

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-20004-CR-COOKE

UNITED STATES OF AMERICA

v.

JOSÉ LUIS DE LA PAZ ROMAN
_____ /

**SENTENCING MEMORANDUM
ON BEHALF OF JOSÉ LUIS DE LA PAZ**

MARCOS D. JIMÉNEZ, P.A.
255 Alhambra Circle, Suite 800
Coral Gables, FL 33134
Tel: (305) 570-3249
Fax: (305) 437-8158
Email: mdj@mdjlegal.com
Attorneys for José Luis de la Paz

Dated: March 19, 2019

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José Luis de la Paz Roman (“José Luis”) respectfully submits this memorandum in aid of sentencing, which is scheduled for April 10, 2019. On January 24, 2019, this Court accepted his plea of guilty to an information charging him with conspiracy to violate the Foreign Corrupt Practices Act (“FCPA”). José Luis has also agreed to a forfeiture judgment in the amount of \$2,062,500.

PRELIMINARY STATEMENT

*Imposing a sentence on a fellow human being is a formidable responsibility. It requires a court to consider, with great care and sensitivity, a large complex of facts and factors. The notion that this complicated analysis, and moral responsibility, can be reduced to the mechanical adding-up of a small set of numbers artificially assigned to a few arbitrarily-selected variables wars with common sense.*¹

José Luis, a 40-year old Ecuadorian, loving husband and father of three young girls,² did what few in his shoes are willing to do or have done. Contrary to every other defendant in the PetroEcuador-related cases,³ he did not flee to the United States to avoid prosecution and evade authorities in his home country of Ecuador. Instead, he voluntarily upended his life to answer for his conduct. He travelled to the United States at his own expense on multiple occasions to be held accountable. The company he has led for many years since the premature death of his father, Nolimit C.A. (“Nolimit”), was still performing work at the Esmeraldas refinery of PetroEcuador when José Luis decided to cooperate with the U.S. government.

Nevertheless, José Luis did the right thing and has accepted responsibility in the United States for his conduct. His accountability is extraordinary. Therefore, we respectfully submit that

¹ *United States v. Gupta*, 904 F. Supp.2d 349, 350 (S.D.N.Y. 2012), *aff’d*, 747 F.3d 111 (2d Cir. 2014).

² While José Luis is a U.S. citizen by happenstance because he was born in New Orleans when his parents were students there, he has lived virtually his entire life in Ecuador and Ecuador is his home country.

³ PetroEcuador is the state-owned and state-controlled oil company of Ecuador. The Ecuadorian government is PetroEcuador’s sole stockholder. Marco Legal, EP PetroEcuador, <https://www.epPetroEcuador.ec/?p=3763> (citing Article 313 of the Constitution of Ecuador) (last visited Mar. 19, 2019).

the sentence imposed should focus on his unique status and send the message that individuals outside the United States will receive favorable treatment if they voluntarily submit to our justice system rather than become fugitives or avoid extradition, both of which José Luis could have pursued but correctly rejected.

José Luis very much regrets and feels humiliated by his conduct in this case. The mistakes he made in this case stand in stark contrast to his otherwise exemplary life. Nothing in this memorandum is meant to minimize the significance of the conspiracy charge or the FCPA; however, we respectfully request the Court consider his conduct in proper comparative perspective with other defendants in the context of the circumstances he faced and sentence him to a non-guidelines sentence based on the factors set forth in 18 U.S.C. § 3553(a)(2).⁴

**A SENTENCE OF ALTERNATIVE CONFINEMENT RATHER THAN
INCARCERATION IN FEDERAL PRISON IS WARRANTED**

A. Applicable Legal Standards

A sentence should be sufficient but not greater than necessary to comply with the specific purposes set forth in 18 U.S.C. § 3553(a)(2). *Gall v. United States*, 552 U.S. 38, 49-50 (2007). The Sentencing Guidelines are no longer mandatory and are not presumed to be reasonable. *Nelson v. United States*, 555 U.S. 350, 352 (2009) (“[t]he Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable.”) (emphasis in original); *Rita v. United States*, 551 U.S. 338, 351 (2007). Calculation of the advisory guideline sentence is only the first step in the sentencing process, and a court must consider whether the section 3553(a) factors

