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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. MARGARITA MONIR HOSSEINI Defendant.	Case No.: 5:15-CR-00271-FB **DEFENDANTS' SENTENCING MEMORANDUM** JUDGE: Hon. Fred Biery PLEA: September 20th, 2017 SENTENCING: February 16, 2018 TIME: 9:00am

COMES NOW, Defendant Margarita Hosseini, through her undersigned attorney of record Robert E. Barnes, and respectfully files this Sentencing Brief for this honorable Court's consideration in determining a reasonable sentence that inspires confidence in the criminal justice system. *United States v. Booker*, 543 U.S. 220 (2005), and 18 U.S.C. §3553(a) Margareta Hosseini is scheduled to be sentenced by this Court on February 16, 2018, at 9:00am.

I. Summary

Ms. Hosseini simply wants to take responsibility and move on with her life. She has continued to do so despite defense counsel doubts of the integrity of the proceeding from the perjury purchased by the government; the undisclosed compromising conflicts of government witnesses; the conflicting reports of tax loss and the government's inability and unwillingness to produce numbers with any indicia of reliability; the inordinate intervention of the court in the trial itself; the coercive environment behind the plea (despite the Fifth Circuit's recent warnings to this court in *U.S. v. Hemphill,* 748 F.2d 666 (5th Cir. 2014); the apparent prejudice of the Court against defendant's choice of counsel based on residence; court staff promising a "hotter" environment for the defendant during trial and undermining the ability to meaningfully exercise jury selection. Despite defense counsel's deep doubts about the integrity of this proceeding and the voluntariness of the plea, the defendant has chosen to put her future in the hands of this Court. Ms. Hosseni wants to make amends to those that feel she has wronged them, pay her restitution, pay her debt to society, and move on. The only issue left before the court is determining what sentence would be sufficient, but no greater than necessary, to meet the goals of 18 U.S.C. § 3553.

Pursuant to *Booker* and its progeny, a sentence should be "not greater than necessary" to satisfy the statutory purposes of sentencing and, consider all of the characteristics of the defendant and circumstances. If necessary, the court should reject advisory guidelines that are not based on national sentencing data and empirical research, as is the case here, where the guidelines greatly overstate the judicial sentencing patterns. *See United States v. Booker*, 543 U.S. 220 (2005); *Rita v. United States*, 551 U.S. 338 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Spears v. United States*, 555 U.S. 261 (2009); *Nelson v. United States*, 555 U.S. 350 (2009).

As the Probation Offices Presentencing Memorandum shows, Ms. Hosseini is not a super-criminal whom society will applaud if she is drawn and quartered in the public square. Ms. Hosseini has no past felonies, no criminal record relating to financial crimes, and has never been incarcerated. As the many letters from friends and family shows, Margaret is a kind, gentle and faithful person, helping friends, family, and animals in need. Importantly, Margaret intends to pay back every penny, nickel, dime, and dollar of the restitution she is found to owe, and has gone to

great lengths to arrive at the hearing with most of that amount available, despite the government's eagerness to put her in a position to arrive at sentencing without the necessary funds for restitution.

Under the facts and circumstances attendant to this case, the sufficient sentence necessary to meet the mandates and goals of 18 U.S.C. § 3553 is home detention, probation of 5 years or more, combined with community service and restitution in some fashion the Court deems appropriate. Such a sentence conforms to "similarly situated defendants" as well as "not unreasonably harsh," yet compels the defendant to publicly restore what she took from the community by working to benefit society and the underprivileged, always subject to this court's control and power to revoke the probation and issue a full-length incarceration sentence. This effectuates concerns for restorative justice without imposing de-facto punishment on the taxpayer and community the defendant's behavior wronged, while also affording the defendant make up for her mistakes directly to that community. As fellow courts request from the Supreme Court, the punitive path to justice, the incarceration-dominant modus operandi of punishment, costs communities more than it aids, undermines confidence more than it empowers, and curtails justice more than assists it. https://www.washingtonpost.com/?utm_term=.f102b4d7cb84

II. Procedural History and Factual Background

On September 21, 2017, Margaret Hosseini plead guilt to a single count of aiding and abetting a false tax return with a tax loss of $XXX. (Dkt. No. 62). Sentencing was set for January 12, 2018. On January 9th, 2017 Defendant asked for the sentencing hearing to be continued until after tax season in order to collect the necessary funds by liquidating her business. This delay was necessary due to the Court's clear statements made on September 20th 2017 (Dkt No. 69, Pg. 84 & 91) that "it is very important as to whether or not all or a significant part of the restitution is made before the sentencing decision" and that "if we're making progress towards those goals (collecting the restitution in full before sentencing), the Court could extend this sentencing date." This motion was denied.

On January 12th, 2018, a Presentence Investigation Report was filed with the Court, with a modified Presentence Investigation Report filed on February 8th. (Dkt. Nos. 74 and 78). The initial presentence report identified the tax loss for guidelines and restitution purposes as $20,000 in

taxes. (The report mistakenly identified penalties and interest, which is not subject to restitution, a correction later made).

