

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

Case No. 18-20530-CR-UNGARO/O'SULLIVAN

UNITED STATES OF AMERICA

Plaintiff,

Vs.

JAVIER ESTEPA, *ET AL.*

Defendant.

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**JAVIER ESTEPA'S SENTENCING MEMORANDUM**

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I

**AUTHORITY AND PURPOSE**

The Defendant, by and through undersigned counsel and pursuant to **Rule 32(i)(4)(A)(i)** of the **Federal Rules of Criminal Procedure**, hereby submits the following Sentencing Memorandum, designed to assist the Court in arriving at an equitable disposition of the instant matter. The Defendant's objective is threefold:

1. Establish an accurate Guideline calculation;
2. Supplement the PSI's information about Mr. Estepa; and
3. Justify a Departure and/or Variance.

II

**GUIDELINES**

**A. Disputed Information**

On April 17, 2019, the Defendant submitted to United States Probation Officer Mercedes Sornoza his objections to the Presentence Investigation Report which, among other things, challenged the offense level computation. Given the likelihood that some of the disputed issues may be resolved prior to sentencing, for purposes of this Memorandum, only the most significant issues<sup>1</sup> are addressed. While a synopsis of the objections is provided here for the Court's perusal, the full basis and justification for the Defendant's position is delineated in the objections provided to the probation officer (Exhibit 1).<sup>2</sup> A district court should begin all sentencing proceedings by correctly

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<sup>1</sup> Pursuant to **18 USC §3661**, "No limitation shall be placed on the information...[the] court ... may **receive and consider** for the purpose of imposing an appropriate sentence" (emphasis added).

<sup>2</sup> The Court should note that, prior to filing his objections – specifically as they relate to the calculation of "Loss" under **§2B1.1** of the Guidelines – undersigned counsel called the United States Sentencing Commission's Hotline and spoke with Mr. Rusty Burress, who trains probation officers on the Guidelines. After confirming and endorsing

calculating the applicable Guideline range. *United States v. Campbell*, 765 F.3d 1291, 1298 (11<sup>th</sup> Cir. 2014).

## **B. Adjustments**

The Eleventh Circuit Court of Appeals stated that, "...when, as here, a defendant challenges one of the factual bases of his sentence as set forth in the PSI, the government has the burden of establishing the disputed fact by a preponderance of the evidence." *United States v. Bernardine*, 73 F.3d 1078, 1080 (11<sup>th</sup> Cir. 1996); *United States v. Martinez*, 584 F.3d 1022 (11<sup>th</sup> Cir. 2009). Further, the Eleventh Circuit previously held that, "the preponderance standard is not toothless. It is the district court's duty to ensure that the Government carries this burden by presenting reliable and specific evidence." *United States v. Lawrence*, 47 F.3d 1559, 1566 (11<sup>th</sup> Cir. 1995). The Government bears the burden of proving the applicability of a Guideline section that would enhance the Offense Level<sup>3</sup>. *United States v. Shriver*, 967 F.2d 572, 575 (11<sup>th</sup> Cir. 1992).

### **Role Assessment:**

The Presentence Investigation Report, pursuant to of **§3B1.1** of the Guidelines, enhances the Defendant's Base Offense Level four (4) points for his Role in the Offense and Mr. Estepa disputes the applicability of this enhancement.

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counsel's calculation of loss, Mr. Burress offered his direct phone number (**202/502-4542**) in the event anyone had any questions.

<sup>3</sup> To demonstrate the fallacy of the Government's position (see Government's response to Defendant's objections to PSR, page 7, top) that the loss calculation should include 111 individuals, the attached interview (Exhibit 2) by Special Agent Michelle Stickler (the case agent) of Mr. Daniel Ramon Fontes Cabrera reflects, in ¶6, that, "...he worked full time hours and did not work any overtime." The Government offers the Court no evidence, despite their burden, upon which the Court could even reasonably estimate the amount of overtime because, among other reasons, the Court does not know – but for a handful of Government witnesses who testified at trial – who worked overtime and how many overtime hours were expended.