⁴ Those purposes are: (1) the nature of the offense and the history and characteristics of the defendant; (2) the purposes of sentencing, described in § 3553(a)(2) to include (a) the need to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; (b) the need to afford adequate deterrence to criminal conduct; (c) the need to protect the public from future criminal conduct by the defendant; and (d) the need 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 Guidelines and their policy statements; (5) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and (6) the need to provide restitution. 18 U.S.C. § 3553(a).

support the requested sentence. *See Gall*, 552 U.S. at 49-50 (guidelines should be “starting point” and “initial benchmark”); *United States v. Hunt*, 459 F.3d at 1180 1184 (11th Cir. 2016) (“If *Booker* is to mean anything, it must be that district courts are obligated to impose a reasonable sentence, regardless of the guideline range, so long as the Guidelines have been considered.”).

Under *Gall*, the advisory guideline range is calculated first but does not have “any particular weight.” *United States v. Irely*, 612 F.3d 1160, 1217 (11th Cir. 2010) (en banc). The Court must conduct an individual assessment of the defendant based on the §3553(a) factors and may “reject (after due consideration) the advice of the Guidelines.” *Kimbrough v. United States*, 552 U.S. 85, 113 (2007). Indeed, the Court “may vary [from the Guidelines range] based solely on policy considerations, including disagreements with the Guidelines.” *Id.* at 101 (quotations and citations omitted); *Gall*, 552 U.S. at 47 (court need not find “extraordinary circumstances to justify a sentence outside of the Guidelines range”).

As discussed below, based on these factors, we respectfully submit that a sentence of probation that substitutes intermittent confinement, community confinement, or home detention for imprisonment would be well warranted.

B. Sentencing Guidelines and Objection to Guidelines Calculation.

1. The Court should grant the reduction for acceptance of responsibility from the guideline level set by USSG § 5G1.1(a)

The total offense level calculated by the Presentence Investigation Report (“PSI”) is 29, which renders a sentencing guidelines range of 87-108 months of imprisonment. PSI at ¶ 55. Because that range is higher than the statutorily authorized maximum term of 60 months under 18 U.S.C. § 371, the advisory sentence becomes 60 months under guidelines section 5G1.1. The plea agreement provides that the government would recommend a three-level reduction for acceptance

of responsibility under USSG § 3E1.1, but in this case applying the reduction to offense level 29 as calculated under section 2C1.1(a), rather than the advisory guideline sentence under section 5G1.1, renders the reduction for acceptance effectively useless.

In *United States v. Rodriguez*, 64 F.3d 638 (11th Cir. 1995),⁵ the Eleventh Circuit recognized this inequity and found that “the [Sentencing] Commission failed to consider that § 5G1.1 might operate to negate the § 3E1.1 adjustment and undermine the ‘legitimate social interests’ served by the adjustment.” *Rodriguez*, 64 F.3d at 643. Due to the applicable drug quantity, the low end of Rodriguez’ applicable guideline range, after being lowered for acceptance of responsibility, was 135 months, which exceeded the statutory maximum sentence by 39 months. *Id.* at 640. Rodriguez argued to the district court that it should apply the three-level reduction for acceptance of responsibility to the section 5G1.1 guideline level. *Id.* at 640-41. The district judge observed that not crediting a defendant’s acceptance of responsibility in such a situation was the equivalent of “giving away snow in wintertime;” but he imposed the maximum sentence of 96 months in prison because he believed he lacked the authority to grant what was essentially a downward departure based on Rodriguez’ acceptance of responsibility. *Id.* at 641.

On appeal, the Eleventh Circuit reversed and remanded the case for resentencing, finding that the district court erred in concluding that it did not have the authority to depart. The Eleventh Circuit held that a sentencing court may grant a downward departure for acceptance of responsibility from an advisory guideline sentence calculated in accordance with § 5G1.1(a). *Id.* at 643. The court reasoned that a reduction in offense level under § 3E1.1 “suggests that the Commission contemplated that a defendant would always receive some benefit at sentencing for accepting responsibility for his conduct.” *Id.* (emphasis added).

⁵ Ten years later, in *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the Guidelines are not binding but merely advisory.

Relying on *Rodriguez*, other district judges have departed downward in similar circumstances to effectuate a reduction for acceptance of responsibility. In *United States v. Corte*, No. 11-Cr-60123-Dimitrouleas (S.D. Fla. Sept. 9, 2011), the defendants who managed Scott Rothstein's law firm I.T. department requested the same departure. *Corte*, DE 43, 44. The Court granted the defendants a reduction for acceptance of responsibility from the advisory 60-month guideline sentence and imposed sentences of 37 months for the two defendants. Notably, each defendant had been held responsible for losses between \$50 and \$100 million. *Corte*, DE 19, 20, 55, 60 (order attached as Exhibit A).