The government calculated a higher number. In the government's first report, "each individual tax payer is responsible for repaying their liabilities to the government…[they] are now facing delinquent penalties totaling $85,536.20." (Dkt. No. 74 at p.7). This document claims the taxpayer penalty is a result of 62 individuals audited, not the 12 witnesses used in the indictment, and brings the total amount owed to the government to $189,255.20. The latter report, for comparison, simply states that Margaret "therefore owes the IRS $103,719 and Joe and Lisa Escobedo a total of $1,065.00." (Dkt. No. 78 at 7)[1]. On January 22nd, 2018, defense counsel objected to the information included in the initial report on multiple grounds, including the tax loss calculations presented by the government, a lack of necessary discovery production by the government, and the inclusion of the audit information of 62 former clients not included in the indictment or plea and was never contacted further.On February 8, 2018, and due to the government' ever changing tax loss theories, the Defendant filed a motion to compel discovery from the government to determine three things: first, what amount of tax remains unpaid; second, how much of that stems from mistakes alleged to have been made by the defendant; and third, who are the people responsible for the unpaid tax amounts, such that the defendant can itemize the payments by taxpayer. This motion was based on the Court's own directive that the government produce "all information…that could mitigate any punishment that might be imposed in this case." Dkt. No. 16. The government responded in objection to this motion, and the motion was denied. Dkt. No. 75. The government subsequently changed the basis of their tax loss calculation and restitution calculation, now shifting to other returns named in the indictment, and admitting for the first time that the government neither had, nor would, collect any tax from almost all of the government witnesses. For defense counsel, this raised a serious issue of a Brady violation (despite the court's comments that Brady violations don't happen here in the Western District of Texas), as it suggested government witnesses had a pecuniary motive from the government to lie.

[1] This distinction is not as nuanced as it appears. The fact that Ms. Hosseini has been determined to owe the IRS $103,719, and not the individual taxpayers, shows that the IRS has intended to let the taxpayer witnesses keep their ill-gotten gains in exchange for testimony and assistance, and did so without auditing the majority of the taxpayer witnesses to determine their true tax liability.

Pre-Sentence Report and Guideline Calculations

The U.S. Probation Office has calculated an advisory guideline range of 18 to 24 months imprisonment, derived from a total Offense Level of 15 and a Criminal History Category of I (Dkt. No. 78). The Defense concurs with the PSR in a few regards, most importantly, that all parties agree to recommend a sentence no greater than the bottom of the applicable sentencing guidelines, but some issues remain. *Id*.

The defense has some factual and legal disagreements with the conclusions reached in the PSR. As explained more fully in Sections A below, the defense contests the tax loss asserted by the government. Defendant believes the actual tax loss is not $103,719 as calculated in the original PSR, nor $104,784 as calculated in the modified PSR, nor the "up to $111,113.00" figure included in the plea agreement, but is actually only $37,262.00. This would drop Ms. Hosseini's initial Offense Level from 16 to 12, and would drop another net point to 11 after adjusting for responsibility and aiding the government. An Offense Level of 11 would move Hosseini to Zone B of the Sentencing Table with an advisory guideline range of 8-14 months. The guidelines advise that Zone B allows probation terms to be substituted for imprisonment provided that the probation terms include confinement conditions (community confinement, intermittent confinement, or home detention)[2]. This necessarily means that both the government and the Defendant take a position that Ms. Hosseini's sentence should be no greater than 8 months probation with confinement conditions as that is "at the bottom of the applicable sentencing guidelines." *Ibid*.

III. Argument

The Supreme Court has ruled that the mandatory nature of the Federal Sentencing Guidelines runs afoul of the Sixth Amendment. *See Booker*, *supra*, 543 U.S. 220. After *Booker*, the Sentencing Guidelines are "effectively advisory," not mandatory. *Id*. Thus, This Court's authority has been restored to its pre-guideline judicial function of evaluating all statutory factors relevant to sentencing, instead of just those factors the Sentencing Commission deemed permissible. *Gall*, *supra*, 552 U.S. at 50. The factors set forth in 18 U.S.C. § 3553(a) must also be

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[2] See: Alternative Sentencing in the Federal Criminal Justice System by the United States Sentencing Commission available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf

considered in fashioning the appropriate sentence. *See ibid*., *Booker,* 543 U.S. at 261 (sentencing guidelines are but one of many statutory concerns that federal courts must take into account during sentencing determinations). 18 U.S.C. § 3553(a) states in pertinent part: the court "shall impose a sentence sufficient, but not greater than necessary" to achieve the objectives of sentencing. In arriving at the appropriate sentence, Section 3553(a) directs the Court to consider:

> (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;
>
> (4) the advisory guideline range;
>
> (5) any pertinent policy statements issued by the Sentencing Commission;
>
> (6) the need to avoid unwarranted sentence disparities; and
>
> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a); *Booker*, *supra*, 543 U.S. at 268–69.

Other statutes also direct a district court in sentencing a defendant. Under 18 U.S.C. § 3582, a sentence involving incarceration is subject to the following limitation: "The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall […] recogniz[e] that *imprisonment is not an appropriate means of promoting correction or rehabilitation*." 18 U.S.C. § 3582 (emphasis added).