**Victim Impact:**

The probation officer used Aaron's net profit to reflect the victim impact calculation. However, the figure used by the probation officer was for a period of four years and the conspiratorial parameters alleged in the Indictment was three years. As the chart (Exhibit 3) reflects, the properly calculated net profit figure during the conspiratorial period is **\$265,737.56**.

**Acceptance of Responsibility:**

The Eleventh Circuit has previously recognized that simply putting the Government to its burden of proof and exercising one's right to trial by jury does not eliminate the two points for Acceptance of Responsibility. *U.S. v. Stubbs*, 944 F.2d 828 (11<sup>th</sup> Cir. 1991). As explained in his objections, Mr. Estepa had issues he wanted to preserve for appeal. But, he gave a statement of contrition and the Court would be justified in awarding the two point reduction for acceptance of responsibility.

**Specific Offense Characteristics:**

The net profit figure used by the probation officer was not accurate and it substantially overstates (almost triples) the actual profit Aaron made. Additionally, in calculating loss, the probation officer neglected to afford Aaron any credit for the value of the work that was completed. The Guidelines specifically support such credit in computing loss calculation, as fully explained in Mr. Estepa's objections. See *a/so*, the United States Sentencing Commission's Primer on Loss Calculation (Exhibit 4), as well as *United States v. Campbell, supra.* at 1302.<sup>4</sup> Further, the Defense believes – the trial

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<sup>4</sup> An excellent synopsis of "Loss" calculation, authored by the Honorable Donald L. Graham, United States District Court Judge for the Southern District of Florida, can be found in *U.S. v. Foster*, 2015 U.S. Dist. LEXIS 116185 (S.D. Fla., Mar. 31, 2014) *aff'd*, *U.S. v. Foster*, 878 F.3d 1297 (11<sup>th</sup> Cir. 2018).

record being silent – that a two point enhancement for 10 or more victims cannot be sustained. While the Court is free to make a reasonable estimate of the loss, *United States v. Miller*, 188 F.3d 1312, 1317 (11<sup>th</sup> Cir. 1999), the court must not speculate about a fact that would permit a more severe sentence under the Guidelines, *United States v. Willis*, 560 F.3d 1246, 1251 (11<sup>th</sup> Cir. 2009).

#### **Downward Departure Considerations:**

**Application Note 21(C)** of the Guidelines acknowledges that there may be cases where the Offense Level determined under **§3B1.1** of the Guidelines “...overstates the seriousness of the offense.” A salient securities fraud example is used by the Commission to illustrate its point where the harm inflicted is relatively small but the group of victims is relatively large. While it is the Defendant’s burden to establish entitlement to a downward departure, *United States v. Cruz*, 946 F.2d 122, 126 (11<sup>th</sup> Cir. 1991), as expressed in Defendant’s objections to the probation officer, and in this Memorandum (*infra*. pg. **5**), the essence of Defendant’s crime makes this consideration appropriate. *United States v. Rodriguez*, 64 F.3d 638 (11<sup>th</sup> Cir. 1995).

#### **C. Applicability**

As pivotal as the Guidelines were - and important as they remain - as a result of the *Booker*, *Gall*, and *Rita* decisions<sup>5</sup>, the Sentencing Guidelines are now but one among several equally important factors that the Court must consider in fashioning a sentence that, as stated in the Introductory Comments to Chapter Five of the Sentencing Guidelines (“Determining the Sentence”), is “...**sufficient but not greater than necessary**...” to achieve the objectives designated in **18 USC §3553** (emphasis

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<sup>5</sup> 543 U.S. 220 (2005), 552 U.S. 38 (2007), and 551 U.S. 338 (2007), respectively.

added).

