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7 UNITED STATES DISTRICT COURT
 8 DISTRICT OF ARIZONA

9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 vs.

12 LUIS ENRIQUE AYALA-GARCIA,

13 Defendant.

Case No.
 CR 06-2061-TUC-CKJ-GEE

SENTENCING MEMORANDUM
 WITH OBJECTIONS

14
 15 It is NOT expected that excludable delay under Title 18, USC
 16 §3161(h) (1) (F) will occur as a result of this memorandum.

17 The Defendant, LUIS ENRIQUE AYALA-GARCIA , by and through
 18 undersigned counsel, pursuant to 18 USC 3553(a) and Rule 32 of the
 19 Federal Rules of Criminal Procedure, respectfully submits to this
 20 Court a Sentencing Memorandum in his case.

21 RESPECTFULLY SUBMITTED this 18th day of JUNE, 2007.

22 LAW OFFICE OF RUBEN ESPARZA

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 27 S/Ruben Esparza
 Ruben Esparza
 ATTORNEY FOR DEFENDANT
 LUIS ENRIQUE AYALA-GARCIA

1 **SENTENCING MEMORANDUM**

2 **OVERVIEW**

3 Mr. Ayala pled guilty to an indictment charging him with
4 illegal re-entry pursuant to 8 USC 1326 with an enhancement under
5 1326 (b) (2). Mr. Ayala accepted the Government's plea offer under
6 USSG 5K.3.1 conditions. The 1326(b) (2) enhancement was listed in the
7 plea agreement as a theft charge from 14 October of 1988. The
8 Government supplied various documents in support of the 1988
9 conviction. These documents may not provide sufficient proof that
10 the prior qualifies for the (b) (2) enhancement.

11 Mr. Ayala reviewed the pre-sentence report for accuracy. The
12 report appears to be accurate. Portions involving acceptance of
13 responsibility, criminal history, family history and offender
14 characteristics are accurate. Additionally, Mr. Ayala understands
15 that the recommendation in his case is for 41 months.

16 Mr. Ayala objects to paragraph 14, involving the offense of
17 assault on a police officer. See Objections section below.

18 **GUIDELINES**

19 Mr. Ayala pled guilty to illegal re-entry under 8 USC 1326.
20 Base level is 8. The pre-sentence report lists a 16 level
21 enhancement in paragraph 14. This enhancement is based on the
22 offense listed in paragraph 26. The crime is listed as an
23 aggravated assault, a crime of violence. The adjusted offense level
24 is 24. Three levels are subtracted for acceptance of responsibility
25 and savings to the government. Total offense level is 21.

26 Mr. Ayala is objecting to the enhancement in paragraph 14. See
27 objections below.

1 **CRIMINAL HISTORY**

2 Mr. Ayala's criminal history category is listed as Category
3 IV. Counsel reviewed the criminal history with Mr. Ayala. He
4 question the age of the convictions in paragraph 24. It appears
5 that Mr. Ayala was on warrant status from 1990 to 1999. Because of
6 the warrant status he was sentenced to prison within the 15 year
7 period under USSG §4A1.2(e). There are no objections to the
8 criminal history portion.

9 **OBJECTIONS**

10 Mr. Ayala objects to the enhancement under paragraph 26. It is
11 incumbent on the Government to provide any documents in support of
12 any prior used to enhance the sentence of a defendant. The
13 Government has indicated that the documents for this conviction are
14 not in the possession of the government. This fact raises three
15 points of law.

16 First, the Government, and not the Court, must prove any prior
17 criminal history for enhancement purposes¹. Second, the
18 Government's burden of proof must be by a standard higher than a
19 preponderance of the evidence for any enhancement². In this case,
20 a clear and convincing evidence standard applies³. Third, the Court
21 is limited to examining conviction documents on their face for a
22 categorical analysis. A modified categorical analysis is permitted
23 by reviewing the charging documents, plea agreement and sentencing
24 documents provided by the government. No other judicial
25 investigation is permitted⁴.

26
27 **MITIGATION**

28 Pursuant to 18 USC 3553(a) any number of sentencing factors

1 are now to be considered as well as guidelines factors.

2 Mr. Ayala is before the Court for sentencing on the charge of
3 illegal re-entry. The circumstances of his arrest are listed in the
4 pre-sentence report. He was attempting to cross marijuana across
5 the border. He was trying to earn money to help his family pay for
6 the funeral expenses of his mother and youngest brother.

7 Mr. Ayala was beside himself with grief at his family's loss.
8 He was helpless regarding death. He felt that perhaps he could ease
9 the family's suffering with enough money to pay for the funerals.

10 Mr. Ayala remained in Mexico for five years after his last
11 deportation. He had no idea the amount of time that he was facing
12 for the re-entry conviction. He will remain in Mexico for the
13 remainder of his life.

14 **RESPECTFULLY SUBMITTED** this 18th day of June, 2007.

15 **LAW OFFICE OF RUBEN ESPARZA**

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19 S/Ruben Esparza
20 Ruben Esparza
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22 LUIS ENRIQUE AYALA-GARCIA
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18 1. United States v. Pimentel-Flores, 339 F.3d 959 (9th Cir.
19 08/11/2003)

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21 2. United States v Ameline, 400 F.3d 646, 656 n.7 (9th Cir. 2005)
22 Rehearing en banc granted 401 F.3rd 1007 (9th Cir. 2005)

23 3. United States v. Jordan, 256 F.3d 922, 927 (9th Cir. 2001)

24 4. Shepherd v United States, 125 S.Ct 1254 (2005)
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