The Commission's institutional role in formulating guidelines "sufficient, but not greater than necessary," consists of two basic components: (1) reliance on empirical evidence of pre-Guidelines sentencing practice; and (2) review and revision in light of judicial decisions,

sentencing data, and comments from participants and experts in the field. *Rita v. United States*, 551 U.S. 338 at 349–351 (2007). If the Commission has failed to base its formulation of a guideline upon these two components or, rather, when a guideline "do[es] not exemplify the Commission's exercise of its characteristic institutional role" because the Commission "did not take account of 'empirical data and national experience,'" the sentencing court is free to conclude that the guideline "yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case" and "may vary [from Guidelines ranges] based solely on policy considerations." *Kimbrough v. United States*, 552 U.S. 85 at 109 (2007).

Due to the Commission's failure to base the ranges on empirical evidence of accurate pre-Guidelines sentencing practice and data, as well as judicial decisions and comments from participants and experts in the field, guidelines ranges involving regulatory offenses, fraud, **tax**, and other **nonviolent** crimes are particularly vulnerable to scrutiny. The tax guideline is a pointed example of where the Commission failed to properly exercise its institutional role. The development of the tax guideline, Chapter 2T, is a clear example of how its flawed use of data, combined with its failure to heed national experience, has resulted in ranges that diverge dramatically from past practice, and largely fail to achieve the legitimate purposes of sentencing.

After *Booker*, the Court recognized the power of a sentencing court to impose a sentence outside the advisory guideline range by considering not only the facts of the case before it, but also policy considerations—including disagreement with the policies underlying the guideline applicable to the case. *Gall*, 552 U.S. at 59; *Kimbrough*, 552 U.S. at 101; *Rita*, 551 U.S. at 351. Especially given that the tax guideline is neither based on empirical data not national experience, the Supreme Court has directed the sentencing court not to presume "that the Guidelines range is reasonable" or mandatory, but rather to "make an individualized assessment based on the facts presented" and explain how the facts relate to the purposes of sentencing to arrive at a sentence that is sufficient, but not greater than necessary. *Gall*, 552 U.S. at 50, 52-53; *Pepper v. United States*, 131 S. Ct. 1229, 1242–43 (2011). [K3] In doing so, the court is required to follow the framework set forth in § 3553(a), as further informed and guided by Supreme Court authority, and consider all mitigating factors that are relevant to any purpose of sentencing. To reiterate, after calculating the applicable guidelines range, the court must consider the factors listed in § 3553(a)

to determine whether a sentence within the guidelines range is appropriate, keeping in mind that §3553(a) requires the imposition of a sentence sufficient, but not greater than necessary to achieve respect for the law, just punishment, deterrence, protection of the public, and needed education and treatment, taking into account the nature of the offense, the history and characteristics of the defendant, the need to avoid unwarranted sentence disparities, and the guidelines.

Here, even if the correct offense level is used, the guidelines range should not be relied upon because it fails to effectively promote many purposes of sentencing. Not only is the guideline range not based on empirical evidence or national experience, but it also: (1) fails to provide significant, if any deterrent effect; (2) would result in unwarranted disparity as compared with sentences for similarly situated defendants; (3) eschews more effective, alternative sentences in favor of incarceration; and (4) does not account for Margaret's individual characteristics and other mitigating factors that favor a sentence of no incarceration or, at most, minimal incarceration.

In fact, as suggested by the Commission itself, increasing the certainty and **severity** of punishment is the only goal of sentencing reform articulated in the Sentencing Reform Act that the tax guideline, and the guidelines as a whole, fully achieve. *See* U.S. Sent'g Comm'n, Fifteen Years of Guidelines Sentencing: *An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, p. 138 (2004) ("*Fifteen Year Report*") ("For offenders who are imprisoned, the length of time served has increased substantially in the guidelines era. The average time served more than doubled after implementation of the guidelines . . . increasing from an average of just under 25 months to almost 50 months.").

Starkly, because the imposition of a guidelines range sentence here would violate §3553(a)'s overarching statutory command to "impose a sentence sufficient, but not greater than necessary," the Court should disregard a guidelines range sentence and fashion a discretionary sentence—a sentence of probation—to abide by the mandate.

A. The PSR and the Government's Tax Loss Calculations, and All Sentencing Conclusions Derived Therefrom, Provide No Indicia of Reliability.

One of the preliminary concerns in this case is the difficulty with even deciding the appropriate guideline range. The range is directly correlated to the tax loss presented, and the parties have wildly different findings. The government's position is created without an audit of

most of the taxpayer witnesses and in violation of the Administrative Procedures Act, which requires the IRS to follow certain rules and regulations when adjusting tax liability. The unsettling, and unprecedented, act of awarding false and illicit refunds to government witnesses (according to the government's version of events), by having Hosseini pay the government for refunds the government admits should never have issued, is itself is especially problematic. But this case is also unprecedented in other ways: no audits of almost any of the returns; no IRS records review of bank statements, credit cards, gas cards, cell phone use, mileage, or anything to ascertain the actual amount of tax loss; and no attempt to incorporate actual trial testimony from the government's own witnesses into correcting the tax claims made before trial. Even worse, evidence discovered after trial reveals local law enforcement witnesses for the government hid their past (one fired for falsifying evidence; another hid their compulsive gambling; another hid their criminal record; another hid their mileage records refuting their testimony). Nothing about the government's claims now of tax loss can be relied upon without jeopardizing the defendant's rights to a fair sentencing.

