UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 19-CR-20004-MGC

UNITED STATES OF AMERICA

v.

JOSE LUIS DE LA PAZ ROMAN,

Defendant.
_______________________________________/

UNITED STATES' RESPONSE TO DEFENDANT DE LA PAZ ROMAN'S
SENTENCING MEMORANDUM

The United States of America ("the government") respectfully submits this response to defendant Jose Luis de la Paz Roman's (the "defendant") sentencing memorandum (DE 16). The government opposes his requests for a downward departure and downward variance resulting in a proposed probationary sentence. The undisputed facts to which the defendant has admitted through his guilty plea and factual proffer describe a serious and calculated crime. As set forth in more detail below, the government respectfully submits that the departure and variance sought are not warranted by the Guidelines or the sentencing factors enumerated in 18 U.S.C. § 3553(a).

I. Introduction

The defendant pleaded guilty to participating in a conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371 by paying bribes in violation of the Foreign Corrupt Practices Act ("FCPA") to public officials of PetroEcuador, the state-owned and state-controlled oil company of Ecuador. On two separate occasions, in early 2013 and again three years later, the defendant caused bribe payments amounting to $8.25 million to be made from U.S. bank accounts held by U.S. companies affiliated with his Ecuadorian company ("No Limit") for the

benefit of senior PetroEcuador officials. The defendant made these bribe payments in order to obtain and retain lucrative contracts with PetroEcuador. He used U.S. companies and accounts to pay the bribes because he knew what he was doing was criminal and he wanted to hide any connections between these unlawful payments and NoLimit.

II. The Government Opposes a Reduction for Acceptance of Responsibility from the Guideline Level set by § 5G1.1(a).

The Presentence Investigation Report ("PSR") calculates a total offense level of 29, with a corresponding advisory guidelines range of 87-108 months of imprisonment. The government agrees with the defendant and the PSR that because the defendant pleaded guilty to a violation under 18 U.S.C. § 371, his maximum term of imprisonment is 60 months, which becomes the advisory guideline sentence pursuant to § 5G1.1(a).[1]

Citing *United States v. Rodriguez*, 64 F.3d 638 (11th Cir. 1995), the defendant asks this Court to depart from the guidelines and apply the three-level reduction for acceptance of responsibility to the lowest applicable range that includes the statutory maximum sentence of 60 months. The defendant makes this argument because the three-level reduction off the advisory guidelines range provides him with no tangible benefit, since the statutory maximum of 60 months is so significantly below the calculated guidelines range. Nothing in the *Rodriguez* decision compels this court to apply a three-level reduction off the statutory maximum. *See Rodriguez*, 64 F.3d at 641 ("The sentencing guidelines clearly provide that adjustments, such as that for acceptance of responsibility, are applied to the base offense level. *See* U.S.S.G. § 1B1.1. The government is correct that adjustments no longer are relevant once § 5G1.1(a) applies to render the statutory maximum sentence the guideline sentence."). Rather, *Rodriguez*, which was decided

[1] *See* U.S.S.G. § 5G1.1(a): "Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence."

when the guidelines were mandatory, afforded the district court discretion to grant a departure from a guideline sentence prescribed by § 5G1.1 for acceptance of responsibility pursuant to § 3E1.1. 64 F.3d at 643.

The government opposes the defendant's request for a departure based on *Rodriguez*. Departures from the guidelines are permissible if the sentencing court finds an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. Here, the seriousness of the defendant's conduct reflected by the advisory guidelines calculation resulted in a guideline range of 87-108 months of imprisonment, which incorporated the three-level reduction under § 3E1.1. That three-level reduction is indeed of no use to him, because the statutory maximum sentence effectively reduces his guideline sentence to a far greater extent than the three-level reduction ever would. Unsatisfied with the guideline reduction conferred by the statutory maximum, the defendant asks this Court to depart in such a way from the statutory maximum that he would still reap the benefit of a three-level reduction under § 3E1.1. The defendant's lament rings hollow under these circumstances. As explained in more detail below, the government respectfully submits that a departure emanating from the interplay between § 5G1.1 and § 3E1.1 is not warranted.

III. The Guidelines do not Overstate the Defendant's Misconduct

While the defendant has accepted responsibility and has expressed remorse for his criminal conduct, the government rejects the notion that the guidelines overstate his criminal conduct that continued over a period of several years. The defendant is an experienced businessman who sought to profit from his corrupt payments and voluntarily engaged in criminal behavior. He himself caused bribe payments of more than $8 million to be made through companies and bank accounts he and his partners at NoLimit controlled. In addition to making these bribe payments, the

defendant also maintained illegal cash funds as a quasi in-house banker for a then-senior government official in Ecuador and engaged with fellow contractor Juan Baquerizo in an attempted bribery scheme that was thwarted only by the arrest of a senior PetroEcuador official before the bribes could be consummated. These events suggest that the defendant did not have one or two momentary lapses of judgment during which he committed crimes, but that he was willing to transact in improper payments involving public officials in various ways in order to advance his business interests.