Likewise, in *United States v. Gladstone*, No. 10-Cr-60195-Dimitrouleas (S.D. Fla. June 2, 2011), the Court granted a departure request in reliance on *Rodriguez*. *Gladstone*, DE 46, 51 (order attached as Exhibit B). Furthermore, in a more recent securities fraud case, Judge Altonaga likewise granted a similar reduction for acceptance of responsibility. *United States v. Sanders*, No. 16-20572-Cr- Altonaga (S.D. Fla. Feb. 17, 2017) (DE 73, Sentencing Transcript, at p. 34).⁶

In this case, the advisory guideline sentence is 60 months under § 5G1.1(a). The lowest offense level correlating to 60 months is offense level 24 (range of 51-63 months). Applying the three-level reduction for Jose Luis' acceptance of responsibility from the offense level consistent with a 60-month sentence results in an offense level of 21, rendering a range of 37-46 months of imprisonment. In sum, we respectfully request that the Court grant Jose Luis the departure authorized by *Rodriguez*. José Luis objects to the calculation of the acceptance of responsibility reduction in the PSI to the extent an objection is necessary. The Court should apply the reduction

⁶ Other courts granted departures in analogous cases. *See United States v. Hayes*, 5 F.3d 292, 295 (7th Cir. 1993) (granting two-level substantial assistance departure using "the lowest offense level consistent with a 60-month sentence"); *United States v. Jones*, 233 F. Supp. 2d 1067, 1075 (E.D. Wis. 2002) (granting two-level downward departure for exceptional rehabilitative efforts from "the lowest range that would support the statutory maximum sentence").

to produce an effective guideline range of 37-46 months as set forth above.

2. The guidelines overstate José Luis’ misconduct.

In addition to negating his acceptance of responsibility, the guidelines overstate Jose Luis’ conduct because they are driven by the arbitrary “loss table” in fraud guideline section 2B1.1, which should not have persuasive force in determining José Luis’ sentence. *See United States v. Algahaim*, 842 F.3d 796, 800 (2d Cir. 2016) (Sentencing Commission could have assigned an offense level that reflects the seriousness of the criminal conduct rather than assigning a base offense level and then leaving the sentence to be driven primarily by the loss amount). Prior to *Algahaim*, another court explained that section 2B1.1’s loss table “appears to be more the product of speculation, whim, or abstract number-crunching than of any rigorous methodology – thus maximizing the risk of injustice.” *United States v. Gupta*, 904 F. Supp. 2d. 349, 351 (S.D.N.Y. 2012) (high-profile securities fraud case where the defendant was convicted at trial). While the increases in white collar sentences have resulted in part from congressional mandate, the Sentencing Commission botched the execution of the mandate:

But in implementing the Congressional mandate, the Sentencing Commission chose to focus largely on a single factor as the basis for enhanced punishment: the amount of monetary loss or gain occasioned by the offense. By making a Guidelines sentence turn, for all practical purposes, on this single factor, the Sentencing Commission effectively ignored the statutory requirement that federal sentencing take many factors into account, *see* 18 U.S.C. § 3553(a), and, by contrast, effectively guaranteed that many such sentences would be irrational on their face.

Id.

Here, the guidelines applicable to FCPA violations at section 2C1.1 cross-reference the section 2B1.1 loss table, requiring an arbitrary increase of 18 levels due to the dollar amount of the bribes demanded by PetroEcuador’s corrupt officials. Section 2C1.1 starts with a base offense level of 12, while the fraud guidelines at section 2B1.1 start with an offense level of 6. Yet both

use the section 2B1.1 loss table. Therefore, Medicare fraudsters, Ponzi scammers, and boiler room operators start with a lower base offense level and face a lower guideline range than offenders like José Luis who paid bribes demanded by public officials in connection with otherwise legitimate work.