“A district court may determine, on a case by case basis, the weight to give the Guidelines, so long as that determination is made with reference to the remaining section 3553(a) factors that the court must also consider in calculating the defendant’s sentence.” *United States v. Hunt*, 459 F.3d 1180 (11<sup>th</sup> Cir. 2006). The “justification for [a] variance must be ‘sufficiently compelling to support the degree of the variance.’” *United States v. Bell*, 537 Fed. Appx. 883 (11<sup>th</sup> Cir. 2013) and “[t]he weight to be accorded any given §3553(a) factor is a matter committed to the sound discretion of the district court.” *United States v. Clay*, 483 F.3d 739,743 (11<sup>th</sup> Cir. 2007).

In the instant case, the United States Probation Office concluded that Mr. Estepa’s Total Offense Level is **27** (with a Criminal History Category of **I**), thereby making his Guideline Imprisonment Range **70 - 87** months.

If the Court sustains Mr. Estepa's objection to the four (4) point enhancement for Role in the Offense, his Base Offense Level would be reduced to **23**; using the proper net profit figure as the measure of loss (which the Defense believes is, nonetheless, inapplicable) would drop the Base Offense Level two more points to **21**; denying the two point enhancement for 10 or more victims would bring the Base Offense Level down to **19**; if Acceptance of Responsibility is recognized, the final Base Offense Level would be **17**.

#### **D. Sentencing Factors**

Along with the Guidelines, the Court must now consider the factors set out in **18** USC **§3553**, specifically:

### **Nature and Circumstances of the Offense**

To be clear, at 48 years of age, Mr. Estepa stands convicted of wrongdoing and he does not seek to deny or minimize it. However, in the scheme of things<sup>6</sup>, what, exactly, did he do? Aaron maintained an outstanding reputation with the County for not only completing projects on time but with admirable results. Even assuming, as the Government insists, that Aaron was required to list subcontractors, that omission from the forms inflicted no harm upon the County. In fact, the only reason the information is required is so the County can verify that Davis Bacon wages were, in fact, paid.

That leaves the workers who Mr. Estepa stands convicted of shortchanging. Aaron offered work and the workers accepted the jobs; they were neither coerced nor threatened to take the work. Fact is, in today's climate and, in particular, Miami-Dade County<sup>7</sup>, in return for a steady job and paycheck, many, many people are only too happy to sign on. Is it wrong? Yes. Is it a common practice? Absolutely.

Is this the type of conduct we want to imprison people for? Are the Estepa's a danger to society? Is the gravity of their wrongdoing such that prison is an appropriate sanction? Respectfully, the Defense believes removing Javier Estepa from his wife and children, thereby rendering him unable to work and be productive, would inflict greater damage on society than the harm he perpetrated on the workers. In fact, incarcerating Javier Estepa may say more about us than him; all participants in the criminal justice

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<sup>6</sup> As a former assistant Miami-Dade County public defender, undersigned counsel is familiar with this Court's previous position as a Miami-Dade County Circuit Court Judge. One of the many benefits such experience brings to federal practice is a realistic sense of priority and practicality, as well as the wisdom that accompanies it.

<sup>7</sup> One need look no further than the parking lot of any Home Depot. Any distinction that the workers are exclusively illegal immigrants is not only inaccurate but also belied by the testimony at trial wherein citizen witnesses for the Government, such as Orlando Blanco, testified they were happy to have the work.



system.

As was made clear during the trial testimony and as the chart (Exhibit 3) reflects, the profit margin Aaron derived was not such that Mr. Estepa could be labeled greedy, a common incentive for, and characteristic of, fraud (see business and personal Tax Returns<sup>8</sup>, Exhibit 5). In return for the risks of owning and operating his own business, Mr. Estepa shouldered the day to day responsibility of attending to all aspects of such an undertaking, from making payroll to purchasing materials, winning bids to completion of projects. Along the way, and not to be overlooked, was the additional burden of paying taxes and exposure to enforcement sanctions for failure to act properly.

Who would have looked out for Aaron had it been unable to complete its obligations? Avoid bankruptcy? And that is precisely why this type of behavior has become so common in the construction industry today.<sup>9</sup> But, unlike Aaron, Miami-Dade County resolves such issues with employers administratively (requiring payment of the difference and a fine).

