UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal No. 19-47 (WMW)
v.	)	
	)	
	)	**POSITION OF THE DEFENDANT**
MARGURITE MARY COFELL	)	**WITH RESPECT TO SENTENCING**
	)	
Defendant.	)	

INTRODUCTION

Margurite Cofell is a 62-year-old grandmother with no prior record whatsoever. The circumstances of her fraud are rather unusual, as will be explained in greater detail in this position paper. Indeed, she is unique in many respects as a 62-year-old first time offender facing significant imprisonment in Federal Court. While not diminishing the seriousness of her offense, it is equally important to look at her as a whole person, as someone who otherwise has led an exemplary and law-abiding life, as someone who people care a great deal about, as someone who people say good things about. While the advisory guidelines call for substantial imprisonment, (and the defense's sentencing request calls for substantial imprisonment), those mathematic and formulae driven guidelines do not take into account Ms. Cofell's "individual characteristics," which in the context of an otherwise exemplary 62 years of life, are certainly equally deserving of credit as a number derived from the guideline book. In this court's sentencing calculus, in determining what sentence is "sufficient but not greater than necessary" in a case

involving a 62-year-old first time offender, that analysis must account for Ms. Cofell as an individual.

Ms. Cofell pled guilty to an Information in this case. On February 15, 2019, she pled guilty to a one-count Information charging her with Credit Union Fraud in violation of 18 USC 1344. The parties have agreed to a base offense level of 7, and upward adjustments for loss (16 levels), sophisticated means (2 levels), jeopardizing the soundness of a financial institution (4 levels), and abuse of a position of trust (2 levels). While the defense reserved a potential objection for the enhancement for unauthorized transfer of a means of identification, we are not pursuing that issue and acknowledge it applies (2 levels). Accordingly, the only guideline dispute between the parties is whether there should be a 2-point enhancement for obstruction of justice under USSG 3C1.1. Given that Ms. Cofell's undisputed lack of criminal history places her in Category I, the party's guidelines ranges are thus either 97-121 months (defense view) or 121-151 months (government's view). The PSR has adopted the government's view of the obstruction enhancement and has also applied another adjustment for substantial financial hardship to a victim that was not contemplated by either party in the plea agreement; each party has objected to that additional enhancement as redundant with the other enhancements and have asked that it not be applied, as noted in the Addendum to the PSR.

This is not a case where a sentence within the advisory guidelines range is necessary to satisfy the purposes of sentencing. The defense requests that the court

impose a sentence of 72 months (six years) with substantial community service as a condition of supervised release as an appropriate sentence for Ms. Cofell in this case. Such a sentence is consistent with this court's overall sentencing directive to impose a sentence that is "sufficient but not greater than necessary." For the reasons set forth in greater deal throughout this position paper, imprisoning Ms. Cofell beyond 72 months is not necessary to satisfy the purposes of sentencing and a sentence of 72 months for Ms. Cofell would be consistent with the sentencing factors set forth in 18 U.S.C. § 3553(a).

FACTS

Margurite Cofell is 62 years old. She has no criminal background and no criminal record whatsoever. She was born in Little Falls in 1957 and was raised on a farm in the Township of Flensburg; the family farm is located about 10 miles west of Little Falls. It was an 80-acre dairy farm family and they also raised pigs. Ms. Cofell's father farmed and also worked full-time for a road construction company; he was a foreman and was on the road and out-of-town frequently. Ms. Cofell has four siblings - two older brothers, a sister one year older, and a younger brother. Her mother worked on the farm and also provided baby-sitting services to earn extra money for the family.

This was a close-knit farm family. Everyone worked hard and there were lots of chores. The cows needed feeding and milking on a daily basis, there was a large vegetable garden that needed planting, tending, and harvesting, and the family heated with wood so there was always wood to be cut, split, and stacked, and fields of hay that were planted, harvested and bailed. Ms. Cofell's two older brothers were out of the

house by the time she was a teenager, so taking care of the farm became her responsibility during the work week since their father was out on the road working his construction job. Ms. Cofell attended Catholic grade school in Flensburg then attended public schools in Little Falls. She graduated from Little Falls high school in 1975 where she participated in Future Homemakers of America; there were no sports for women offered at her high school in those days.