The use of the loss table here as the primary driver of the sentence should not occur for additional reasons. First, José Luis did not determine the amount of those payments; instead, they were dictated by PetroEcuador's corrupt officials under coercive circumstances, as set forth below. Second, this case does not involve a compensable loss suffered by any victim. The government has correctly noted that PetroEcuador is not entitled to restitution because it "extensively participated in the bribery and money laundering schemes, and thus it is precluded from being recognized as a victim."⁷ Even the PSI states that there is no identifiable victim.⁸ PSI at ¶41. Given the absence of identifiable victims who can be compensated, any notion of "loss" or the use of a "loss table" is incongruous. Third, José Luis' company, Nolimit, performed excellent work that improved the performance of the previous oil pumps at the Esmeraldas refinery and saved PetroEcuador significant sums.

Undoubtedly, this Court can depart downward based on the lack of empirical evidence supporting the section 2B1.1 loss table and the fact it overstates José Luis' wrongful conduct in this case. *See United States v. Snipes*, 611 F.3d 855, 870 (11th Cir. 2010) (citing *Kimbrough*, 552 U.S. at 109-10). Therefore, the Court should depart downward for this additional reason and evaluate the factors set forth in 18 U.S.C. § 3553(a).

⁷ *See United States v. Baquerizo*, Case No. 18-20596-Cr-DPG, DE 42, Government's Response to PetroEcuador's Motion for Recognition of Rights as Victims and Entitlement to Restitution at p. 8.

⁸ In a related case, the PSI observed that the citizens of Ecuador were the victims of defendant Baquerizo's money laundering offense related to bribes paid to PetroEcuador officials; however, according to the government, restitution is impracticable because Ecuador has almost 17 million people. *See Baquerizo*, DE 42, at p. 8, n. 7.

C. José Luis' Personal History and Characteristics

Consideration of the section 3553 factors begins with the recognition that a defendant's character and history may support a downward variance and should be afforded the same weight as the nature and circumstances of the offense. *See United States v. Prospero*, 686 F.3d 32, 39 & 45 (1st Cir. 2012) (affirming downward variance from 87-108 months to home detention because the loss numbers did not take into account the personal characteristics of the defendant); *United States v. Martin*, 520 F.3d 87, 93 (1st Cir. 2008) (affirming a 91-month variance down from the guideline range based in part on "the support that the defendant stood to receive from his family [and] personal qualities indicating his potential for rehabilitation"); *United States v. Rodriguez*, 724 F. Supp. 1118, 1119 (S.D.N.Y. 1989). As one court eloquently stated with respect to this factor:

But, surely, if ever a man is to receive credit for the good he has done, and his *immediate misconduct assessed in the context of his overall life hitherto*, it should be at the moment of his sentencing, when his very future hangs in the balance. This elementary principle of weighing the good with the bad, which is basic to all the 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."

United States v. Adelson, 441 F.Supp.2d 506, 513-14 (S.D.N.Y. 2006) (emphasis added).

José Luis violated the law but he should not be judged solely by his worst moments and conduct. His life is so much more than that, and full of *good*. He should also be judged in accordance with his positive history, contributions and characteristics.

José Luis, age 40, is a devoted father, husband, brother and son. He is deeply committed to his family, business partners, employees, and community in Ecuador. He has no prior criminal record. *See Exhibit D* (certificate from Ecuador showing that José Luis has no criminal history in that country).

The sole provider for his family, José Luis has been married to María Belen Uzcategui, age

37, for 17 years. She has known José Luis her entire adult life. They have three girls, Sofia, age 14; Cayetana, age 11, and Martina, age eight, who reside with their parents in Quito as part of a loving and loyal family. PSI at ¶ 66.

José Luis is extremely close to his children, who adore their father and consider him their hero. *See* Composite Exhibit C (María Belen Uzcatogui (“Belen”) letter). José Luis is also devoted to his extended family in Ecuador, including his brother, Fernando, age 37, and his mother, age 60. His brother eloquently explains that José Luis has protected and provided for his extended family not only throughout his adult life but also as a teenager after his father left the family. *Id.* (Fernando De La Paz (“Fernando”) letter).

While strangers may believe that José Luis has a fortunate and privileged life, they are not aware of the tragedies and difficulties that forced José Luis to become the head of his family at a young age. Both his parents abused alcohol and the family suffered through constant turmoil. *Id.* Their father was aggressive, spent too much money, bankrupted the family, and had a second family with another woman. As a teenager, “Jose Luis to protect the family decided to confront” his father, who did not return home after that. For four years, he and his brother did not have a relationship with their father, while their mother suffered from depression and alcoholism. *Id.*

Then, in 2001, after they had re-established a relationship with their father, José Luis’ father committed suicide by gunshot. At the time, José Luis was just 21 years old, and his brother Fernando was 18. His wife explains: “I saw his most vulnerable side, his tears, his heart broken having had to authorize the withdrawal of the artificial respiration that kept his father alive.” *See Id.* (Belen letter). With only six months remaining before graduation, José Luis was forced to leave college to provide for his family, and he eventually he took over his father’s business, which eventually became known as Nolimit. *See* PSI at ¶¶ 75, 77.