For purposes of sentencing and when determining actual tax loss, "the court should account for the standard deduction and personal and dependent exemptions to which the defendant was entitled. In addition, the court should account for any unclaimed credit, deduction, or exemption that is needed to ensure a reasonable estimate of the tax loss". *2016 Federal Sentencing Guidelines Manual*, pg. 336. Most importantly, tax loss can never include interest or penalties. *Ibid*. Assumptions, guesses, conjecture or thrown-at-the-dart-board numbers are insufficient to prove tax loss "unless sufficient information is available to make a more accurate assessment." *Ibid*. Beyond Joe and Lisa Escobedo, addressed in section B below, the taxpayer witnesses were not audited and thus the government's tax loss calculations are without a sufficient indicia of reliability to support their probable accuracy as is required.

i. Defendant's Actual Tax Loss Is Only $37,262 Because the Government's Numbers Lack a Sufficient Indicia of Reliability.

The government now finds itself hooked on its own horns: to gain a conviction for a violation of 7206(2) does not require a provable tax loss, but a provable tax loss is required to

sentence the one found guilty of a violation of 7206(2).[3] Without audits, there simply is not enough sufficiently reliable data to support these tax loss numbers, even if there is specific evidence to satisfy the elements of the crime (that do not require a tax loss at all). See: Footnote 3. The tenuous nature of the government's tax loss conclusions is further supported by many who were put on the stand under cross examination. Aaron Bryant, Certified Public Accountant and Certified Fraud Examiner, reviewed the case and was "surprised to find that tax assessments for the purpose of calculating 'tax harm' had been made on individual tax payer witnesses where no audit of the individuals was performed. The government's tax loss calculations were based on Memorandum of Interviews (MOI) with taxpayers and IRS CI agents. No additional documentation was secured from the tax payer witnesses." See: Exhibit A. As shown below, several "tax payer witness' testimony differed from IRS CI MOI's" because "[t]he government's tax loss is not based on facts" as no audit was conducted. *Ibid*. The following are tax loss adjustments are based on Mr. Bryant's evaluations and expected testimony at sentencing.

Fabio Rodriguez

IRS CI disallowed Fabio's vehicle and other business expenses for 2009 and disallowed almost all of Fabio's business expenses for 2010, per the MOI. According to Mr. Rodriquez's testimony at trial, business use of these expenses would be more aligned as deducted at 60%. If 60% of Fabio's business expenses are allowed deductions, instead of a severely questionable 0% as used by the government, the tax harm alleged drops from $6,944 to $3,891 for tax year 2009, and from $5,092 to $345 for tax year 2010. Based on nothing more than this testimony, the tax loss attributable to Mr. Rodriguez drops 72% from $12,036 to $3,398. This, and likely other deductions, would have been easily discoverable in any audit had the government chosen to do an actual investigation, and had they chosen not to blatantly ignore any information that conflicted with their myopia.

Terry Mack

IRS CI allowed only $798 for fuel and oil expenses for the entirety of 2008. At trial, Mr. Mack testified that he paid approximately $200 per month ($2400 in 2008) in vehicle fuel

[3] See: *Tax Crimes Handbook, Office of Chief Counsel, Criminal Tax Division* (2009) at page 63. "While it is irrelevant whether there was an actual tax deficiency, some measurable tax harm is important for gauging the probability of conviction and for purposes of sentencing."

expenses for the same year. Based on nothing more than this testimony, the tax loss attributable to Mr. Mack drops 51% from $3,162 to $1,623. This, and likely other deductions, would have been easily discoverable in any audit had the government chosen to do an actual investigation, and had they chosen not to blatantly ignore any information that conflicted with their myopia.

Mario & Kim Ruiz

IRS CI disallowed $12,900 in advertising expenses claiming that Ruiz had no receipts and could not remember the expenses. At trial, Mr. Ruiz claimed not only that he had receipts to verify these expenses but had contacted the IRS CI to provide the same. Mr. Ruiz's testimony states that IRS CI did not want the receipts. Based on nothing more than this testimony, the tax loss attributable to Mr. Ruiz drops 100% from $1,356 to $0. This, and likely other deductions, would have been easily discoverable in any audit had the government chosen to do an actual investigation, and had they chosen not to blatantly ignore any information that conflicted with their myopia.

Mike Trevino

IRS CI disallowed a 2010 Tundra purchased at the end of 2009 citing it as personal use only. Mr. Trevino testified at trial that the Tundra was a business asset and used 100% for business in 2010. Based on nothing more than this testimony, the tax loss attributable to Mr. Trevino drops 69% from $8,728 to $2,700 in 2009 and drops 100% from $1,563 to $0 in 2010. This, and likely other deductions, would have been easily discoverable in any audit had the government chosen to do an actual investigation, and had they chosen not to blatantly ignore any information that conflicted with their myopia.