Following high school, she remained on the family farm. Ms. Cofell began working full time after high school and never attended college. She worked for a summer youth program supervising playgrounds in Little Falls and she also worked as a server at the Pine Edge Inn in Little Falls. In 1978 she obtained a job as a secretary/receptionist at the American National Bank in Little Falls, and eventually became a teller there as well. She worked at the bank for nearly a decade before she got her job at the credit union in 1987, where she worked until she was fired following the discovery of her fraud in January of 2014.

In 1978, when she was 21 years old, she married Greg Zupko. He was a carpenter and they lived in a mobile home on 10 acres of what was part of the original family farm (where Ms. Cofell's current house is located). However, a year or so after they were married, Mr. Zupko was working in the oil fields out in North Dakota and got sick, a lump was discovered in his lymph nodes and he was diagnosed with cancer. Following a two-year struggle, he passed away in 1981. He was 28 years old when he died. During this time period, Ms. Cofell's father also became sick, he suffered an aneurysm and was

hospitalized for an extended period of time at the University of Minnesota. Ms. Cofell's husband Greg was also receiving his chemotherapy treatment at the University of Minnesota, so during this two-year period her life consisted of working full-time, taking care of her sick husband, and driving back and forth between Little Falls and the University of Minnesota, attending to her husband and father. As noted, Greg passed away in 1981 and they have no children.

In 1987 the St. Francis Campus Credit Union had a job opening and she applied and was hired as the manager of what was then a small credit union located in St. Gabriel's Hospital in Little Falls. She and another woman were the only full-time employees and they also had another part-time person. She estimates that they had a few million dollars in assets and initially the credit union was only available to employees of the hospital and their relatives. It was a very small operation and was housed in two small rooms on the first floor of the hospital. The business primarily consisted of checking and savings accounts as well as small consumer loans (auto loans and personal loans). There were no real estate loans and no real commercial loans initially. This was a small credit union which grew and expanded over the 25 years that she worked there.

Around the time that she was hired at the credit union, she married her second husband, Paul Cofell. Simply put, this was a "bad choice." Paul was a musician and taught guitar. It was a difficult marriage and he simply turned out to be a bad choice and a mistake. They were together for about 10 years before she finally divorced him. They have two children together. Jon Paul is 31 years old and is a turkey farmer in Swanville.

Ms. Cofell has two grandchildren through Jon Paul's marriage. Her other son Lucas is 22 years old and married, and lives in Chicago and recently started law school at Loyola in Chicago.

During this time-period, the credit union continued to grow. The credit union changed its charter and opened up membership. She estimates that it had approximately 3500 members at the end. It grew from two full time employees (Ms. Cofell and another person) to six employees including herself and the assets grew to around $50 million and the business expanded to include real estate loans and IRAs. The facility remained on the first floor of the hospital, and took over the nursing school office and added some additional space later on.

As noted, Ms. Cofell was divorced from Paul Cofell in 1995. Around 2000 she started dating John Gwost. She had known John all her life, they attended grade school together and remained friends. They began dating around 2000 and have been together ever since. About14 years ago, John moved in with Ms. Cofell at her residence on the 10-acre site she got from her parents and he brought with him his two children; Casey is now 30 and Nicole is 32. Together, they raised their four children as one family, although the two of them are not married. The children are all grown and it is just now her and John living in the house. Mr. Gwost drives a truck and works as a salesman for a welding supply company where he has the northern Minnesota territory. Ms. Cofell's parents are now deceased. Her father died in 1996 following his problems after the aneurysm and her mother passed away in 2015. The family farm is now owned by her younger brother Paul,

a union brick layer who lives in the Twin Cities, and he has turned the family farm back into its natural habitat for wildlife and conservation management.

THE OFFENSE

This is a very unusual fraud case. The majority of the money at issue went to make payments on loans and overdrawn checks for credit union customers and others that she knew, none of whom were aware of what Ms. Cofell was doing to prevent default on their loans and overdrawn checks. The elaborate scheme she created was started because she didn't have the fortitude to call in bad loans, default non-paying customers loans, write-off bad loans, and close her customer's accounts. Instead, she alone, without the customers' knowledge or participation, engaged in this elaborate scheme to avoid defaults, loan collections, and terminating customers' accounts. The genesis of this and her motives underlying this scheme are indeed very unusual for this type of federal fraud case.