In 2002, José Luis married at age 23 and started a family. Unfortunately, he and his wife soon suffered another tragedy. In January 2003, their first child, Ana Gabriela, was born with a grave and rare medical condition, Trisomy 18, also known as Edwards syndrome, which is caused by an error in cell division known as meiotic disjunction. *See* Composite Exhibit C (Belen Letter). Ana Gabriela died in March 2003, at just two months of age. As José Luis' wife describes, the pain of their baby's death caused her and her husband to suffer "a pain that has no name." *Id.* She describes José Luis as her "rock" during this tragic time. Brother Fernando explains that José Luis, for his family's sake, appeared to be the only one keeping it together, as they were all – his wife, their mother, his in-laws, and his brother – broken. *Id.* (Fernando letter).

José Luis and his family forged on as best they could. José Luis and his wife eventually were able to have three healthy daughters, and they have remained married and devoted to each other. José Luis wife describes him as an excellent and dedicated father, son, brother and husband, and as generous both with his work and time. *Id.* (Belen Letter). *See* Composite Exhibit "C" (photos of José Luis with his family).

His wife and brother describe José Luis as a tireless worker so that he can provide for his family and his employees. For example, his wife Belen states: "If only you knew how many hours away from us [his wife and daughters] José Luis' has had to spend on account of his work for the company; if you only knew that he developed hypertension because of the stress, because of his effort to take care of his family, his employees, and his mom." *Id.* Furthermore, as attested to in the letters submitted to the Court, José Luis' wife, children and mother all depend on him. His daughters very much need his support and guidance. Sofia, 14, is a teenager, and Cayetana, 11, will soon be a teenager; a sensitive time in their lives.⁹

⁹ *See* Jaqueline Howard, *This might be why depression is rising among teenage girls*, Nov. 14, 2016, <http://www.cnn.com/2016/11/14/health/depression-teen-girls/> (last visited March 19, 2019).

Here, the letters submitted to the Court attest to José Luis' dedication to and support of his family and how much they depend on him. As of the writing of this memorandum, José Luis' mother, who suffers from epilepsy and depression, PSI at ¶ 63, has yet to be told that José Luis is being prosecuted and faces imprisonment, as the family fears that she would not be able to withstand the news.

A defendant's family responsibilities are a recognized reason for a downward variance. *See, e.g., Proserpi* 686 F.3d at 48 (affirming substantial variance where district court found that both defendants played important roles as caregivers and caretakers in their families."); *United States v. Muñoz-Nava*, 524 F.3d 1137 (10th Cir. 2008) (sentence of one year and a day for a man facing a guideline range of 46-57 months for possessing with intent to distribute heroin because of his long work career, community support, lack of criminal record, and responsibilities as sole supporter of 8 year-old son and elderly parents, which reduced the likelihood he would re-offend); *United States v. Davis*, 2008 WL 2329290, at *5 (S.D.N.Y. June, 5 2008) (sentence of time served for first time offender devoted to the education of six children of fifteen-year marriage) (stating that incarceration would deny the children the "care and guidance clearly needed at this point in their lives").

José Luis is also generous and supportive of the greater community beyond his family and home. For years he has been involved with a charity known as "*Mi Navidad es Diferente*," a non-profit organization that conducts a yearly Christmas toy and food drive for 1500 children in Ecuador. José Luis is part of a group that helps underwrite the event in addition to donating his time and service to the organization and its worthy cause. See Composite Exhibit F (photos showing José Luis' involvement with *Mi Navidad es Diferente*).

D. The Nature of the Offense Conduct

While the basic facts of the case are set forth in the factual proffer, the offense conduct section of the PSI and José Luis' acceptance of responsibility statement, they should be viewed in the context of his life in Ecuador.