Joe & Deborah Walach

IRS CI calculated the tax harm based on a 30% business use of a Nissan Titan for 2008 and 2009. Vehicle expenses were limited to only fuel costs with no additional considerations made for depreciation, and other vehicle expenses. Mrs. Walach testified at trial that the Titan was used 100% for business. Based on nothing more than this testimony, the tax loss attributable to Mrs. Walach drops 100% from $6,250 to $0 in 2008 and drops 100% from $4,915 to $0 in 2009. This, and likely other deductions, would have been easily discoverable in any audit had the government chosen to do an actual investigation, and had they chosen not to blatantly ignore any

information that conflicted with their myopia

Even more damning, several of the taxpayer witnesses did not have an audit **and did not testify**. As neither an IRS audit, nor the defendant, could meaningfully test the veracity of their numbers, and as a small sampling of the numbers that could be tested showed significant error based on testimony in open court, fairness and Due Process demand exclusion for the purposes of sentencing. Teresa Gonzales, Stephanie Taylor, Jessica Navarro, and Diana Martinez did not testify and the IRS conducted no audit. Combined, the tax loss between these non-audited and non-testifying witnesses that should be discounted from the government's total figure is $18,678. When that is combined with the five witnesses above who were cross-examined into a lower tax loss, and the instances of blatant perjury discussed below, the government's tax loss can be claimed to be no higher than $37,262.

ii. Defendant's Actual Tax Loss Is Only $37,262

The Government trotted out a multitude of witnesses during Defendant's brief trial, all former clients of the Defendant, all with questionable entries on their own personal tax returns allegedly caused by the Defendant's preparation of the same. Some of these witnesses are, or were, law enforcement. The law enforcement witnesses were used specifically for their effect on the Court and the jury. The Government rightfully assumed that the average juror, and this honorable Court, would weigh evidence presented by police officers as being of higher weight or veracity than the average citizen. In the mere months since the end of the trial, Defendant's own investigation has found evidence of extreme flaws with the testimony of no fewer than three of the taxpayer witnesses, two of whom are former law enforcement, that would rise to perjury on the grandest scale. These documents further suggest a flawed, myopic, if not negligent government investigation that would trigger the effects of *Brady* should it be found that any of this information was known by the government and not provided to the defense.

Glaringly, the Defendant has been provided a set of documents that apparently originated from Bexar County about Mario Dominquez, proving that his testimony was not only misleading but that the government likely knew this to be the case assuming a diligent and competent investigation. See Exhibit B. Per the July 2, 2014 "Order of Dismissal" from Susan Pamerlea, Sheriff, Bexar County, Mr. Dominguez was not a retired police officer, but "dishonorably"

terminated from his position as investigator for "criminal misconduct and untruthfulness." Importantly, the document's factual basis for the dishonorable discharge states that "A review of the video footage revealed that [Dominguez] falsely reported a burglary in progress, physically removed property that [he] claimed was evidence and fabricated a crime scene to make it appear that a burglary had occurred." *Ibid*. The defense has tried to subpoena further documents from Mr. Dominguez but he is evading service. See: Exhibit C.

On its own, the absence of the letter illustrating the reasons for the dishonorable termination of Dominguez as an investigator with Bexar County would raise severe questions about a fair trial and the government's handling of an investigation. There is no doubt that a case built on any witness of that caliber would test an objective observer's confidence in any plea or verdict. There is no doubt that if the government's investigators had operated with a modicum of due diligence they should have uncovered this damning circumstance in one of their star witnesses background, a circumstance that would require questioning his truthfulness in all regards, including his alleged tax loss. And yet, the government put him on the stand to woo the jurors as a retired detective, not a disgraced and fired fabricator of evidence. Any tax loss associated with someone willing to fabricate evidence, and perjur themselves, especially without any corroborating evidence from an audit, should be wholly discarded.

The Defense's continued investigation has produced *even more* previously undisclosed impeachment evidence that could not be addressed at trial. This evidence would serve not only to impeach the witnesses but to wholly discredit their testimony, and importantly, their tax loss.

Anita Price, whom the Court might remember due to the Court's own comments praising her as a witness[4], gave an incredible story about her "just one time" trip to Las Vegas in 2008 that culminated in a "once in a lifetime win." (Dkt No. 68, P. 174-177). Specifically, Ms. Price stated that she spent $15 and hit a jackpot of $7400 or $7500. Id. At 175. Her memory of the event is vivid, including how she was in her "house shoes and sweats celebrating" by herself. *Ibid*. Subpoenaed documents obtained from the Las Vegas Sands, and Treasure Island Casinos paint an entirely different picture. See: Exhibits D, and E. These documents reveal not one trip, but

[4] The court comments on the strength of Anita Price as an organized and strong witness "…like Deputy Price, for example, I mean she had everything right there." Dkt. No 69, P. 96.

multiple. These documents never indicate a $15 investment with a $7500 return. In fact, these documents show that in 2008, Prices' losses for just Treasure Island, and the Las Vegas Sands totaled more than $6500.00[5], not *zero* like the government asserts. These documents paint a picture of a chronic gambler who spends many hours playing the slots. This is wholly distinct from her testimony in court, under oath. And, this is wholly distinct from her statements to the Defendant when preparing her tax returns. This sort of ever shifting, self preserving testimony is not surprising given that Price testified during trial that she both did not discuss her gambling losses with Defendant (Dkt. No. 68 at 179), and did discuss gambling losses with the Defendant (Id. At 198-199). Her testimony should be discounted in whole as the second government law-enforcement witness proven to significantly twist facts, and is further proof of a myopic government investigation given to cutting corners, or outright hiding evidence, to garner a conviction.