This all started years ago when Ms. Cofell used bank funds to make loan payments for a customer, the owner of a small tree trimming/removal business, who was having financial problems. He was behind on his payments; his loan was headed towards default and he asked her for help. Rather than call in the loan, write it off, get the bank's legal department involved and go after his assets, she made his payment (and then payments) by increasing the balance on the loan and then using the loan proceeds to make the payment for this financially distressed small business owner, rather than putting him out of business. She did this for one customer and then a handful of other similarly

financially distressed business owners rather than taking the hard-necessary steps that a good prudent banker would normally do under the circumstances: write off the loan, close the account, and go after the customer's assets.

There were a number of small business customers that this got started with years ago, a number of tree trimming, tree removal businesses that she "helped out" in a similar fashion. There was a local insurance agent who was constantly in financial trouble; he was a good talker and Ms. Cofell used a new method to assist him when he was overdrawn at the bank. She recalls that at one point he was overdrawn by nearly $40,000 in his checking account. Rather than close the account and go after him, she created a fake loan and put the money in his account to cover his deficiencies. Once she started doing this, this became her somewhat regular practice, and this (creating fake loans to make payments on customer's delinquent accounts) underlies the vast majority of the fraud involved in this case.

How and why did she do this?

Part of her mindset was that they were the Credit Union's customers, they lent the people money in the first place, and they had an obligation to help them out. This was also a small community and she knew most of these people and their extended families first hand. She also trusted people and thought they would pull through and make good on their loans, and that, somehow, everything would work out and be fine. And while she knew most of the recipients involved here, the majority of this did not involve close

friends and family members. Equally important, none of them knew what she was doing.

Another critical piece in the analysis is that she knew first-hand how devasting it could be on these people if she were tough on them; she did not have the heart to go after these people and be a coldhearted but good prudent banker. Early on in her banking career, she remembers a particular customer who came to her for help because he was behind on his payments and headed into default territory; she turned him down, she said there wasn't anything more she/they could do for him, and he went home that night and committed suicide. This weighed heavily on her throughout her banking career, it still plagues her to this day. Accordingly, this suicide of a customer early on in her banking career had a critical impact on her and her subsequent mindset in "helping" out her customers.

In addition, Ms. Cofell has a rather passive and non-confrontational type personality, she avoids conflict and arguments, and it hurt her to be the one delivering bad news and hurting people; she is the type of person who seemingly needs to please everyone else, and she put others' interests before hers, very much to her personal detriment. She also did this to avoid conflict with her board of directors, and to avoid the conflict and stress over reporting bad customers, writing off their loans, and closing their accounts. Ironically and unfortunately, she took all this burden on herself, created an unmanageable and stressful double life, all to her personal detriment, and she has no one to blame but herself for her decisions, how she handled all of this, and what she did.

In short, after she started doing this, Ms. Cofell created a spiraling mess that quickly became out of control and for which she had no exit strategy but inevitable discovery and prosecution. To sustain the fraud, she had to take out new fake loans to make the payments on the other existing fake loans, and she created an unsustainable nightmare. When she was interviewed and stated that she was hoping that she would win the lottery, that was more than just a joke, she has known for years that she had no way out of her mess but this inevitable conclusion. She should never have been a banker.