The defendant further argues that the loss underlying the guideline calculation, which is driven by the bribe payments he caused to be sent through U.S. bank accounts and U.S. companies, is arbitrarily high. To be sure, the defendant does not assert a mistake in the loss amount calculation; rather, he appears to criticize that offenses including bribery of public officials are governed by § 2C1.1, with a higher base offense level than certain other fraud offenses that are governed by § 2B1.1. The Sentencing Commission and Congress saw it fit to have different calculation formulae depending on the specific crime at issue. For example, numerous adjustments that apply in the § 2B1.1 context do not apply in § 2C1.1, and vice versa. None of this suggests that application of the guidelines to the defendant's conduct is unreasonable or warrants a downward departure. That the crime with which the government charged the defendant – conspiracy against the United States in violation of the FCPA – is statutorily limited to 60 months imprisonment, does not mean that the higher adjusted guideline range unfairly overstates his culpability, or that the guideline calculations involving FCPA prosecutions are arbitrary. Finally, while the defendant argues that this Court should depart downward based on a lack of empirical evidence supporting the loss table in § 2B1.1 and its purported overstatement of the defendant's wrongful conduct, courts in this Circuit and elsewhere have held that the lack of empirical evidence

does not invalidate the guidelines. *See United States v. Snipes*, 611 F.3d 855, 870 (11th Cir. 2010) ("the absence of empirical evidence is not an independent ground that compels the invalidation of a guideline"); *United States v. Vega-Santana*, 479 Fed.Appx. 262, 263 (11th Cir. 2012) ("a guideline is not per se invalid because it is not based on empirical evidence"); *United States v. Gonzalez-Soria*, 447 Fed.Appx. 85, 89 (11th Cir. 2011) ("the absence of empirical evidence does not independently undercut the validity of any guideline"); *see also United States v. Beyer*, 544 Fed.Appx. 507 (5th Cir. 2013) (argument that defendant's sentence was unreasonable because the fraud guidelines lack an empirical basis and result in excessive sentences was without merit); *United States v. Miller*, 665 F.3d 114, 121 (5th Cir. 2011) ("Empirically based or not, the Guidelines remain the Guidelines. It is for the Commission to alter or to amend them. . . . [A] district court must include the Guidelines range in the array of factors warranting consideration even if the Commission did not use an empirical approach"); *United States v. Spurlin*, 512 Fed.Appx. 398, 399 (5th Cir. 2013) ("This Court rejects the notion that a guideline is unreasonable unless it is based on empirical data").[2]

IV. The § 3553 Factors Do Not Warrant A Downward Variance

The defendant seeks a downward variance resulting in a sentence of probation in light of various personal characteristics and the circumstances of his crime. None of the § 3553(a) factors, in the government's view, is so compelling or extraordinary from the typical offender that a variance is necessary.

[2] Further, the defendant's argument that the use of the § 2B1.1 "loss table" is incongruous with the absence of identifiable victims who can be compensated misunderstands the sentencing guidelines. Under § 2C1.1, the § 2B1.1 table is not simply a table for determining the appropriate enhancement based on a "loss" amount. Rather, it is for determining the enhancement based on "the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest." Here, the amount used for the calculation of the defendant's guidelines was the bribe amount, and therefore, the absence of a compensable victim here does not undermine the use of the § 2B1.1 table.

1. The Defendant's Personal History and Characteristics

First, the government does not dispute the description in the sentencing memorandum of the defendant as a decent, devoted family man. Some of the events described in the defendant's family life are indeed tragic and heartbreaking. It is admirable that the defendant has been able to pull his family together and provide stability and support. But as a result of his own positive contributions, it appears that his family has become stable and close-nit. The circumstances of the defendant's current family situation thus do not appear so extraordinary as to warrant departure from the general rule set forth in § 5H1.6 that "family ties and responsibilities are not ordinarily relevant to determining whether a departure is warranted." *See, e.g., United States v. DeVegter*, 439 F.3d 1299, 1307 (11th Cir. 2006) (reversing district court's downward departure based on need of defendant to care for dyslexic son and sick mother-in-law because "[t]here is nothing inherently extraordinary about caring for a child or a sick parent"); *United States v. Beriguete*, 342 Fed. Appx. 576, 580 (11th Cir. 2009) (defendant's need to support three children not sufficiently extraordinary to merit consideration of whether his sentence should vary from the guideline range) (citing *DeVegter*, 439 F.3d at 1307); *United States v. Brown*, 509 Fed. Appx. 936, 940 (11th Cir. 2013) (affirming district court's sentence at low end of Guidelines range for a defendant convicted of tax fraud who was a single mother raising two children, had stable work history, did not receive much financial gain from the conspiracy, and was willing to testify against a co-defendant).