Before any dealings with PetroEcuador, Nolimit had developed a relationship with EagleBurgmann, a manufacturer of sealing products. In 2012, Nolimit correctly believed that through EagleBurgmann it could provide better oil pumps than those in place at the Esmeraldas refinery. José Luis on behalf of Nolimit approached Marcelo Reyes of PetroEcuador for the opportunity to compete for work, and Nolimit eventually was asked to participate in an international bidding process. PSI at ¶23. Nolimit won the bid, put up a bond secured by personal guarantees executed by José Luis and his partners, and received the initial payment under the contract. Although not unexpected given the corruption prevalent in Ecuador, official Marcelo Reyes then conveyed his bribe demand to José Luis through an intermediary. *See* PSI at ¶¶ 23-24. It was then, in early 2013, that José Luis mistakenly agreed to the bribe payments.

To be sure, José Luis improperly agreed to facilitate corrupt payments demanded by public officials. But this is not a case where José Luis set out to bribe anyone in the first instance. The bribes resulted from demands made by PetroEcuador officials. *See* PSI at ¶¶ 23-24, 28. José Luis' misconduct, which he deeply regrets, occurred in the context of a highly corrupt system in Ecuador where practically every private contractor was required to pay a bribe.

This requirement emanated from the country's very highest officials. Corruption is endemic in Ecuador.¹⁰ The U.S. government has correctly observed that PetroEcuador's officials

¹⁰ *See* 2019, Economic Index of Freedom, Heritage Foundation, found at <https://www.heritage.org/index/ecuador> (ranking Ecuador's government as repressive and describing corruption in Ecuador as "pervasive."); Zuckerman, Adam (June 22, 2016).

engaged in “pervasive, constant and consistent illegal conduct” during the relevant period. *See Baquerizo*, DE 42, at p 11. For example, the former general manager of PetroEcuador, Jorge Glas, who is also a former vice president of Ecuador, was convicted in Ecuador and sentenced to six years for accepting millions in bribes, including bribes from companies that contracted with PetroEcuador.¹¹

As José Luis explained in his statement accepting responsibility, PSI at ¶43, he felt pressured by the demands for corrupt payments. While the economic pressure and coercion may not provide him a legal defense, they were a very real component of doing business in Ecuador. From José Luis’ perspective, he had to either play by the corrupt PetroEcuador officials’ rules or risk losing not only Nolimit’s contracts with PetroEcuador but also his personal assets and the financial security of his family. Indeed, José Luis and his partners were very concerned that their guarantees in connection with Nolimit’s performance bond could lead to their financial ruin if the corrupt officials declared Nolimit in default under the contracts.

With respect to the payments demanded in late 2015, Jose Luis faced even more pressure when confronted with the PetroEcuador officials’ demand for payment. At the time, PetroEcuador owed Nolimit very significant sums, and Nolimit in turn owed millions of dollars to suppliers, employees and others. Nolimit’s very survival and its financial viability were at stake. When examining José Luis’ improper decision to pay the demanded bribes, it can be easy to lose sight of the fact that Nolimit was and is a real company with real obligations to suppliers, employees and others. Nolimit employed dozens of employees to service its contracts with PetroEcuador. It

¹¹ *See Baquerizo*, DE 42, at pp. 11-12; *see also* DW News, Ecuador’s VP Jorge Glas Jailed for Six years Over Odebrecht Kickbacks (December 14, 2017), <https://www.dw.com/en/ecuadors-vp-jorge-glas-jailed-for-six-years-over-odebrecht-kickbacks/a-41788039> (last visited Mar. 19, 2019).

spent substantial sums to source the equipment installed and maintained at PetroEcuador's refinery. These were all at risk.

It can also be easy to forget that Nolimit performed excellent work at the Esmeraldas refinery of PetroEcuador under its contracts. Nolimit faced difficult conditions because of the refinery's outdated and obsolete equipment, yet it performed at a high level. *See* Composite Exhibit G (photos depicting Esmeraldas refinery oil pumps, seals and other equipment before and after Nolimit's work).

José Luis reiterates his personal responsibility for his wrongful conduct and apologizes for it to this Court and his family.

E. The Need to Avoid Unwarranted Sentence Disparities

As the Court considers the offense conduct, we respectfully set forth a comparison of the specific conduct before the Court with the actions of the other defendants in related cases so that the Court can "avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). In so doing, we are not minimizing the seriousness of the violation in this case. Rather, we respectfully submit that José Luis' conduct, on a comparative basis, warrants significantly less punishment.