### **History and Characteristics of Mr. Estepa**

Unknown to the Court, and without prompting, a curious ritual took place on each and every day of trial: the Defendants and the prosecutors shook hands and wished each other well. So exceptional was the interchange that, on more than one occasion, the prosecutors expressed their opinion that ‘the Defendants were not bad guys and their initial perception was wrong.’ While such comments bind the Government to

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<sup>8</sup> Redacted for convenience; full copies available upon request.

<sup>9</sup> A review of the Miami-Dade County Department of Small Business Development Violations Chart (Exhibit 6), for the period alleged in the Indictment, shows just how common Davis Bacon violations are, i.e., “underpayment of employee.”

nothing, they do reflect the unmistakable presence of character, of sufficient gravitas to earn acknowledgment from the prosecution.

A common thread running through all the letters of support (Exhibit 7) is a reference – directly and indirectly – to the dignity and decency<sup>10</sup> of Mr. Estepa. The adjectives frequently used to describe him are “polite” and “respectful.”

Few are in a better position to evaluate character, in hindsight, than the Court, having imposed sentenced on hundreds of defendants over your Honor’s tenure as a judge. The Court’s attention to detail during the trial was meticulous yet, at no point, was there so much as a sense of arrogance attributed to the Defendant yet, alone, the usual personality traits reflective of fraudsters, i.e., greed, malice, selfishness<sup>11</sup>.

Between the pictures of Mr. Estepa’s family (Exhibit 9), the letters attributable to his wife and children (Exhibit 10), and the impression his personality left on everyone involved in the prosecution, it is apparent that he is a kind, loving, and dedicated husband and father. Without reservation, undersigned counsel can represent Javier and Elizabeth Estepa are the nicest, most loving couple counsel has ever had the responsibility of representing.

### **Seriousness/Respect/Punishment**

There is nothing about a federal prosecution that does not very pointedly drive home to the community at large and, particularly, this Defendant, the seriousness of the

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<sup>10</sup> In the aftermath of Hurricane Irma (August 30, 2017), Javier Estepa, and his oldest son, Simon Estepa, together with Diego Estepa and Ricardo Velazquez (Javier Estepa’s father-in-law) all volunteered their efforts on behalf of Aaron Construction Group to clean up the Overtown area of Miami, i.e., Liberty City and the Annie Coleman Housing Projects (Exhibit 8). Going house to house and street to street, they removed downed trees, cleaned and picked up debris. They were the only contractor present the day following the hurricane.

<sup>11</sup> Close as the Government came was the allegation, by Yanith Barrera, that Defendant attempted to obstruct justice by telling Mr. Barrera to lie to the Government and say the checks paid to Mr. Barrera’s business were a “bonus” rather than the “balance” of funds owed. The jury rejected such an allegation, as did the probation officer (¶23, PSI).

offense. Indictment, expense, anxiety, and possible incarceration demand the public's attention. But, as the United States Supreme Court recognized in *Gall, supra*. "a sentence of 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 without taking into account the real conduct and circumstances involved in sentencing. *Gall*, 552 U.S. at 54.

The verdict crushed Mr. Estepa; he has lost everything he worked so hard and diligently for. Short of incarceration, the loss of his General Contractor's license, owing to his felony conviction, will be an event he will never fully recover from. Having toiled to absorb and complete the educational prerequisites and having passed, with great pride, the state examination, Mr. Estepa's license was a lifetime endowment for his wife and children. Now, while his obligation to support and provide for his family remains, his ability to do so is compromised.

At 48, Mr. Estepa must start over and find his way. While his character allows him to meet the challenge with determination and optimism, his and his family's future remains uncertain.

### **Adequate Deterrence**

In general, the process of federal prosecution affords prospective wrongdoers plenty of justification for abstaining from criminal behavior. Unlike its state counterpart, the federal conviction rate is substantially higher; unless found not guilty, there is no exception to felony conviction, incarceration is generally longer, and expense greater.

Courts have noted that the deterrence factor "unquestionably envisions more severe sentences for defendants considered more likely to commit further crimes and

less severe sentences for those unlikely to commit [additional] crimes.” *United States v. Rodriquez*, 724 F.Supp. 1118, 1120 (S.D.N.Y. 1989).