2. The Nature and Circumstances of the Offense

The defendant also requests a downward variance in light of the nature of the offense charged. The government does not dispute that NoLimit, the defendant's company, has legitimate operations. But as the government would have proved at trial and the defendant has admitted, the defendant – the president and part owner of NoLimit – paid significant bribes on behalf of NoLimit

to further the company's business interests and sought to conceal the bribes by paying them through affiliated U.S.-based companies and U.S. bank accounts.

The fact that certain PetroEcuador officials and persons acting as their intermediaries demanded secret bribe payments from the defendant in exchange for ongoing contractual payments and follow-up opportunities does not excuse the defendant's voluntary agreement to accede to those demands. PetroEcuador was replete with bad actors who sought to personally benefit from their positions of public trust. But those bad actors depended on contractors like the defendant to enable the corrupt scheme to operate. And the defendant knew how to deal with PetroEcuador's bad actors. For example, to seek the release of contractual payments in 2015 from a senior PetroEcuador manager, to whom the defendant then paid corrupt kickback payments in return, he solicited the help of Escobar, the then former PetroEcuador official who himself had received bribe payments and who had excellent connections to PetroEcuador's management.

That the defendant did not proactively seek out opportunities to pay bribes proves precious little. Many bribe payors agree to pay a public official not because they are keen to subsidize a public servant's salary, but because of demands from corrupt officials. It is the failure of businessmen like the defendant to reject such demands and instead make payments to obtain or retain lucrative contracts that triggers their liability under the FCPA. Therefore, while the government acknowledges the difficult situation he found himself in, the defendant is not a victim of circumstance but a willing participant in a pervasive corrupt scheme.

3. Avoidance of Unwarranted Sentencing Disparities

The defendant also argues in favor of his request for a downward variance resulting in probation by emphasizing the § 3553 factor that seeks to "avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C.

§ 3553 (a)(6). The defendant posits that in light of sentences imposed in this district on former PetroEcuador officials Escobar and Reyes, as well as fellow contractor Baquerizo, this court should significantly vary downward from a guideline sentence.

Each of those defendants pleaded guilty to one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h), a different statute with a substantially higher maximum sentence.[3] Reyes received a sentence of 53 months imprisonment, Escobar received a sentence of 48 months imprisonment, and Baquerizo received a sentence of 36 months imprisonment. The advisory guidelines range for each of those defendants was 57-71 months. That range, as noted above, is significantly lower than the defendant's advisory guidelines range of 87-108 months would have been, absent the effect of the statutory maximum. Moreover, the defendant's actual guideline sentence of 60 months by operation of § 5G1.1 is exactly within the advisory guideline range of the other three defendants.

The government disagrees with defendant's suggestion that contractors are less culpable than public officials, such as Reyes and Escobar. That view implies that the contractors were powerless victims of circumstance at the mercy of the whims of the corrupt public officials. While PetroEcuador officials indeed sought to extract the payment of bribes, as noted before, the criminal bribery and money laundering scheme would not have succeeded but for the knowing participation of businessmen like the defendant.

The defendant's argument that he is less culpable than Baquerizo is also not persuasive. The amount of bribes the defendant funneled through the U.S. banking system to benefit PetroEcuador officials was $8.25 million, far more than the loss amounts attributable to Baquerizo.

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[3] Differences resulting from the government's charging decisions do not create the unwarranted sentencing disparities Section 3553(a) seeks to preclude. *See United States v. Molina*, 530 F.3d 326, 331 (5th Cir. 2008) (any disparity resulting from the government's prosecutorial decisions was not unwarranted because the government may choose between different statutory penalty schemes applying to the same conduct).

In particular, the government rejects the insinuation contained in the defendant's sentencing memorandum that the government did not prosecute Reyes and Baquerizo for the full scope of their crimes. The government sought to hold Baquerizo and Reyes accountable for illegal payments attributable to them over which the government had jurisdiction and which the government could readily prove at trial at the time of their convictions. Case in point, the reference in the defendant's sentencing memorandum to an internet news article alleging further improper payments by Baquerizo is not only unsupported, but also completely irrelevant because the article describes an alleged scheme involving Baquerizo's brother Jaime, not Juan Baquerizo.