Joe Escobedo is another glaring example of late discovered facts proving a government witness willing to lie to deceive the investigators, the Court, and the Defendant. In what appeared to be some of the most damning testimony in the two day trial, Mr. Escobedo spun a tapestry wherein he said that his car mileage expenses came from the Defendant's instructions to write down the total mileage on his odometer as opposed to tracking the mileage actually driven. The Court might remember Mr. Escobedo as the court sympathetically loaned Escobedo his reading glasses in order to examine the documents presented as evidence. Escobedo testified that his recorded mileage of 9660 was the total mileage on his truck in 2008 (Dkt No. 69, p. 35). A Car Fax received by the defendant after trial for Escobedo's F-150 showed that on April 10th 2007 a total mileage of 52,434 had been recorded on his truck. See: Exhibit G.

Dominguez, Price and Escobedo. Two law enforcement officers and one sympathetic man with vision problems, all were paraded in front of the jury by a government so blinded by its own need for a conviction that their fantastic stories were never vetted or questioned. All have been proven to have fabricated testimony in the mere months since the Defendant accepted her plea. When taken in conjunction with the effects of the purchased testimony, or with the statements of

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[5] Neither, The Mirage nor many of the other subpoenad Casinos kept data pre 2010 on Ms. Price's losses.

Mario Ruiz as discussed above, the government has illustrated a pattern of myopia and a win at all costs attitude that weighs heavily against any tax loss calculation presented without the benefit of an audit, and especially without the benefit of an audit and cross examination, and weighs heavily against any tax loss presented from the mouths of known perjurers. At best, the government's tax loss for sentencing purposes is no more than $37,262.

B. Similarly Situated Defendants Receive Non-Incarceration Sentences

Regardless of the actual tax loss accepted by the court, the court must also impose a sentence that avoids unwarranted disparities among defendants with similar records who are convicted of similar criminal conduct. 18 U.S.C. § 3553(a)(6). In 2017, sentences below the guideline range were imposed in over 73% of tax cases. *See* U.S. Sent'g Comm'n, *Quarterly Data Report*, *Preliminary FY 2017*, Table 10. Only 25.2% of all sentences imposed in tax cases were within the guideline range and just 1.6% were above the guideline range. *Id*.

Of all defendants convicted of tax related offenses in 2017, over 36% did not receive a sentence of imprisonment at all, but instead were sentenced to either probation and confinement or probation only. *Id*. at Table 7. For the remaining offenders upon which a term of imprisonment was imposed, the average sentence received was 13 months while half received a sentence of 10 months or less. *Id*. at Table 6. In essence, the norm for a plead criminal tax defendant with a loss under $200,000 was probation or home detention.

A sentence of probation with confinement conditions is not only within the Court's authority but is also reasonable, sufficient, and not greater than necessary, particularly in tax cases for similarly situated first time, nonviolent offenders, such as Ms. Hosseini, where the defendant has no criminal history, presents effectively little risk of recidivism, and will be better able to make restitution and contribute to the community outside of prison with home-detention, family support and stable employment, under the court's extensive supervision with the power of incarceration for violations.

That the significant majority of all defendants convicted of tax related crimes receive a sentence below the guideline range, with a large proportion receiving no term of imprisonment at all, is a factor that must be taken into consideration to advance the objectives of 18 U.S.C. §

3553(a). Other courts have demonstrated similar leniency to first time, non-violent, non-gang, middle aged women defendants in tax cases.[6]

C. Punitive Approaches To First-Time Non-Violent Offenders Fail

Imprisonment "may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment." *Gall*, *supra*, 552 U.S. at 54 (internal quotation omitted) (quoting with approval a district court's reason for departing down from the guideline range to impose a sentence of probation in a case involving distribution of ecstasy). In fact, the United States Code explicitly instructs Courts that, in determining a sentence, it shall […] recogniz[e] that *imprisonment is not an appropriate means of promoting correction or rehabilitation*." 18 U.S.C. § 3582 (emphasis added).

Moreover, the legislative history of §3553 explicitly recognized "that we do not know very much about how to deter criminal conduct or rehabilitate offenders. Subsections (b)(1) and (c) is designed to encourage the constant refinement of sentencing policies and practices as more is learned about the effectiveness of different approaches." S.REP. 98-225, 161 (1984) U.S.C.C.A.N. 3182, 33344 (1983).

The empirical research regarding non-violent, non-drug offenders shows no difference between the deterrent effect of non-incarceration sentences and that of imprisonment. *See* David Weisburd *et al*., *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology 587 (1995). "[T]here is no decisive evidence to support the conclusion that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders."

