and the pulling reports (requiring repetitive use of hands) be eliminated. Tr. (8/16/05) at 103-04.

On or about May 7, 1997, DOL sent Patricia Clarke a letter stating that it had considered her doctors' concerns about the shift change and found that the effect on her personal life from the shift change was not an issue for the USPS. Tr. (8/16/05) at 111-12. Patricia Clarke failed to return to work and DOL continued to communicate with her to come back to work.

On August 7, 1998, however, the USPS notified the defendant that she would be separated from her postal employment effective September 11, 1998 because she had not returned to work or accepted a position deemed suitable by DOL. Tr. (8/16/05) at 112.

On or about March 31, 1999, Clarke filed for disability benefits from the Social Security Administration ("SSA"). By decision dated September 3, 1999, Patricia Clarke was denied SSA disability benefits. Tr. (8/17/05) at 312. She filed for reconsideration and on or about June 5, 2000, the SSA affirmed the original decision denying Clarke disability benefits. Tr. (8/17/05) at 313 & 322. On or about August 5, 2000, Clarke requested a hearing. Tr. (8/17/05) at 323-24. On or about April 16, 2001, Judge James Garrett found that the record evidence in this case

was sufficient to grant Clarke Social Security benefits. Tr. (8/17/05) at 328-29. Clarke received benefits retroactively from 1998. Tr. (8/17/05) at 334.

In 1999, the defendant also had filed for benefits from the Office of Personnel Management ("OPM") for disability retirement under the Federal Employees' Retirement System ("FERS"). Tr. 8/17/05 at 470 & 475. On or about August 18, 2000, OPM denied Patricia Clarke disability benefits. Tr. 8/17/05 at 490. Clarke requested reconsideration of her claim and on March 29, 2001, OPM denied Clarke's benefits again. Tr. 8/17/05 at 493 & 495. Clarke subsequently appealed OPM's decision to the Merit Systems Protection Board. Tr. 8/17/05 at 499. Administrative Judge Catherine Armstrong presided over the hearing. Tr. 8/17/05 at 499. During the hearing that was held on July 13, 2001, Clarke testified about her disabilities. Tr. (8/24/05) at 1143-44. James Clarke also testified on Clarke's behalf about her physical limitations. Tr. (8/24/05) at 1145, 1146. During that hearing, Clarke also submitted the decision from SSA finding that she was totally disabled from doing any work. In a decision dated October 15, 2001, Judge Armstrong reversed OPM's denial and granted Clarke disability retirement benefits. Tr. (8/24/05) at 1152.

Clarke continued to receive disability benefits from SSA and OPM until shortly after the federal jury in this case determined that she was guilty of fraud. Tr. (3/24/06) at 4-5.

In or about August 2000, the United States Postal Inspection Service initiated a criminal investigation into Clarke. USPS began to conduct video-surveillance from Heidi Clark's – a neighbor of Patricia Clarke's – residence. (A169-71). Video-surveillance was conducted from August 2000 until May 2001. (A171).

The jury had the opportunity to view a high-light video which contained excerpts of the surveillance video covering the nine-month surveillance period. The video-surveillance was conducted on or about the time she was filing her applications for disability and testifying about her physical and emotional limitations. The video surveillance demonstrated that Clarke was a very active woman who was engaged in activities including, but not limited to, watering flowers, picking flowers, cleaning her pool, weeding her garden, repeatedly carrying various items, hammering stakes in her garden, utilizing hedge clippers, cleaning windows, painting the rear wooden deck, shoveling heavy snow, and raking. (A194-205).

Drs. Luchini and McVeety who treated Clarke and wrote letters in support of her disability claims also both testified and, contrary to Patricia Clarke's trial testimony, both doctors indicated they were not aware of the level of activity that Clarke was engaged in. They further opined that knowing what they knew at the time of trial, they no longer believed that she was disabled. Tr. (8/24/05) at 1077; Tr. (8/18/05) at 677. Both of the doctors terminated their treatment of Clarke because of her failure to disclose her level of activity. *Id.*

Many of Patricia Clarke's neighbors were called to testify about the physical activity that they observed Patricia Clarke engaged in. Some of the neighbors also personally interacted with Clarke during the time that she was seeking disability benefits. *See generally*, (8/19/05) (testimony of Ms. Nicefaro); (8/23/05) at 802-71. The neighbors' testimony about Clarke's activity in her backyard corroborated the videotaped evidence. The neighbors were able to provide additional information about activity that Clarke was engaged in, and in one case a neighbor testified that during the relevant period of time, Clarke came in and sponge-painted her entire bathroom. Tr. (8/19/05) at 769.

B. The Defense Case

Clarke testified in her own defense at trial. Clarke testified extensively about her history of medical problems while working for the USPS since 1984. She also testified about all of the medical claims that she filed while working for the USPS. Finally, she discussed all of the medications that she was taking. *See* Tr. (8/25/05); Tr. (8/26/05) at 1425 (listing all medications).