At 48, with no prior criminal history (Category I), especially given the nature of the instant offense, the likelihood of recidivism by Mr. Estepa is *de minimis*. “Lack of criminal history, even though already taken into account in calculating his advisory guideline range, could nevertheless [ ] form [ ] the basis for a variance.” *United States v. Chase*, 560 F.3d 828,831 (8<sup>th</sup> Cir. 2009). See also, *United States v. Howe*, 543 F.3d 128, 137 (3<sup>rd</sup> Cir. 2008) (affirming district court’s variance based upon, among other things, fact that defendant “led an honorable and lawful life until this point and had no prior criminal history.”); *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”).

#### **Public Protection**

The public is not in need of protection from Javier Estepa who, having lost his license, will no longer be qualified to participate in public construction projects. Further, while the workers were underpaid, there was never so much as a hint any were mistreated or abused. Quite the contrary, Aaron made certain all workers were covered by workman’s compensation and otherwise treated everyone with respect.

#### **Training/Treatment**

There is no training or treatment that Mr. Estepa needs. He has always held steady, respectable employment, been a good father, and loving husband. He shall continue to provide for himself and his family in a positive, lawful manner.

### Sentences Available

The offense carries no mandatory minimum sentence. Accordingly, the Court is free to impose any sentence within the statutory range; from incarceration for whatever the Guidelines' Imprisonment Range is subsequently determined to be, to probation with a condition of home detention.

### Sentencing Disparity<sup>12</sup>

No statistics for Davis Bacon Wage Violations, **40 USC §3142**, are available. However, as **Application Note 3(F)(iii)** informs, most such cases are prosecuted pursuant to **18 USC §1001** (False Statement), as was the instant case. Those statistics (Exhibit 11) reflect that, with a Total Offense Level of **27** (Criminal History Category I), as originally calculated by the probation officer, the average sentence, absent any departure and/or variance, was **62.8** months; with a downward variance, **43.6** months.

Should the Court sustain Defendant's objections, with a Total Offense Level of **17** (Criminal History Category I), the average sentence was **21** months; with a downward variance, **9.2** months. While level 17 is in **Zone C**, a four point downward variance would put Defendant in **Zone B**.

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<sup>12</sup> As courts have observed, sentencing does not lend itself to a "mechanical" process of "arbitrarily-selected variables" (*United States v. Gupta*, 904 F. Supp. 2d 349,350 (S.D.N.Y. 2012) *aff'd*, 747 F.3d 111 (2<sup>nd</sup> Cir. 2014)), however, a comparison is revealing. At the initial Calendar Call of the instant case, the Court requested the Government relate what the case was about. The response: 'a **Carlisle** type case.' While the Defense adamantly disputes such a comparison – Carlisle was an egregious, morally bankrupt course of conduct and abuse to the tune of **36 million dollars** – the sentences imposed upon those defendants (in contrast to the **70-87** guideline imprisonment range calculated by the probation officer here) show the disproportionality of the instant case, to wit: Rene Sierra (three years probation), Gonzalo DeRamon (36 months incarceration), Matthew Greer (36 months incarceration), Lloyd Boggio (57 months incarceration), Michael Cox (five years probation), Michael Runyan (three years probation). While cooperation may have influenced the ultimate sentences, it does not mitigate the willfulness or significance of the criminality.

### III

#### RECOMMENDED DISPOSITION

Considering the factors enumerated in **18 USC §3553** and, as provided in **§5C1.1** of the Guidelines, entitled: **Imposition of a Term of Imprisonment**, the Defense respectfully suggests that a three year term of **probation**, with a condition of **15** months of Home Detention, would be “**...sufficient but not greater than necessary...**” to achieve the objectives designated in **18 USC §3553** (emphasis added).