And while the core of the fraud is as described above, making payments for customers on their loans and overdrawn checks, over time, her misuse of banks funds became more complicated and elaborate, and yes, she did engage in self- dealing, and providing financial assistance to family members and others without their knowledge or participation. There are other elements and aspects to her scheme that need explaining, but upon closer examination show that she was using credit union funds for purposes other than for her own greedy self-interests. For example, she made payments for the City of Flensburg, and payments for the baseball association. She bought things for the bank and paid for them through one of these accounts rather than get approval from the board because it was less hassle and led to less confrontation over her spending credit union funds for fundraisers, company picnics, and things of this sort.[1] And, as stated, the

[1] She used a John Gwost account without his knowledge or participation to pay for various credit union expenses, as well as other matters, but he had no idea what she was doing or that she was using an account in his name.

characterization that she was doing this primarily for family members and close friends is not entirely accurate, while she knew most everybody, and had personal relationships with many of the customers and business people that were the recipients of her fraud, there was little to nothing in it for her, and there isn't a single customer, relative, or family member that knew what she was doing. And she personally got little out of this. She has never led an exorbitant or opulent lifestyle. She doesn't have a drug habit, this was not the result of a gambling addiction, or an addiction to selfish and greedy spending habits. She did it primarily for the benefit of others.

As stated, this was a house of cards that was unsustainable and had spiraled out of control. In terms of the losses here, there is an exponential component due to how this fraud was structured and maintained. She was taking out loans to pay loans. Each month was an accounting mess, and sustaining the scheme took more and more of her time and energy. It all had to come to an end. It did, with a civil audit in January of 2014. She was not prepared when the auditors showed up, and she lied and tried to stall to get her books in order, and she was caught in her web of lies and deception. Finally, she confessed, was suspended and then terminated, and the case was referred to the FBI for prosecution. The regulatory entity closed the credit union, the assets were assumed by another credit union, i.e., taking over existing members accounts, loans, IRA's, etc. It is noteworthy there were no customers involved in her scheme and they did not suffer financial losses here.

Since then, and for now approaching six years, Ms. Cofell has lived in her house, and worked two or three jobs at the same time: as a waitress at a local cafe, as a care assistant in a local nursing home, and she has continued to work as City Clerk for Flensburg, a position she is training another person to take over in light of her upcoming imprisonment. She attends church regularly, continues to sing and play guitar in the church choir, and has continued to live a quiet existence, remorseful over what she has done. There has been an unprecedented outpouring of support letters coming in for this 62-year-old woman who has never been in any kind of trouble before and who by all accounts is truly remorseful, and, this offense aside, a decent, kind person. She is remorseful and accepts responsibility for what she has done, and understands that imprisonment will be imposed as her punishment. As noted in the acceptance of responsibility portion of the PSR, Ms. Cofell is not one to offer excuses and acknowledges her guilt, and she is truly sorry for what she has done:

> I acknowledge that I am solely responsible for the failure of the St Francis Campus Credit Union due to the fact that I abused my position as CEO/Manager during my tenure of employment with the Credit Union. I am also sincerely sorry to all the members of the Credit Union and will be for the rest of my life. I took something that was so good and ruined it, and there is nothing that will ever take that away. I accept full responsibility for my crime, what I did was wrong and illegal, and I wish I could somehow undo the damage I have done. I understand that I will be sent to prison, and I make no excuses for myself. I am truly sorry.
>
> Margurite Cofell, PSR. ¶ Par. 24.

Now she faces sentencing for this serious federal offense, and the question is, how much time is sufficient but not greater than necessary in this particular case?

GUIDELINE ISSUES

There are two guideline issues at issue. The first is whether an enhancement for willfully obstructing the administration of justice under USSG § 3C1.1 should applied due to Ms. Cofell's attempts thwart the civil auditors during the course of their audit in January of 2014. (PSR Par. 35). This objection is a legal objection only due to the civil nature of the audit. There is no question about her conduct here and this is no attempt to minimize her behavior as set forth in the PSR. However, the obstruction enhancement does not apply to civil matters, it applies to criminal investigations.

Section 3C1.1 provides for a 2-level adjustment in cases where "the defendant willfully obstructed or impeded . . . the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction." USSG § 3C1.1. As the quoted text suggests, the adjustment aims to penalize post-offense behavior that constitutes an "unlawful attempt to avoid responsibility." *United States v. Dunnigan,* 507 U.S. 87, 97 (1993). Generally speaking, it does not seek to penalize pre-investigation acts, with one notable exception, *i.e.*: "Obstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction may be covered by this guideline if the conduct was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction." USSG § 3C1.1, App. N. 1.