On cross-examination, Clarke admitted that she could work but insisted that it was the responsibility of the USPS to find her a job. Tr. (8/26/05) at 1440. She admitted that she never even attempted to do the job of a Rehab Clerk that she had been offered. Tr. 8/25/07) at 1455. She also confirmed that in 1999 she had many medical problems including medial issues with both shoulders, her lower and upper back, and her elbows, carpal tunnel syndrome,

Raynauds syndrome, stomach irritation, irritation of the nail beds, drowsiness, fogginess, headaches, and depression. Tr. (8/26/05) at 1461-63. Many of these issues continued into 2000 when she was filing her appeals for worker's compensation and social security disability benefits. *See generally*, Tr. (8/26/05) at 1474-87. Clarke admitted that while filing her applications in 1999 and 2000, she consistently stated that was limited in her ability to reach, grasp and engage in repetitive movements. Tr. (8/26/05) at 1488. On cross-examination, however, she admitted that during the same period of time that she was filing these applications, she was reaching and grasping when she was cleaning her pool, cutting her flowers, painting her deck for over an hour, cleaning her rugs, vacuuming, cleaning her windows, and hammering. Tr. (8/26/05) at 1488-1496.

Several other witnesses testified on Clarke's behalf including family members and friends. They testified about her character and their interactions with her. *See* Tr. (8/25/05) at 1338-55.

C. The Verdict

On August 30, 2005, the jury returned a guilty verdict against Clarke on counts two, three and four of the indictment which charged her with wire fraud and mail fraud in violation of 18 U.S.C. §§ 1341 and 1343. Tr. (3/24/05) at 2. Clarke and her husband, James Clarke, were acquitted on the conspiracy count (count one), and James Clarke was acquitted of the remaining counts against him. Tr. (8/30/05) at 1739-40. The district judge

proceeded immediately to the forfeiture trial. On the same day, the jury returned a forfeiture finding of $135,135.00. Tr. (8/30/05) at 1748.

D. The Sentencing Proceeding

On March 24, 2006, Clarke was sentenced principally to 30 months in prison. (A 409). The district court reviewed the maximum penalties in this case. (A 362). The district court then heard argument on the Government's request for an enhancement for obstruction of justice. (A 364-68). The district judge declined to impose the enhancement finding that although the defendant's "testimony was at times inconsistent with objective fact and certainly was inconsistent with other witnesses and I believe that the jury correctly discounted her credibility" that she did not seek to "willfully perjure[] herself on the stand." (A 367-68).

The district judge also heard argument on the appropriate loss calculation under the Sentencing Guidelines. (A 368-74). The Government argued that the loss amount should be based on an intended loss amount to hold Clarke responsible for the benefits that she would have received had she continued to receive benefits until the age of 62. (A 368-72). In support of this amount, the Government relied on a certification from SSA that set forth the amount that Clarke would have received if she had continued the fraud until the age of 62. (A 362); (A 368-69). In addition, the Government argued that there was ample evidence that Clarke intended to continue the fraud as long as possible. (A 370-72). First, the fraud

itself was perpetrated over a long period of time. (A 370). More importantly, Clarke was notified of the criminal investigation in 2002 and she nevertheless continued to receive the benefits until shortly after the jury verdict in this case. (A 370-71). By contrast, Clarke's attorney argued that the loss calculation should be based on the actual loss amount, claiming that the actual loss amount "adequately addresses the seriousness of the offense" and that the intended loss calculation is speculative. (A 373).

The district judge agreed with the Government that the intended loss calculation was the appropriate measure of loss in this case. (A 374-75). The court found that because Clarke had engaged in the fraud over a long period of time "with frequent opportunity to abandon it and without abandoning it," the evidence "suggests that she intended to continue her course of conduct as long as she was able to." (A 374). The district judge further found that although he did not have to establish a full amount of intended loss, getting over "the 200,000 mark [to apply a 12 level rather than a 10 level enhancement] . . . would occur in a relatively short additional period of time." *Id.* Therefore, the district court applied a 12-level enhancement for intended loss to determine the defendant's offense level. *Id.*

The district judge then heard from several character witnesses. (A 379-97). Clarke also spoke at the sentencing during which she discussed, *inter alia*, the loving and supportive family that had supported her through-out her life. (A 397-99). Both Clarke's attorney

and the Government made arguments regarding Clarke's sentencing. (A 399-405).

The district court then addressed Clarke. The district court recognized the support that Clarke had from her family and friends. (A 405). The district judge also recognized that Clarke was "physically capable of performing" the job offered to her by USPS. (A 406). The judge went through and discussed the various statutory factors including the purposes of punishment (A 407-409) and the Guidelines which he recognized were "advisory" but "an important source of guidance . . . [to] help insure that persons who sit where you're sitting across this country who do the same type of conduct will be punished similarly taking into account their individual characteristics" (A 409).

The district court then sentenced Clarke to thirty (30) months of incarceration, a three-year period of supervised release, restitution in the amount of the forfeiture imposed ($135,135) plus an additional $2,456 for the additional payments that had been made by the SSA, and a criminal fine of $6,000. (A 409-11).

SUMMARY OF ARGUMENT

I. Judge Underhill did not err, much less abuse his discretion, in refusing to admit all of the videotaped evidence. Judge Underhill repeatedly provided defense counsel with the opportunity to proffer which, if any, portions of the videotaped evidence the defense wished to publish to the jury. The only proffer made by the defense

was that all of the videotaped evidence be permitted to be published. Recognizing that this was nothing more than a defense tactic to cause extraordinary delay and needless waste of the jury's time, the judge properly excluded the videotaped evidence under Federal Rule of Evidence 403.