### IV

#### CONCLUSION

Not the facts, the law, the Guidelines, or the character of the Defendant require incarceration for vindication of the criminal justice system. To the extent Mr. Estepa must be punished for his transgression, given the impact of his offense and no prior criminal history, he has suffered enough. A period of probation, with Home Detention, would not only solidify for Mr. Estepa the wrongfulness of his conduct but it would spare his family, especially his minor children, the burden of being without their father during such formative years. Finally, such a disposition would not only allow Mr. Estepa to work and remain productive in an effort to support and provide for his family but it would allow Mr. Estepa – a proud and decent man – to conclude that the Government and the Court treated him fairly, all things considered.

### V

#### POST-SENTENCING REQUESTS

##### 1. **Appeal Bond**

Pursuant to **18 USC §3143(b)(1)**, should the Court impose a term of

incarceration, Defendant requests he be allowed to remain at liberty pending an appeal. Of the two criteria for such relief, one has already been found by the Court, i.e., (A) that Mr. Estepa is not likely to flee or pose a danger to the safety of any other person or the community (predicate upon which the Court authorized a post-conviction, presentence bond). As to the remaining criteria, (B) that the appeal is not for purpose of delay and raises a substantial question of law likely to result in reversal, there are several legitimate issues that would meet this requirement: from whether or not, given the facts and testimony, Defendants were required to list subcontractors; whether George Navarrete was improperly precluded from testifying about, among other things, the necessity of listing the subcontractors under the circumstances; failure of the Court to give the Defendant's Theory of Defense Instruction; prejudicial impact, given the facts and allegations, of the Court's allowing the Government to introduce, and make an aspect of the prosecution, the spending habits of Diego Estepa; and preclusion of Defendant's Advice of Counsel defense.

## **2. Voluntary Surrender**

In the event incarceration is imposed and the Court refuses to set an appeal bond, given how Mr. Estepa has conducted himself from the time of his arrest through and including trial and sentencing, the Defense requests he be allowed to voluntarily surrender to the designated institution.

When appropriate, voluntary surrender benefits both the Government as well as the Defendant; the former avoids the cost of housing and transportation to the designated facility, while the latter avoids the stress such transfer generally involves.

### 3. Facility Recommendation

Recognizing it is not binding upon the Federal Bureau of Prisons, in the event incarceration is imposed, the Defendant requests the Court recommend FCI Miami, Satellite Camp. The facility is close to the Defendant's home, would minimize the hardship of visitation upon the Defendant's family, and is a level one facility that, given the Defendant's exposure, he would qualify for.

### 4. Residential Drug Treat Program Recommendation

As explained in paragraphs 63-65 of the Presentence Investigation Report, under the heading of "**Substance Abuse**", Mr. Estepa has developed a dependency on both drugs and alcohol. Pursuant to **18 USC §3621(e)**, the Bureau of Prisons has an RDAP Program<sup>13</sup> that consists of 500 hours of treatment. If successfully completed, the inmate is eligible for a sliding scale sentence reduction of up to 12 months (if sentenced to a minimum of 37 months; 9 months for a sentence of 31-36 months; no more than 6 months for a sentence of 30 months or less). **28 CFR §550.58**; Program Statement **5331.02**. It should be noted that FCI Miami, Satellite Prison Camp, has an RDAP Program.

### 5. Shock Incarceration Program

In the event the Court imposes incarceration for a period of more than **12** months but no more than **30**, pursuant to **§5F1.7** of the Guidelines and **18 USC §4046**, Defendant requests the Court recommend the Shock Incarceration Program for Mr. Estepa. The program is designed to provide a rigidly structured program that is based upon discipline, physical training, hard labor and drilling, characteristic of basic training.

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<sup>13</sup> At selected facilities only



It also affords the Director of the Bureau of Prisons discretion to place the Defendant in a graduated release program comprised of community corrections and home confinement.

Respectfully submitted,

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By: /s/ Neil G. Taylor  
Neil G. Taylor, Esq.

#### **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was electronically filed, by CM/ECF, this 3<sup>rd</sup> day of May, 2019.

By: /s/ Neil G. Taylor  
Neil G. Taylor, Esq.