Here, the rationale offered to apply the § 3C1.1 adjustment is that Ms. Cofell engaged in obstructive behavior to conceal her fraud. This is not disputed. However, at that point the matter was simply a civil audit, not a criminal investigation. Her behavior

was not an attempt to obstruct any ongoing criminal investigation, and in fact there was no such active investigation at the time of these claimed acts. In such situations—*i.e.*, where the claimed obstructive behavior occurs in relation to a civil proceeding and has no discernable nexus to a government prosecutorial investigation—the § 3C1.1 adjustment does not apply. As one court has said:

> Impeding a private civil investigation [] without some contemporary nexus to a government-led investigation [] by itself does not justify an obstruction of justice enhancement. To be clear, committing perjury during a private civil proceeding initiated prior to a government-led investigation may support an obstruction enhancement, but only if the private investigation had some existing or expected connection to the later government inquiry and the perjury was purposefully calculated to thwart that investigation or prosecution of the offense of conviction. It is not enough to show that the obstructive conduct simply impeded a civil investigation that later turns out to relate or lead to a government investigation and an offense of conviction.

United States v. Chivers, 488 Fed. Appx. 782, 788-89 (5th Cir. 2012) (internal punctuation and citations omitted); *accord United States v. DeGeorge*, 380 F.3d 1203, 1222-23 (9th Cir. 2004) (reversing § 3C1.1 obstruction adjustment involving claimed perjury at underlying civil trial, reasoning that the "perjury occurred during the *civil* trial as part of [the] scheme to defraud and not during the *criminal* investigation as part of an attempt to obstruct justice"). Hence, the § 3C1.1 adjustment for obstruction does not apply to her behavior during the course of the civil audit.

Next, the PSR is also recommending an enhancement for "substantial financial hardship" to a victim – the credit union, which neither party supports. PSR Par. 29. That enhancement does not apply here because it is already covered in the four-point

enhancement (not disputed and agreed to by the parties) for conduct that jeopardized the soundness of a financial institution. PSR Par. 32. This covers the same behavior, the same conduct, it is the same conceptual construct, and the identical enhancement in two forms. This enhancement is not meant to be applied to financial institutions that are already covered under another section, and violates the well-established rule against "double counting" of redundant guideline enhancements. Accordingly, the parties ask that it not be applied in this case.

§3553(a) DISCUSSION-WHAT IS A REASONABLE SENTENCE?

Regardless of the court's resolution of the guideline issues in this case, the sentencing guidelines are only advisory and the guidelines are not entitled to a presumption of reasonableness. "The Guidelines are not only ***not mandatory*** on sentencing courts; **they are also not to be *presumed* reasonable**." *Nelson v. United States,* 129 S.Ct. 890, 894 (2009) (emphasis added). Even in pre-guidelines practice, the fact that the sentencing guideline calculations were determined to be arithmetically accurate, however, still did not mean that they constituted an appropriate, reasonable, and just sentence in any case. "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue." *Koon v. United States*, 518 U.S. 81, 113 (1996). The Supreme Court has ruled emphatically that the guideline sentence is not to be presumed reasonable in any individual case and that the Court "must make an

individualized assessment based on the facts presented" in each case. *Gall v. United States*, 128 S.C. 586, 602 (2007).

In *Booker*, the United States Supreme Court held that the United States Sentencing Guidelines are advisory, and that District Courts must examine all factors set forth in 18 U.S.C. §3553(a) and impose a sentence that is "sufficient but not greater than necessary" to accomplish the goals of sentencing. *United States v. Booker*, 543 U.S. 220 (2005). The triad of 2007 Supreme Court decisions made clear that Federal Courts must determine sentences based on the facts and unique circumstances of the particular case, and that the guidelines do not enjoy a presumption of reasonableness. *Gall v. United States*, 128 S.C. 586, 602 (2007) (finding a probationary sentence, substantially outside of the guidelines, to be reasonable); *Kimbrough v. United States*, 128 S.C. 558, 570 (2007) (noting that Courts may vary from guidelines ranges based solely on policy considerations, including disagreements with the guidelines); *Rita v. United States*, 127 S.C. 2456, 2465 (2007) (holding that a District Court may consider arguments that "the Guidelines sentence itself fails properly to reflect §3553(a) considerations"). These decisions "mean that the District Court is free to make its own reasonable application of the §3553(a) factors, and to reject (after due consideration) the advice of the Guidelines." *Kimbrough*, 128 S.C. at 577 (Scalia, J., concurring). The "truly advisory" holding of these cases was made abundantly clear by Justice Stevens: "I trust that those judges who had treated the Guidelines as virtually mandatory during the post-Booker interregnum

will now recognize that the **Guidelines are truly advisory."** *Rita*, 127 S.Ct. at 2474 (J. Stevens, concurring) (emphasis added).