Like in every case, the district courts that sentenced each of the three other defendants evaluated their specific circumstances in granting a downward variance.[4] The Hon. Judge Williams sentenced Reyes to 53 months, seven percent less than the low end of the advisory guideline range of 57 to 71 months; the Hon. Judge Altonaga sentenced Escobar to 48 months, 16 percent less than the low end of the advisory guideline range of 57 to 71 months; and the Hon. Judge Gayles sentenced Baquerizo to 36 months, 37 percent less than the low end of the advisory guidelines range of 57 to 71 months. The government appreciates, of course, that arriving at a sentence involves an assessment of the defendant's individualized circumstances and is thus far more than a mathematical exercise. But it is noteworthy that the defendant's request for a probationary sentence – effectively a 100% reduction from the advisory guideline sentence – is far more extreme than the more modest variances granted to the three defendants sentenced in the related cases. The kind of extraordinary reduction from the guidelines the defendant is seeking must be supported by extraordinary circumstances. *See United States v. Crisp*, 454 F.3d 1285,

[4] For example, the Hon. Judge Altonaga based her downward variance for Escobar in large part on Escobar's voluntary contributions to charitable organizations of the bribe proceeds he had gained prior to any government investigation into the scheme becoming public.

1291 (11th Cir. 2006). The government does not believe that such extraordinary circumstances are present here.

Finally, the government does not entirely agree with the defendant's characterization of the circumstances of his engagement with the government. It is true and very laudable that the defendant decided voluntarily to admit his wrongdoing and accept responsibility for his conduct, even while residing in Ecuador. But he did so against the backdrop of a broad investigation by the U.S. government into the PetroEcuador bribery scheme that has been widely publicized. The defendant knew that the government's investigation already encompassed his role and that of NoLimit, and that the government was developing evidence regarding his violations of federal law. While the government, for reasons articulated in the defendant's sentencing memorandum, appreciates his posture and voluntary submission to the U.S. justice system, it is not necessarily the case that the defendant would have been ultimately successful in avoiding extradition or escaping punishment for his crimes had he not accepted responsibility and pleaded guilty.[5]

4. The Remaining § 3553 Factors Do Not Warrant a Variance

Additional § 3553(a) factors, including, among others, the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment and adequate deterrence, and protect the public, counsel against a downward variance. *See* 18 U.S.C. § 3553(a)(2). Indeed, the facts of this case fall within the heartland of the sentencing guidelines, thus making the defendant's argument in favor of a variance not compelling. *See United States v. Irey*, 612 F.3d 1160, 1202 (11th Cir. 2010) (*en banc*).

The United States considers the bribery of foreign public officials a serious crime. The

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[5] The defendant's observation that he is a U.S. citizen by happenstance because he was born in the United States to Ecuadorian parents and that he lived nearly his entire life in Ecuador may be correct. But that he chose to remain a U.S. citizen for his entire life and carry a U.S. passport was a conscious choice, with all the rights and obligations his U.S. citizenship entails.

conduct of this defendant, paying bribes to obtain and retain contracts with PetroEcuador, and using U.S. companies and bank accounts in the United States to distance his Ecuadorian company from these payments, undermined the rule of law in the United States and Ecuador and helped perpetuate a grotesque system of bribery involving PetroEcuador. Appropriate punishment for such crimes will serve as an effective deterrent. The Eleventh Circuit has instructed:

> Because economic and fraud-based crimes are more rational, cool, and calculated than sudden crimes of passion or opportunity, these crimes are prime candidate[s] for general deterrence. . . . Defendants in white collar crimes often calculate the financial gain and risk of loss, and white collar crime therefore can be affected and reduced with serious punishment.
> Our assessment is consistent with the views of the drafters of § 3553. As the legislative history of the adoption of § 3553 demonstrates, Congress viewed deterrence as particularly important in the area of white collar crime. S.Rep. No. 98-225, at 76 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3259. Congress was especially concerned that prior to the Sentencing Guidelines, major white collar criminals often were sentenced to small fines and little or no imprisonment. Unfortunately, this creates the impression that certain offenses are punishable only by a small fine that can be written off as a cost of doing business. *Id.*

United States v. Martin, 455 F.3d 1227, 1240 (11th Cir. 2006) (certain internal quotations and citations omitted); *Kuhlman*, 711 F.3d at 1328-29 (same).

V. Conclusion

For the reasons set forth above, the government opposes the defendant's motion for a downward departure under *Rodriguez*. The government also opposes the requested downward variance under the factors contained in § 3553(a). Accordingly, the government opposes the defendant's request for a sentence of probation and instead submits that a guideline sentence is sufficient, but not greater than necessary, to comply with § 3553(a).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by CM/ECF.

s/ David Fuhr

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