José Luis was not a public official or abused a position of public trust, like Marcelo Reyes and Arturo Escobar. These officials, along with superior government officers, directed the conspiracy and demanded corrupt payments from private contractors like Nolimit. Reyes fled prosecution in Ecuador and moved to Miami, where he purchased \$3.5 million in real estate properties. José Luis, therefore, is less culpable than Reyes and Escobar, and he should receive a more lenient sentence.

Indeed, José Luis is also less culpable than Baquerizo. The charged offense applicable to

Baquerizo, another contractor who paid bribes, “likely underrepresents the full severity of the defendant’s conduct. In addition to losses within the scope of the charged scheme, the defendant has also acknowledged that the nature of the oil business in Ecuador was such that he was required to pay bribes to get all of his company’s contracts.” *Baquerizo*, DE 35 at 8.¹² This is consistent with various newspaper reports documenting the large amounts paid to entities affiliated with Baquerizo, including a \$70 million “commission” paid in connection with a deal between PetroEcuador and PetroChina.¹³

Most importantly, unlike every other defendant above, José Luis did not flee prosecution in Ecuador and move to the United States. He chose to cooperate with the government while living and working in Ecuador, and ultimately agreed to enter into a plea agreement. He rejected the option of obtaining Ecuadorean citizenship to avoid extradition. Article 79 of the Constitution of the Republic of Ecuador prohibits the extradition of its citizens. Given that his wife and daughters hold Italian citizenship, he also could have moved to Italy and sought to avoid extradition there. Instead, he voluntarily traveled to the United States at his own expense on multiple occasions to cooperate and be held accountable for his conduct. This makes him unique and deserving of a favorable sentence in comparison to the other charged defendants and warrants a further downward variance.

¹² Likewise, Reyes also escaped the full extent of the bribery conspiracy in which he played an important role. *See Baquerizo*, DE 35 at 10 (explaining that Reyes was not charged with the full extent of his wrongdoing).

¹³ *See* Unclean Hands: Corruption Plagues Ecuador’s Oil Deals with China, <https://amazonwatch.org/news/2016/0622-unclean-hands-corruption-plagues-ecuadors-oil-deals-with-china> (last visited March 19, 2019); PetroChina: La Ruta del Dinero, <https://medium.com/focus-news-ecuador/petrochina-la-ruta-del-dinero-a8a49d8f870f> (last visited March 19, 2019).

F. A Sentence of Probation that Substitutes Intermittent Confinement, Community Confinement, or Home Detention for Imprisonment Is Sufficient to Promote Deterrence, Will Reflect the Seriousness of the Offense and Provide Just Punishment.

In the circumstances of this case, we respectfully submit that a sentence of probation substituting alternative confinement for incarceration in federal prison would serve the purpose of deterrence and result in just punishment in this case. A sentence of probation, particularly one that includes a condition of alternative confinement, restricts liberty. *Gall*, 552 U.S. at 48. Without undermining the seriousness of Jose Luis' offense, he respectfully suggests that a sentence of probation that substitutes alternative confinement for incarceration is appropriate in his case, where he voluntarily left his life, family, work and community in Ecuador to be held accountable for his conduct by our justice system in the United States. His conviction itself will represent significant punishment.

With respect to specific deterrence, there is scant risk of recidivism in José Luis' case. He has no criminal history and a stable family life; he is married; he has an education; he does not abuse alcohol or drugs; and he has positive personal characteristics and history, all of which indicate he is most unlikely to again break the law. As a result of his offense, José Luis will suffer devastating reputational harm and almost certainly be barred from again doing business with PetroEcuador or other state-owned companies. His extraordinary acceptance of responsibility and cooperation in this matter demonstrate his commitment to set the record straight and assist in the government's various inquiries.

Jose Luis' background and extremely low likelihood of recidivating may justify a downward variance or departure. *See United States v. Clay*, 483 F.3d 739, 745 (11th Cir. 2007) (affirming sentence of 60 months based on the district court's view that the defendant was unlikely to reoffend, even though the defendant's guideline range was 188-235 months; *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”).