The Supreme Court has also rejected the pre-Booker mandatory guideline notion that "extraordinary circumstances are required to justify a sentence outside the Guidelines range" and rejected "the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." *Gall* at 595. Indeed, the Court has made abundantly clear that a sentencing judge has the right to disregard the Guidelines simply because they do not agree with the Guideline sentence. *Kimbrough*, 128 S. Ct. at 570. As a result of these decisions, "the range of choice in sentencing dictated by the facts of the case has been significantly broadened." *United States v. Goodman*, 2008 WL 1766759 at 5 (D.Neb. 2008). Recognizing the need to view defendants as unique individuals, the Court observed: "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Gall*, 128 S.C. at 602.

While in practice, a District Court still must calculate the advisory Guidelines range, *Gall*, 128 S.C. at 596-97, the Court must then:

> [A]fter giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the §3553(a) factors to determine whether they support the sentence requested by a party. In so doing, [they] may not

> presume that the Guidelines range is reasonable. [They] must make an **individualized assessment** based on the facts presented

Id. (citation and footnote omitted)(emphasis added).

In terms of Ms. Cofell's individual characteristics, it is important to note that she has otherwise led an exemplary and law-abiding life. She has worked hard throughout her life, has contributed unselfishly to her community, devoted herself to the service of others, and had a significant and positive impact on the people she has interacted with during her lifetime. She is a mother and a grandmother, an active church member, and active in community affairs. The outpouring of support letters paint the picture of an unselfish person that people care deeply about because they have witnessed firsthand the good nature of this person. In addition, many of those close to her have commented on her profound remorse. Importantly, it has been almost six years since her fraud was discovered, and she has since worked hard, often three jobs at one time, has kept to herself and continued to live a quiet existence, and she has demonstrated that she is fully capable of managing her affairs, being responsible, staying out of trouble, following the rules of supervision, and that she does not present a danger to the public or risk to re-offend.

Indeed, empirical research demonstrates that Ms. Cofell falls within that category of offenders least likely to reoffend. Both her age as an offender and her first-time offender status are powerful predictors of the unlikelihood of recidivism. The Sentencing Commission has recognized that (1) recidivism rates decline dramatically

with age, and (2) first-time offenders are even less likely to reoffend than defendants with a limited criminal history who also fall within Criminal History Category I. *See* U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at Ex. 9 (May 2004) [hereinafter *Measuring Recidivism Report*]; U.S. Sentencing Commission, *Recidivism and the "First Offender,"* at 13-14 (May 2004) [hereinafter *First Offender Report*]. The Commission's research has, for example, demonstrated that a 20-year-old defendant in Criminal History Category I has a 29.5.% chance of reoffending, while a 32-year-old defendant with the same criminal history has only a 14.6 % chance of recidivating. *Measuring Recidivism Report* at Ex. 9. With respect to first offenders, the Commission has found that offenders with zero criminal history points have a recidivism rate of just 11.7%, while offenders with just one criminal history point have double the recidivism rate at 22.6%. *First Offender Report* at 13-14. Women recidivate at even lower rates (10%, *Measuring Recidivism Report* at Ex. 9). Moreover, fraud offenders have very low rates of recidivism: "Offenders sentenced in fiscal year 1992 under fraud . . . (16.9%) are overall the least likely to recidivate." *Measuring Recidivism Report* at 13. For individuals in Criminal History Category 1, the rate falls to 9.3%. Id. Despite these clear and compelling findings, the Commission has failed to revise the Guidelines to take either age or first-offender status into account. The Commission clearly recognized the advisability of revising the Guidelines to take these factors into account. *See First Offender Report* at 1-2 (identifying goal of "refin[ing] a workable 'first-offender' concept

within the guideline criminal history structure); *Measuring Recidivism Report* at 16 (noting that "[o]ffender age is a pertinent characteristic" that would "improve [the] predictive power of the guidelines "if incorporated into the criminal history computation"). But, in the years since publishing its *Fifteen Year Report*, the Commission has taken no action toward implementing such revisions.