II. The court properly calculated Clarke's advisory Guidelines offense level using the intended loss calculation instead of the actual loss calculation. The intended loss amount was not based on speculation as defense counsel alleges but rather was a precise finding based on a certification from the SSA as to the total amount of payments that Clarke would have received until the age of 62 if she had continued the fraud. Furthermore, the district court properly found that Clarke intended to continue the fraud for as long she was able to.

III. The district court gave proper consideration to the sentencing factors under 18 U.S.C. § 3553(a). The court gave explicit consideration on the record to the relevant statutory factors, and in any event, the court is entitled to the "presum[ption] . . . that a sentencing judge has faithfully discharged h[is] duty to consider the statutory factors," because there is no "record evidence suggesting otherwise." *United States v. Fernandez*, 443 F.3d 19, 29-30 (2d Cir.), *cert. denied*, 127 S. Ct. 192 (2006).

Finally, the district court imposed a reasonable sentence on Clarke. Clarke's total effective sentence of 30 months was the bottom of the Guidelines range. As the court determined the fraud was an extensive fraud that

occurred over a long period of time. There simply was no basis for a non-custodial sentence. Accordingly, the judgment of the district court should be affirmed.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ADMIT ALL OF THE VIDEOTAPE EVIDENCE

A. Relevant Facts

The Government's evidence in this case included extensive video surveillance of the defendant engaged in a variety of physical activity on her property. The surveillance was conducted from August 4, 2000 until May 11, 2001. (A 171). The video surveillance was conducted from a neighbor's home who had a direct view into Clarke's property. (A 169). For the purposes of trial, the Government created a summary videotape, referred to as the "highlight" video, that contained excerpts from the surveillance videotapes. The Government sought to introduce this videotape and play it to the jury through the testimony of Shawn O'Connell, a contract fraud analyst for the Postal Inspection Service. (A 187). Over defense counsel's objection, this videotape was admitted and played for the jury. (A 191-205).

Shawn O'Connell testified about all the observations of the defendant that he had made. (A172-82). O'Connell also discussed the events contained on the highlight video. The highlight videotape depicted Clarke, *inter alia*,

carrying a portable television, manually rolling up the cover to her pool, hammering stakes into her vegetable garden, working in her vegetable garden, manually cleaning her pool, vacuuming her rugs on her rear deck, painting her deck, cleaning the windows in the rear of her house, shoveling the rear deck of her residence, raking the leaves in her garden, carrying plant material in five gallon buckets, using hand clippers to clip the vines on her fence, trimming trees and hedges, pulling up dead plants by the roots, and engaging in general yard work. (A 194-205).

On cross-examination, Clarke's attorney sought to admit all of the videotaped surveillance into evidence. Neither the Government nor James Clarke's attorney objected to the admission of all of the videotapes. (A 212). Nevertheless, citing to Rule 403 of the Federal Rules of Evidence, the district court adhered to an earlier ruling holding that the tapes would be excluded because to permit counsel to play all of the tapes would cause "undue delay," "a waste of time," and "needless presentation of cumulative evidence." (A 214); (*see generally* A 212-19); *see also* A 64-65 (court's earlier ruling)).

The court, however, repeatedly informed counsel that they could make an offer to the court to play select portions of the videotapes. *See, e.g.*, A 212 ("You can play any portion [of the videotapes]"); A 214 ("If there were some specific portion of them you wish to highlight for the jury and enter into evidence, I'm willing to hear from you what portion [of the videotapes] you want to enter and why and take it up."); A 219 ("I repeat my offer that if the defense wants to offer some specific portion of

these tapes, I'm happy to consider that. I have not heard any suggestion, any proffer, any offer to do anything other than play them in their entirety which is entirely inappropriate."); *see also* A 65 ("I'm not limiting you, I want you to come up with a specific argument about why specific evidence ought to be admitted and I will consider it. I haven't heard it yet."). As stated by the district judge, the only offer made by defense counsel was to play all of the tapes. *See* (A213-14).

After the conclusion of the trial, the district court published an opinion regarding its ruling on the videotaped evidence. *See United States v. Clarke*, 390 F. Supp.2d 131 (D. Conn. 2005). In its decision, the district court noted that portions of the excluded videotape footage was irrelevant to any issue in the case because it merely showed the back of Clarke's house or Clarke at rest. With respect to the relevant portions, the district judge explained that it "excluded the footage – offered by the defendants only in its entirety – as extremely cumulative and a waste of time, relying on Rule 403 and my duty to control the presentation of evidence under Rule 611(a)." *Id.* at 133.