The letters submitted on José Luis’ behalf provide every reason to believe that José Luis will not re-offend, a conclusion only buttressed by his age, lack of criminal history, and substantial family obligations. *See United States v. Ruiz*, 2006 WL 1311982, at *4 (S.D.N.Y. May 10, 2006) (“This Court and others have previously declined to impose Guidelines sentences on defendants who, like Ruiz, were over the age of forty at the time of sentencing on the grounds that such defendants exhibit markedly lower rates of recidivism in comparison to younger defendants.”); *United States v. Olis*, 2006 WL 2716048, at *13 (S.D. Tex. Sept. 22, 2006) (granting significant downward variance where the “need to provide support for his family will provide adequate deterrence against any potential future criminal conduct”).

A sentence of probation with alternative confinement will impose a significant cost to José Luis, whose life in Ecuador has been upended, while sending the salutary message that those who voluntarily come to the United States to be held accountable will receive a favorable sentence. There is little reason to conclude that his sentence will negatively impact deterrence. *See United States v. Gardellini*, 545 F.3d 1089, 1095 (D.C. Cir. 2008) (rejecting government's contention that affirming a probationary sentence would lessen deterrent value of criminal law "because it elevates one § 3553(a) factor - deterrence - above all others. As § 3553(a) makes clear, the district court at sentencing must consider and balance a number of factors- not all of which will point in the same direction.").¹⁴

¹⁴ Studies have shown that increasing the severity of a person’s sentence does little to deter future crime. U.S. Dep’t of Justice, Nat’l Inst. Of Justice, *Five Things About Deterrence* (May 2016) (citing Daniel S. Nagin, *Deterrence in the Twenty-First Century, Crime and Justice: A Review of Research*, vol. 43 (2013)). Further, lengthy prison sentences are actually less likely to reduce the likelihood of recidivism. Valerie Wright, *Sentencing Project, Deterrence in Criminal Justice: Evaluating Certainty vs. Severity in Punishment* 7 (2010) (finding that “[a]mong low-risk offenders, those who spent less time in prison were 4% less likely to recidivate than low-risk offenders who served longer sentences”). Instead, research has consistently shown that while the certainty of being caught and punished has a

José Luis' prosecution in the United States adequately sends the message of deterrence to similarly situated individuals. Other private contractors residing in foreign jurisdictions now know they face prosecution in the United States. Deterrence is ultimately about the "message" a certain sentence may send to the public and to similarly situated potential offenders. Here, the message tied to the sentence should be that those outside the country who voluntarily submit to U.S. jurisdiction, investigation, questioning and prosecution, as José Luis has done, will be rewarded.

G. The Sentence Should Not Be Longer than Necessary to Meet the Goals of the Sentencing Statute.

Ultimately, 18 U.S.C. § 3553(a) instructs that a sentence should not be longer than necessary to meet the purposes set forth in paragraph (2) of § 3553(a). In other words, the Court should impose the least severe sentence that meets the goals of the statute.

As explained above, the applicable guidelines deny José Luis the acceptance of responsibility reduction and overstate his wrongdoing. The section 3553(a) factors, taken as a whole and not in isolation, weigh in his favor. José Luis's history and characteristics show he is a good person who has overcome difficult obstacles and whose family relies heavily on him; his wrongful conduct was influenced by economic pressure and demands made by corrupt public officials in his home country; he presents little or no risk of recidivating; persons similarly situated to José Luis in other countries are now on notice that they are exposed to prosecution by the United States; and the message the Court should endeavor to send is that those outside the United States who voluntarily agree to cooperate and to be held accountable will be rewarded by our justice system for having done the right thing.

deterrent effect, "increases in severity of punishments do not yield significant (if any) marginal deterrent effects." Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime & Just.* 1, 28 (2006); *see also Adelson*, 441 F. Supp.2d at 514 (S.D.N.Y.) ("There is considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective white collar offenders.").

CONCLUSION

For all of the reasons set forth above, we respectfully request that this Court sentence José Luis to a sentence of probation that includes a condition or combination of conditions such as intermittent confinement, community confinement or home detention that substitute for imprisonment.

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Respectfully submitted,

Marcos Daniel Jiménez
Marcos Daniel Jiménez
Florida Bar No. 441503
Marcos D. Jiménez, P.A.
255 Alhambra Circle, Suite 800
Coral Gables, FL 33134
Tel: 305-570-3249
Fax: 305-437-8158
Email: mdj@mdjlegal.com

Counsel for Defendant, Jose Luis De La Paz Roman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 19, 2019, a copy of the foregoing document was electronically filed and served via the CM/ECF electronic filing system upon all counsel of record.

Marcos Daniel Jiménez
Marcos Daniel Jiménez