In response to the Commission's inaction, a growing number of courts, including the Eighth Circuit, have themselves taken both age and first-offender status into account when fashioning an appropriate sentence under 18 U.S.C. § 3553(a). *See, e.g.*, *United States v. Wilder*, 597 F.3d 936, 946 (8th Cir. 2010)("[A] defendant's age is among the many factors a sentencing court must consider in fulfilling the mandate of section 3553(a) . . . ."); *United States v. Chase*, 560 F.3d 828, 831 (8th Cir. 2009) (vacating sentence and remanding because the district court did not properly exercise its discretion in taking into account defendant's advanced age, employment record, health issues, and lack of criminal history)*; United States v. Hamilton*, 2009 WL 995576, at *3 (2d Cir. Apr. 19, 2009) (holding that "the district court abused its discretion in not taking into account policy considerations with regard to age and recidivism not included in the Guidelines"); *United States v. Holt*, 486 F.3d 997, 1004 (7th Cir. 2007) (affirming a below-guidelines sentence where the district court's only reason for the variance was that the defendant's age made it unlikely that he would again be involved in another violent crime); *United States v. Cabrera*, 567 F. Supp. 2d 271, 279 (D. Mass. 2008) (granting variance because defendants, like Cabrera, "with zero criminal history points are less

likely to recidivate than all other offenders); *United States v. Nellum*, 2005 WL 300073 at *3 (N.D. Ind. Feb. 3, 2005) (explaining that age of offender is relevant to §3553(a) analysis, even if not ordinarily relevant under the Guidelines, and granting variance to 57-year-old defendant); *United States v. Ward*, 814 F. Supp. 23, 24 (E.D. Va. 1993) (granting departure based on defendant's age as first-time offender since guidelines do not "account for the length of time a particular defendant refrains from criminal conduct" before committing his first – *i.e.*, the charged – act). Accordingly, Ms. Cofell's lack of risk of recidivism suggests that a long term of imprisonment is not necessary to protect the public from any future crimes.

Margurite Cofell is a good person who did something wrong and she is trying to do the right thing here and make amends. All the law enforcement purposes of sentencing are more than satisfied by a 72-month prison sentence in this case – including promoting respect for the law, and providing deterrence to others - and also is a sentence that reflects the seriousness of the offense, while taking into account the individual characteristics of Ms. Cofell. As Judge Ratzlaff has observed, there is a fundamental reason that courts are asked to review the entire circumstances of a person's life in determining an appropriate sentence: "[I]n determining the appropriate punishment here, if ever a [person] is to receive credit for the good [s]he has done, and [her] immediate misconduct assessed in the context of [her] overall life hitherto, it should be at the moment of [her] sentencing, when [her] future hangs in the balance. This elementary principle of weighing the good with the bad, which is basic to all great religions, moral

philosophies, and systems of justice, was plainly part of what Congress had in mind when it directed courts to consider, as a necessary sentencing factor, 'the history and characteristics of the defendant.'" *Adelman*, *supra*, 441 F. Supp.2d at 513-514. In sum, the guidelines advise a sentence "greater than necessary" for this 62-year-old first time offender to comply with the purposes of sentencing under 18 U.S.C. §3553(a). This is a person who committed a crime, has owned up to it, and is appropriately remorseful. A sentence of 72 months is still a very long sentence for someone of her age and characteristics who has never before spent so much as a day in jail; a sentence of 72 months is no slap on the wrist, it is a significant and serious punishment, will send a strong message to the community, and no one will accuse the court of being soft on her or her crime, and it will satisfy all the purposes of sentencing. It is so requested.

Dated: September 13, 2019

Respectfully submitted,

s/ Douglas Olson

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