B. Governing Law and Standard of Review

Petitioner here argues that pursuant to the rule of completeness embodied in Federal Rule of Evidence 106 that the district court erred in not admitting all of the videotaped evidence. Rule 106 is "an expression of the rule of completeness." Fed. R. Evid. 106, Advisory Committee Notes. It provides that:

> [w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Fed. R. Evid. 106. This rule is violated "'only where admission of the statement in redacted form distorts its meaning or excludes information substantially exculpatory of the declarant.'" *United States v. Yousef*, 327 F.3d 56, 154 (2d Cir. 2003) (quoting *United States v. Benitez*, 920 F.2d 1080, 1086-87 (2d Cir. 1990)); *United States v. Rivera*, 61 F.3d 131, 135-36 (2d Cir. 1995) ("We have interpreted Rule 106 to justify the admission of previously excluded portions of partially received documents or statements only when necessary to explain the admitted portion, to place it into context, to ensure a fair and impartial understanding of the admitted portion, or to correct a misleading impression that might arise from excluding it.").

Rule 106, by its own terms, applies only to writings and recorded statements, but the same principle of fairness in the rule of completeness applies to other forms of evidence through the operation of Federal Rule of Evidence 611(a). *United States v. Castro*, 813 F.2d 571, 576 (2d Cir. 1987); *United States v. Mussaleen*, 35 F.3d 692, 696 (2d Cir. 1994). That Rule directs the district court to exercise control over the mode and order of the presentation of evidence:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Fed. R. Evid. 611(a). Under this rule, it is the obligation of "trial court to control the mode and presentation of evidence" to ensure that the presentation of evidence is effective and yet does not needlessly waste time. *Clarke*, 390 F. Supp.2d at 134.

As this Court has explained, Rule 611(a) and the principles of the rule of completeness embody "the overarching principle that it is the trial court's responsibility to exercise common sense and a sense of fairness to protect the rights of the parties while remaining ever mindful of the court's obligation to protect the interest of society in the 'ascertainment of the truth.'" *Castro*, 813 F.2d at 576 (quoting Fed. R. Evid. 611(a)).

These basic principles of common sense and fairness give the district court wide latitude to inquire of counsel to point to specific passages that ought to have been admitted to avert the distorting effect of the portions already introduced. *United States v. King*, 351 F.3d 859, 866 (8th Cir. 2003); *United States v. Sweiss*, 814 F.2d 1208, 1212 (7th Cir. 1987) (applying rule of completeness, court upholds district court's decision to exclude evidence in part because trial counsel failed to "precisely delineate[]

the relevant portions of the tape that he wished the jury to hear"). The portions identified must both be relevant and "necessary to qualify, explain, or place into context the portion already introduced." *United States v. Branch*, 91 F.3d 699, 728 (5th Cir. 1996) (internal quotations omitted).

Furthermore, the admission of evidence is always subject to the ordinary constraints of Rule 403. *See United States v. Crowley*, 318 F.3d 401, 417 (2d Cir. 2003). Under this rule, a judge may exclude relevant evidence "if its probative value is substantially outweighed . . . by considerations undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. *See Gasperini v. Center for Humanities, Inc.*, 149 F.3d 137, 143 (2d Cir. 1998) (district judge did not abuse discretion to limit scope of cross examination to avoid waste of time).

A district court has broad discretion to admit or exclude evidence and testimony, and so these rulings are reviewed for abuse of discretion. *Castro*, 813 F.2d at 576. They are subject to reversal only where manifestly erroneous or wholly arbitrary and irrational. *Yousef*, 327 F.3d at 156 (manifestly erroneous); *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001) (arbitrary and irrational).

C. Discussion

The only proffer made by defense counsel during the trial in this case was to play all of the videotapes. Indeed,

counsel repeatedly rejected the court's invitation to identify selected portions of the tapes for the jury. *See, e.g.*, A 212 ("You can play any portion [of the video-tapes]"); A 214 ("If there were some specific portion of them you wish to highlight for the jury and enter into evidence, I'm willing to hear from you what portion [of the videotapes] you want to enter and why and take it up."); A 219 ("I repeat my offer that if the defense wants to offer some specific portion of these tapes, I'm happy to consider that. I have not heard any suggestion, any proffer, any offer to do anything other than play them in their entirety which is entirely inappropriate."); *see also* A65 ("I'm not limiting you, I want you to come up with a specific argument about why specific evidence ought to be admitted and I will consider it."); A 213-14 (the only offer made by defense counsel was to play all of the tapes); *Clarke*, 390 F. Supp.2d at 134 n.2 (defense did not offer any specific footage of the videotaped evidence).

On this record, defense counsel failed to lay a foundation for a rule of completeness claim. At trial – and even now before this Court – Clarke failed to specify the portion of the videotaped evidence that is relevant and qualifies or explains other portions that were already admitted. *See Branch*, 91 F.3d at 728. In other words, Clarke did not identify which additional portions of the videotaped evidence could be shown to correct any alleged mis-impressions generated by the highlight video. Thus, although the defendant claims that there were "numerous instances where the appellant was clearly struggling physically, obviously in pain or simply immobile due to her physical disabilities," she never identified these

portions on the videotape to be admitted. Def. Br. at 6. In the absence of a specific offer of relevant videotape, the district court did not abuse its discretion in excluding the compete set of videotape surveillance. *See Sweiss*, 814 F.2d at 1212 (applying rule of completeness, court upholds district court's decision to exclude evidence in part because trial counsel failed to "precisely delineate[] the relevant portions of the tape that he wished the jury to hear").