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[6] See e.g.: http://www.ledger-enquirer.com/news/local/crime/article89684052.html

https://www.hollywoodreporter.com/thr-esq/producers-get-probation-louisiana-film-874310

http://miamiherald.typepad.com/nakedpolitics/2017/09/fresen-sentenced-to-60-days-in-jail-probation-in-tax-case.html

http://www.tulsaworld.com/news/courts/man-sentenced-to-probation-in-income-tax-fraud-case/article_3231c423-da3b-5186-82b8-de7c27ae55b1.html

http://www.tribdem.com/news/johnstown-businessman-wife-get-probation-fines-for-tax-evasion/article_05adbfb2-41e4-11e5-9c5f-d334183f4fdf.html

Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 448-49 (2007). Survey after survey affirms the same. *See* U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines,* at Exh. 9, at 28; Exh. 10, at 29 (May 2004) [hereinafter *Measuring Recidivism*; *see also* Sent'g Comm'n, *Recidivism and the "First Offender,"* at 13-14 (May 2004) [hereinafter *First Offender*]. Typical of the findings on general deterrence are those of the Institute of Criminology at Cambridge University. *See* Andrew von Hirsch *et al.*, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999). The report, commissioned by the British Home Office, examined penalties in the United States as well as several European countries. *Id.* at 1. It examined the effects of changes to both the certainty and severity of punishment. *Id.* While significant correlations were found between the certainty of punishment and crime rates, the "correlations between sentence severity and crime rates . . . were not sufficient to achieve statistical significance." *Id.* at 2. The report concluded that "the studies reviewed do not provide a basis for inferring that increasing the severity of sentences is capable of enhancing deterrent effects." *Id.* at 1; *see also* Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 28 (2006). "Three National Academy of Science panels . . . reached that conclusion, as has every major survey of the evidence." *Id.*; *see also* Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 447-48 (2007).

The bottom line: the norm, and the effective sentence, in like cases, both by other federal courts and by studies by scholars, calls for a sentence that does not depend on incarceration.

D. 18 U.S.C. § 3553(a)(1), (2)(D) – Nature and Characteristics of Margaret Hosseini.

"[I]f ever a [woman] is to receive credit for the good [she] has done, and [her] immediate misconduct assessed in the context of his overall life hitherto, it should be at the moment of [her] sentencing, when [her] very future hangs in the balance." *United States v. Adelson*, 441 F. Supp. 2d 506, 513–14 (S.D.N.Y. 2006). Courts recognize that a "truly extraordinary" charitable history serves as a basis for variance under 18 U.S.C. § 3553(a). *See, e.g., United States v. Howe*, 543 F.3d 128, 132 (3d Cir. 2008) (affirming a sentence of probation and three months' home

confinement in a wire fraud case where the Guidelines range was 18–24 months but the defendant's life was marked by outstanding devotion to family, community, and church); *United States v. Thurston*, 544 F.3d 22, 26 (1st Cir. 2008) (affirming three-month sentence for Medicare fraud conspiracy of more than $5 million (Sentencing Guidelines recommended five years of prison time) based on, among other things, defendant's charitable work, community service, generosity with his time and support and assistance of others). Even before *Booker*, charitable acts and community service were recognized as a basis for large departures from the then-mandatory Guidelines. *See, e.g., United States v. Shuster*, 331 F.3d 294, 296 (2d Cir. 2003), *United States v. Serafini*, 233 F.3d 758, 773 (3d Cir. 2000) (upholding downward departure based on support letters referring to defendant's "assistance, in time and money, to individuals and local organizations"); *United States v. Crouse*, 145 F.3d 786, 790 (6th Cir. 1998) (stating that "exceptional" record of community service was a proper basis for a downward departure); *see also, e.g., United States v. Cooper*, 394 F.3d 172, 177 (3d Cir. 2005) (finding charitable contributions relevant to sentencing where the contributions exceeded mere financial support).

The Court has received eight letters from Ms. Hosseini's friends, acquaintances, professional colleagues and family attesting to her good character. **(Exs ???)** As reflected in those letters, Ms. Hosseini spent her life overcoming obstacles that sunk most into a life of dysfunction and permanent crime, and instead dedicated herself to family and community support. The letters attached to the memorandum speak to that. This, her community service, counterbalance the criminal plea she has accepted. Margaret has shown impressive generosity with his time in caring for others, in helping the less fortunate, and in volunteering her time without any compensation in return. Ms. Hosseini's character—the character the Court did not have an opportunity to see at trial—is undoubtedly the reason that her family, friends, colleagues, and acquaintances, despite their awareness of the guilty verdict, have written to the Court affirming that they continue to trust and support her. A singular set of mistakes in a small percentage of returns for a few taxpayers on items like mileage and cell phones is a mistake that will already cost her: her career, her profession, and her life savings. What will a sentence of incarceration achieve beyond that?

E. 18 U.S.C. § 3553(a)(2)(A) – the Purposes of Sentencing to Reflect the Seriousness of the Offense, to Promote Respect for the Law, and to Provide Just Punishment for the Offense.

In circumstances where the defendant has already suffered punishment by collateral consequence, like not being able to be around the business she built from scratch and that was her sole means of support, (Dkt. 78, p. X) and where the defendant has a minimal risk of recidivism, leniency is reasonable and appropriate. *United States v. Gardellini*, 545 F.3d 1089 (DC Cir. 2008) [upholding non-guidelines sentence of probation and a fine for defendant convicted of filing false tax returns where guidelines range was 10-16 months because defendant, *inter alia*, had accepted responsibility, had a minimal risk of recidivism, had already suffered substantially, and the only real deterrent in these cases are the efforts of prosecutors to enforce the laws, not harsh prison sentences]. Defendants that show exemplary character outside of the conduct for which they have been convicted, and who enjoy support of friends, family, colleagues, and community leaders, a sentence outside the Guidelines is appropriate. *See United States v. Whitehead*, 532 F.3d 991 (9th Cir. 2008) (upholding probation where guidelines range was 41–51 months for creating counterfeit access device where district court had found that defendant was remorseful, was employed, supported his daughter, and no longer posed a threat to community). Finally, the best candidates for crime-free futures are those who have, among other characteristics, no history of drug abuse, no present drug use, and a stable living arrangement with a spouse. *U.S. Sent'g Comm'n, Staff Discussion Paper, Sentencing Options under the Guidelines*, p.18 (Nov. 1996), available at http://www.ussc.gov/Research/Working_Group_Reports/Simplification/sentopt.pdf.