Now, for the first time on appeal, the defendant argues that the soundtrack to the video should have been included because there "were wisecracks by the investigators and occasional remarks about the anatomy of the female appellant." Def. Br. at 7. This claim should be denied. As an initial matter, the defendant has never – whether at trial or before this Court – identified any of the allegedly inappropriate comments. Indeed, the investigator, Shawn O'Connell, was cross-examined on this point at trial and only admitted to one remark about Clarke's anatomy. (A 249). Moreover, even assuming *arguendo* that the investigator made an inappropriate remark about the defendant while videotaping her, the defendant fails to explain how that remark would be relevant to whether the defendant committed fraud. *See* Fed. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

When faced with defense counsel's repeated refusal to identify specific portions of the videotapes to be admitted, the district court properly exercised its discretion under Rules 403 and 611(a) to exclude the proffered entirety of the videotape evidence. *See* Rule 403 (district court may exclude evidence to avoid waste of time); Rule 611(a) (court must control presentation of evidence to avoid needless consumption of time). The videotapes included at least thirty hours of surveillance footage of the defendant, and as the district court properly concluded, "[a]dmitting scores of hours of footage of Patricia Clarke engaged in active or leisure activities or at rest would have been a waste of time and a needless presentation of cumulative, if arguably relevant, evidence." *Clarke*, 390 F. Supp.2d at 134 (citing Rule 403).

The district court's decision is supported by this Court's decision in *United States v. Jackson*, 180 F.3d 55, 73 (2d Cir. 1999). In that case, the Government offered to play a 90-second portion of a taped conversation; the defendant sought to play the remaining portions of the tape which was approximately 42 minutes long. *Id.* The district court denied the request finding that the "rule of completeness" did not require that it be played. *Id.* This Court upheld the ruling, noting that the trial court had reviewed the entire tape and "after listening to the tape, saw little probative value in the parts of the tape proffered by" the defendant. Furthermore, parts of the proffered tape included inadmissible hearsay. *Id.*

Similarly, here the district court had reviewed all of the videotapes prior to the commencement of evidence and

found that portions of the videotapes were inadmissible as irrelevant because they merely showed the back of the defendant's house or the defendant at rest. *Clarke*, 390 F. Supp.2d at 133. Other parts of the footage had little value because they were "extremely cumulative and a waste of time." *Id.* As in *Jackson*, these findings should be upheld.

To the extent that the defendant relies on *United States v. Yevakpor*, 419 F. Supp.2d 242 (N.D.N.Y. 2006) to argue that the district judge erred, that reliance is misplaced. In *Yevakpor*, the Government relied on three short segments of video, and it was unclear how much other videotape footage had existed before it was erased or re-recorded. *Id.* at 245. The *Yevakpor* court found that the erasure/re-recording of the videotapes in that case was not "inadvertent" and therefore the defendant in *Yevakpor* was unfairly hampered by the loss of the majority of the video taped evidence. *Id.* at 246. Clarke can make no such claim here. To the contrary, in this case, not only was all of the videotaped footage preserved and provided well in advance of the trial to defense counsel, but also the defense counsel had many opportunities to specify which missing portions of videotaped evidence would explain or qualify the Government's highlight video.

In sum, the district court did not abuse its discretion in not permitting all of the other videotaped evidence. *See Castro*, 813 F.2d at 576-77 (discussing Rule 106 and 611 and noting that "we must limit ourselves to inquiring whether the district judge's actions amounted to an abuse of discretion"). Far from abusing his discretion, in this

case, the district judge properly excluded the tapes to avoid wasting time and undue delay in the trial. Accordingly, this Court should affirm the district court's refusal to admit all of the videotape evidence pursuant to Rule 403.

II. THE COURT PROPERLY BASED THE DEFENDANT'S SENTENCE ON THE INTENDED LOSS AMOUNT

A. Relevant Facts

Immediately after the jury found Clarke guilty of three counts of mail and wire fraud, Clarke elected to go to trial on the forfeiture count in the indictment, rather than present arguments about the forfeiture at the time of sentencing. The parties presented arguments and the jury returned a forfeiture finding in the amount of $135,135. (A 3). In other words, the jury found that DOL and the SSA had paid Clarke this amount in benefits. Both the Pre-Sentence Report and the Government, however, requested that the court use the intended loss enhancement in this case. PSR at ¶ 28. Attached as Exhibit A to the Government's sentencing memorandum was a certified calculation by the SSA regarding the amount of monies in disability benefits that Clarke would have received if she received benefits until the age of 62. (A 362); (A 370-71). (There was no similar certification from DOL.) The SSA statement certified that Clarke would have received an additional $214,063.68 had she continued to receive payments. (A 362). Thus, the total intended loss calculation was approximately $349,198.68, assuming no

cost of living adjustments, resulting in a 12-level offense enhancement.

At the time of sentencing, the defendant did not object to the calculations but rather argued that the actual loss amount should be used to determine the offense level. *See* (A 362); (A 372-74).

The district court found that the intended loss amount should be utilized to determine the Guidelines calculation. (A 374). The court noted that the defendant's fraud had continued for a "significant period of time resulting in a significant actual loss." (A 374). Furthermore, the court found that the defendant had "frequent opportunity" to abandon her fraudulent scheme but had failed to do so, thus indicating that "she intended to continue her course of conduct as long as she was able to . . ." (A 374). The court found that it did not need to "find that the full amount of what's been calculated as intended loss would, in fact, have been suffered or was intended to be suffered," because, at a minimum, there was ample evidence to suggest that she intended the scheme to endure long enough to cause more than $200,000 in losses and qualify for a 12 level, rather than a 10 level, enhancement. (A 374).

B. Governing Law and Standard of Review

Section 2B1.1 of the Guidelines, which governs the offense of conviction, provides a base offense level of 6. Under § 2B1.1(b)(1), levels are added based upon the loss attributable to the offense and relevant conduct. Loss is

defined as "the greater of actual loss or intended loss." U.S.S.G. § 2B1.1, Application Note 3. Further, under the Sentencing Guidelines:

> "Intended loss" (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

U.S.S.G. § 2B1.1, Application Note 3(A)(ii).

The calculation of loss need not be precise. Rather, the loss calculation must be a reasonable estimate of the loss using the information available to the court. *See, e.g.*, *United States v. Burns*, 104 F.3d 529, 536 (2d Cir. 1997); *United States v. Gomez,* 31 F.3d 28, 31 (2d Cir. 1994) (*per curiam*). The Government bears the burden of proving the intended loss amount by a preponderance of the evidence. *See*, *e.g.*, *United States v. Desimone*, 119 F.3d 217, 228 (2d Cir. 1997); *United States v. Garcia*, 413 F.3d 201, 223 (2d Cir. 2005) (re-affirming preponderance standard in wake of *Booker*, and reviewing role enhancement under § 3B1.1(c)); *United States v. Beverly*, 5 F.3d 633, 642 (2d Cir. 1993). In making its findings, the court may draw reasonable inferences from circumstantial evidence, *United States v. Jones*, 900 F.2d 512, 521 (2d Cir. 1990), and may rely on any type of information known to it, *United States v. Concepcion*, 983 F.2d 369, 387-88 (2d Cir. 1992).

This Court "review[s] issues of law *de novo*, issues of fact under the clearly erroneous standard, mixed questions of law and fact either *de novo* or under the clearly erroneous standard depending on wehther the question is predominantly legal or factual, and exercises of discretion for abuse of discretion. *United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir. 2005) (internal citations omitted).

C. Discussion

Because the record here plainly supports the intended loss calculation, the district court appropriately calculated the defendant's Guidelines based on that amount. The Government supplied a statement from the SSA to establish the amount of money that the defendant would have received had her fraud continued until she reached the age of 62. (A 362); (A 375). In addition, the district court found that the defendant intended to continue her fraud into the future. (A 374). This evidence fully supports the district court's calculation of the defendant's Guidelines range based on the intended loss amount.

In response, the defendant argues first, that the district court should not have used the intended loss amount because that amount was based on pure speculation. (Def. Br. at 16). That argument is without merit. The district court here did not engage in speculation but rather relied on a certification produced by the SSA which accurately set forth the amount of payments that would have been rendered to Patricia Clarke if she had continued to engage in the fraud. (A 362).

Moreover, the district court properly found that the defendant would have continued her fraud. (A 374). The defendant's scheme became known as a result of an anonymous tip. If the Government had not received such information and initiated a criminal investigation and prosecution, the defendant would have continued to receive disability payments from DOL and SSA. Indeed, even after the defendant was notified of the investigation into her conduct, and even after she went to trial, she continued to receive disability benefits and did not stop receiving those benefits until she was found guilty of fraud. (A 370-71). Thus, although the defendant testified that she wanted to work "within her limitations," the defendant's own conduct revealed that working "within her limitations" was not inconsistent with her continued receipt of disability benefits.

Furthermore, as the district judge noted, the fact that Clarke "engaged in this conduct over a significant period of time with frequent opportunity to abandon it and without abandoning it suggests that she intended to continue her course of conduct as long as she was able to." (A 374). In addition, the district judge found that getting over the "200,000 mark [] would occur in a relatively short additional period of time" and that given all the facts in this case the court "believe[d] that that would have resulted in at least a $200,000 intended loss in this case." (A 374). Although the defendant disagrees with these findings, she cannot demonstrate that they are clearly erroneous. *See United States v. Jacobs*, 117 F.3d 82, 98 (2d Cir. 1997) ("Ultimately, intended loss is dependent on the findings of the trial judge."). Thus, the district court

properly used intended loss to calculate the defendant's Guidelines range.

The defendant's second argument is similarly meritless. She argues that the district court should not have relied upon the intended loss amount because that amount was not found by the jury. This argument is squarely foreclosed by *United States v. Crosby*, 397 F.3d 103, 112 (2d Cir. 2005), where this Court noted that so long as the sentence does not exceed the statutory range authorized by the facts found by the jury or admitted by the defendant, "the traditional authority of a sentencing judge to find all facts relevant to sentencing will encounter no Sixth Amendment objection." "Thus," this Court continued, "the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence." *Id.* *See also United States v. Henderson*, 416 F.3d 686, 695 (8th Cir. 2005) (noting that intended loss is a sentencing enhancement which the government does not need to allege in indictment), *cert. denied*, 126 S. Ct. 1343 (2006). The intended loss amount found by the judge did not subject the defendant to a sentence beyond the statutory maximum penalties for the offenses of conviction, and thus there was no Sixth Amendment violation here.