Equally, a sentencing court should consider whether a defendant is a first-time offender, like Margaret. *See, e.g., United States v. Darway*, 255 Fed. Appx. 68, 73 (6th Cir. 2007) [upholding downward variance on basis of defendant's first-offender status]; *United States v. Hamilton*, 323 Fed. Appx. 27, 31 (2d Cir. 2009) ["the district court abused its discretion in not taking into account policy considerations with regard to age recidivism not included in the Guidelines"]; *United States v. Holt*, 486 F.3d 997, 1004 (7th Cir. 2007) [affirming below-guideline sentence based on defendant's age, which made it unlikely that he would again be involved in a violent crime]; *United States. v. Urbina*, slip op., 2009 WL 565485, *3 (E.D. Wis. Mar. 5, 2009) [considering low risk of recidivism indicated by defendant's lack of criminal record, positive work history, and strong family ties]; *United States v. Cabrera*, 567 F. Supp. 2d 271, 279 (D. Mass. 2008) [granting variance because defendants "with zero criminal history

points are less likely to recidivate than all other offenders"]; *Simon v. United States*, 361 F. Supp. 2d 35, 48 (E.D.N.Y. 2005) [basing variance in part on defendant's age upon release because recidivism drops substantially with age]; *United States v. Nellum*, 2005 WL 300073 at *3 (N.D. Ind. Feb. 3, 2005) [granting variance to 57-year-old defendant because recidivism drops with age]; *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 offense].

By contrast, increasing incarceration for such individuals increases the risk to the community, noting the "criminogenic effects" of imprisonment including "contact with more serious offenders, disruption of employment, [and] weakening of family relations," and comport with comparable surveys and studies of the same. *See* U.S. Sent'g Comm'n, *Staff Discussion Paper, Sentencing Options Under The Guidelines* (Nov. 1996); *see also* Miles D. Harar, *Do Guideline Sentence for Low-Risk Drug Traffickers Achieve Their Stated Purpose?*, 7 Fed. Sent. Rep. 22, 1994 WL 502677 (July/August 1994) [increasing incarceration negatively impacts recidivism]; Sentencing Project, *Incarceration & Crime: A Complex Relationship*, 7–8 (2005) ["The rapid growth of incarceration has had profoundly disruptive effects that radiate into other spheres of society…and contribute to an increase in recidivism"].

Courts and Congress alike took notice. Increasingly across the country, federal judges routinely call for less punitive sentences in many such cases. *See* U.S. Sent'g Comm'n, *Summary Report: U.S. Sentencing Commission's Survey of Article III Judges* (Dec. 2002) [noting the large number of federal judges who requested less incarceration sentences for fraud cases].

The risk of recidivism rate for all defendants convicted of a white-collar offense extremely low. *See* D. Weisburd, E. Waring & E. Chayet, *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology 587 (1995) (funded by National Institute of Justice); Daniel Glaser, *Effectiveness of a Prison and Parole System*, pp. 36–37 (1964); P.B. Hoffman & J.L. Beck, *Burnout -- age at release from prison and recidivism*, 12 J. Crim. Just. 617 (1984). Additionally, a number of other characteristics of Ms. Hosseini suggest that she is unlikely to recidivate *See* U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, (Res. Ser., rel. 1, May 2004) (*Measuring Recidivism*).

Because Ms. Hosseini's individual characteristics indicate that she is unlikely to recidivate, a lengthy sentence of incarceration would only increase his risk of recidivism. Offenders are most likely to recidivate (25.6%) when their sentence is a straight prison sentence. *See Measuring Recidivism* at 13. On the other hand, of offenders sentenced to a probation only sentence, only 15.1% recidivate, and offenders serving a sentence of probation combined with confinement alternatives have a rate of 16.7%. *See ibid*.

IV. Conclusion

The Defendant seeks a sentence of probation and home detention with work release, as the "no greater than necessary" sentence.

Respectfully submitted this 13th day of February, 2018.

/s/ Robert E. Barnes
ROBERT E. BARNES
Attorney for Defendant
Margaret Hosseini

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. MARGARET HOSSEINI, Defendant.	Case No.: SA-15-CR-0271-FB CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, Derek Jordan, am a citizen of the United States and am at least 18 years of age. My business address is 601 South Figueroa Street, Suite 4050, Los Angeles, California 90017.

I am not a party to the above titled action. I have caused service of this "DEFENDANT'S MOTION TO COMPEL DISCOVERY AND OPPOSED MOTION FOR CONTINUANCE OF SENTENCING UNTIL DISCOVERY IS PROVIDED." on the following parties by filing with the court's electronic filing system (ECF):

Asst. United States Attorney Greg Surovic.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 13, 2018.

/s/ Derek Jordan
Derek Jordan
Attorney for Defendant
Margaret Hosseini