III. THE DEFENDANT'S REMAINING SENTENCING ARGUMENTS ARE MERITLESS

Clarke argues that the court committed substantive and procedural errors by "slavishly" applying the Sentencing Guidelines in a manner which demonstrated a "mandatory adherence" to the Guidelines. Def. Br. at 19. In addition, Clarke claims that the sentence imposed was not reasonable because she should have received a non-custodial sentence. The defendant's claims should be dismissed in their entirety.

A. Relevant Facts

An overview of the relevant facts is provided, *supra*, in the Statement of Facts in Sections IA and IIA.

B. Governing Law and Standard of Review

In *United States v. Booker*, 125 S. Ct. 738 (2005), the Supreme Court held that the Sentencing Reform Act of 1984 was unconstitutional to the extent it mandated that district courts impose sentences in conformity with the United States Sentencing Guidelines, which entail judicial fact finding by a preponderance of the evidence. In order to remedy this constitutional infirmity, the Supreme Court

excised certain portions of the federal sentencing statutes which rendered the Guidelines mandatory, namely 18 U.S.C. §§ 3553(b)(1) and 3742(e).[1] Henceforth, the

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[1] Section 3553(a) provides that the sentencing "court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection," and then sets forth seven specific considerations:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;

(continued...)

[1] (...continued)

(4) the kinds of sentence and the sentencing range established [in the Sentencing Guidelines];

(5) any pertinent policy statement [issued by the Sentencing Commission];

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(continued...)

Court said, sentencing courts should still consider the range applicable to a particular defendant under the Guidelines, but treat that range as advisory rather than binding.

The Supreme Court recognized in *Booker* that by excising § 3742(e), it had eliminated the statutory provision which had set forth the standard of appellate review for sentencing decisions. The Court nevertheless determined that implicit in the remaining sentencing scheme was a requirement that appellate courts review sentences for "reasonableness" in light of the factors outlined in 18 U.S.C. § 3553(a). *See Booker*, 125 S. Ct. at 765.

The Court has recognized that "[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge 'exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a

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[1] (...continued)

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

clearly erroneous finding of fact.'" *Fernandez*, 443 F.3d at 27 (citations omitted). In assessing the reasonableness of a particular sentence imposed,

> [a] reviewing court should exhibit restraint, not micromanagement. In addition to their familiarity with the record, including the presentence report, district judges have discussed sentencing with a probation officer and gained an impression of a defendant from the entirety of the proceedings, including the defendant's opportunity for sentencing allocution. The appellate court proceeds only with the record.

United States v. Fairclough, 439 F.3d 76, 79-80 (2d Cir.) (per curiam) (quoting *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005)) (alteration omitted), *cert. denied*, 126 S. Ct. 2915 (2006).

When reviewing a sentence for reasonableness, the length of the sentence imposed is one of several considerations. *See Crosby*, 397 F.3d at 114. Procedural errors may also render a sentence unreasonable – for example, application of the Guidelines in a mandatory manner. *Id.* Likewise, the improper calculation of a Sentencing Guideline enhancement may also render a sentence unreasonable, at least where that enhancement had an "appreciable influence" on the sentence imposed by the district court. *See United States v. Rubenstein*, 403 F.3d 93, 98-99 (2d Cir.) (vacating and remanding pre-*Booker* sentence, and reviewing enhancement determinations because such decisions "may have an

appreciable influence even under the discretionary sentencing regime that will govern the resentencing"; "express[ing] no opinion as to whether an incorrectly calculated Guidelines sentence could nonetheless be reasonable"), *cert. denied*, 126 S. Ct. 388 (2005); *Selioutsky*, 409 F.3d at 118 ("An error in determining the applicable Guideline range would be the type of procedural error that could render a sentence unreasonable under *Booker*.").

Factual determinations underlying Guidelines determinations under *Booker* are considered under a clear error standard of review. *Selioutsky*, 409 F.3d at 119. Issues of law are reviewed *de novo*, and mixed questions of law and fact are reviewed under either a *de novo* or clear error standard of review, depending on whether the issue is predominantly legal or factual. *Id.* (citing *United States v. Vasquez*, 389 F.3d 65, 75 (2d Cir. 2004), and *Rubenstein*, 403 F.3d at 99). A district court's exercise of discretion is reviewed for abuse of discretion. *Id.*

Although this Court has declined to adopt a formal presumption that a within-Guidelines sentence is reasonable, it has "recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Fernandez*, 443 F.3d at 27; *see also United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) ("In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment

of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.").[2]

C. Discussion

1. The district court properly considered all relevant sentencing factors in selecting the defendant's sentence

The defendant argues that the district court erred by "slavishly" adhering to the Guidelines, but this argument is belied by the record.[3] The district court fully complied

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[2] The Supreme Court has recently agreed to consider whether a presumption of reasonableness applies to within-Guidelines sentences, and, if so, whether that presumption justifies such a sentence where there has not been an explicit analysis of the factors set forth in 18 U.S.C. § 3553(a), *Rita v. United States*, 127 S. Ct. 551 (2006) (granting certiorari), and whether a sentence substantially varying from the Guidelines must be justified by extraordinary circumstances, *Claiborne v. United States*, 127 S. Ct. 551 (2006) (same).

[3] The defendant also criticizes the district court for "slavishly" adhering to the Guidelines when it calculated the defendant's Sentencing Guidelines range. Def. Br. at 19. This critique is misplaced. As this Court made clear in *Crosby*, the trial court's first job in sentencing is to calculate the defendant's Guidelines range – according to the Guidelines. 397 F.3d at 111-12. It is only after that range has been calculated that it can be considered, in conjunction with the other § 3553(a) factors, in selecting an appropriate sentence. *Id.*

(continued...)

with *Booker* and *Crosby*. Judge Underhill recognized that the Guidelines are "advisory," (A409) and gave consideration to the other statutory factors. As required, the district court set forth the applicable Guidelines range, based on the factors found by the court, and also considered the other factors set forth in § 3553(a).

As relevant here, the Government sought enhancements for both intended loss amount and obstruction of justice. The court denied the Government's obstruction of justice enhancement (A 367-68), and as described more completely in Part II, *supra*, calculated the defendant's offense level based on a finding of intended loss (A 374). Based on these findings, the court properly calculated the defendant's Guidelines range. (A 375).

The court also reviewed the other factors set forth in § 3553(a). (A 406-10). After presiding over a trial in this case and reviewing all of the videotaped evidence, the court noted that the job offered to Clarke was one that she was "physically capable of performing" and that the evidence at trial showed her to be a very "industrious" woman. (A 406). The district court identified and recognized the statutory factors it considered in imposing sentence, including the characteristics of the defendant, the seriousness of the offense, the purposes of punishment (deterrence, rehabilitation, incapacitation), and the Guidelines which the district judge noted were "advisory." (A 408-409). In the absence of any record evidence to

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[3] (...continued)
at 112-13.

suggest that the court misunderstood its obligations or failed to consider any particular factor, the court is entitled to a presumption that it acted properly. *Fernandez*, 443 F.3d at 29-30. The mere fact that the court imposed a Guidelines sentence does not prove that the court applied the Guidelines mandatorily, especially where, as here, the court expressly identified the Guidelines as one factor among many that it considered.

2. The resulting sentence, a sentence at the bottom of the Guidelines range, was reasonable

The sentence imposed on Clarke was reasonable. The district court calculated the correct Guidelines imprisonment range, treated the Guidelines range as advisory, properly considered the Section 3553(a) factors, and ultimately imposed a within-Guidelines sentence at the bottom of the Guideline range, explaining in detail the reasons for its sentence. (A 405-410). As noted by the district court, the defendant's crime was perpetrated over a long period of time and involved a substantial sum of money. (A 374); (A 405-06). The crime was a serious one, perpetrated against a government "system that is there to protect people who are truly needy." (A 408). *See also* A 405-406 ("And what I'm faced with today is a very extensive fraud, extensive over the amount of time that it continued, extensive in terms of the amount of money that was taken from the government agencies, and extensive in the sense that you had frequent opportunities to decide to stop what you were doing."). And while the court found no need to impose a sentence to incapacitate the defendant,

the court's sentence was designed in part to "deter other people from doing what you did." (A 408).

The sentence in this case is squarely within the "overwhelming majority of cases" in which the Guidelines sentence "fall[s] comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Fernandez*, 443 F.3d at 27. Clarke's sentence of 30 months for her brazen fraud – a fraud she continued until the day of conviction – was a clearly reasonable sentence. Examination of "the record as a whole" clearly establishes that the district court did not exceed the bounds of its discretion in sentencing Clarke. *Id.* at 28.

Understandably, the defendant would prefer a non-custodial sentence, but the defendant's assessment that a custodial sentence is unreasonable is neither controlling nor persuasive on the record here. The defendant's reliance on *United States v. Carey*, 368 F. Supp.2d 891 (E.D. Wis. 2005) in support of her plea for a lower sentence is similarly unpersuasive. Unlike the defendant in *Carey*, Clarke proceeded to trial even after being provided with nine-months of videotaped evidence, was found guilty by a jury after a two-week trial, elected to proceed to a trial on the issue of forfeiture and required the government to put on evidence of intended loss. The defendant's argument for a lower sentence is unavailing and should be denied.

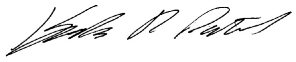
CONCLUSION

For the foregoing reasons, this Court should affirm the defendant's conviction and sentence.

Dated: February 20, 2007

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

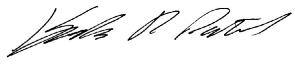


KRISHNA R. PATEL
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,395 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



KRISHNA R. PATEL
ASSISTANT U.S. ATTORNEY

Addendum

18 U.S.C. § 1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343. Fraud by wire, radio, or television.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Fed. R. Evid. 106

Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Fed. R. Evid. 403

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 611(a)

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.