

1 **Law Office of Leslie A. Bowman**
 360 N. Court Ave.
 2 Tucson, Arizona 85701
 (520) 623-3336
 3 By: Leslie A. Bowman, Bar # 014738
LBowman@dakotacom.net
 4 Attorney for Defendant

5 **UNITED STATES DISTRICT COURT**
 6 **DISTRICT OF ARIZONA**

7 UNITED STATES OF AMERICA,]
] No. CR-09-0237-TUC-CKJ
 8 Plaintiff,]
] SENTENCING MEMORANDUM AND
 9 vs.] CONCURRENCE WITH THE PRE-SENTENCE
] REPORT'S DISCUSSION OF MINOR ROLE
 10 EMMANUAL RAMON PEREZ-OZUNA,]
 11]
]
 12 Defendant.]

13 It is expected that excludable delay under 18 U.S.C.
 14 §3161(h)(1)(F) will not occur as a result of this motion or of
 15 any order based thereon.

16 Pursuant to Rule 32(i), Fed.R.Crim.P. and U.S.S.G. § 6A1.3,
 17 Emmanuel Perez-Ozuna concurs with the pre-sentence report's
 18 analysis of minor role and submits his sentencing memorandum as
 19 follows:

20 1. Mr. Perez-Ozuna's conduct merits a reduction from the
 21 advisory sentencing guideline range based on his minor role in
 22 the offense, which also results in a base offense level of 30.

23 2. When considering the factors set forth in 18 U.S.C. §
 24 3553(a) and recent case law instructing the Court to sentence a
 25 defendant based on all information that impacts the determination
 26 of an appropriate sentence, a sentence based primarily on the
 27 weight and type of drug is not supported.

1 Further support for the sentencing memorandum is contained
2 in the attached Memorandum of Points and Authorities.

3 MEMORANDUM OF POINTS AND AUTHORITIES

4 1. Minor Role

5 Emmanuel Perez-Ozuna is a 26 year old young man with no
6 prior criminal history. He pled guilty to the indictment for
7 driving a car across the United States/Mexico border with
8 packages of cocaine hidden inside the front seats. There is no
9 evidence to suggest that he owned, packaged, touched or loaded
10 the drugs into the vehicle. When he was interviewed by the agents
11 at the time of his arrest, Emmanuel admitted that he knew there
12 was cocaine in the vehicle but he didn't know how much. He was
13 hired in Nogales, Sonora by a man named Carlos to drive the
14 vehicle to a Wal-Mart in Tucson, Arizona.

15 Emmanuel was instructed by Carlos to call on a cellular
16 telephone to advise members of the drug smuggling operation when
17 he arrived in Tucson. Someone else would take the vehicle from
18 him and remove the drugs at a stash house. The vehicle would
19 later be returned to Emmanuel who was told to drive back to
20 Nogales, Sonora. Upon his return he would be paid \$1,000.00,
21 more than he could make as a cook in Mexico in a month and a
22 half.

23 Prior to the date of his arrest, the organization had
24 registered the car in Emmanuel's name. They permitted him to use
25 the vehicle occasionally to cross into the United States to shop
26 for items for his mother's food cart business. The agents claim
27

1 that Emmanuel said he crossed cocaine once before and was paid
2 \$1,000.00. Emmanuel denies that. He previously crossed the
3 border in the vehicle, which is typical to create a crossing
4 history.

5 The government never alleged that Emmanuel was anything more
6 than a courier in this case.

7 Chapter 3, part B, section 2 (U.S.S.G. § 3B1.2) states:

8 Based on the defendant's role in the offense, decrease
9 the offense level as follows:

10 (a) If the defendant was a minimal
11 participant in any criminal activity,
12 decrease by 4 levels.

13 (b) If the defendant was a minor participant
14 in any criminal activity, decrease by 2 levels.

15 In cases falling between (a) and (b),
16 decrease by 3 levels.

17 Application Note 2 to this section states that the guideline
18 is only applicable where more than one participant was involved
19 in the offense. The term participant is defined, by reference to
20 Application Note 1 to U.S.S.G. § 3B1.1. A participant is a
21 person who is criminally responsible for the crime, whether or
22 not that person was convicted. The Ninth Circuit held in United
23 States v. Webster, 996 F.2d 209, 212 (9th Cir. 1993) that in
24 order for a defendant to be eligible for a reduction for minor
25 participant there must be evidence available at the time of
26 sentencing to demonstrate to the court that, 1) the relevant

1 conduct that the defendant would be held accountable for pursuant
2 to U.S.S.G. § 1B1.3(a)(1) involved more than one participant, and
3 2) that the defendant's culpability for such conduct was
4 relatively minor compared to other participants.

5 According to Application Note 3(C), the determination
6 whether to apply an adjustment pursuant to U.S.S.G. § 3B1.2
7 depends heavily on the facts of the case. In the case at bar,
8 the facts are set forth in the pre-sentence report in paragraphs
9 3, 4, and 7, pages 3 and 4. Aside from the information provided
10 by Emmanuel at the time of his arrest and during the pre-sentence
11 interview, the workings of drug organizations in this district
12 are common knowledge and common sense.

13 The first prong of Webster is met, and Application note 2 is
14 satisfied in this case because there are more than one
15 participant. They include Carlos, who recruited Emmanuel. The
16 person who registered the car in his name, the person(s) who
17 packaged the drugs and secreted them in the car, the person he
18 was instructed to call in Tucson, the people who would retrieve
19 the car and unload it, and the caretaker at the stash house. Of
20 course, the organization starts well before Emmanuel was
21 contacted and well after the drugs land at the stash house.
22 Clearly there was more than one participant in this case. In
23 comparison to the owners, managers, organizers, leaders and
24 distributors, Emmanuel's participation was minor.

25 Application Note 3(A) states that the adjustments apply to
26 defendants who are "substantially less culpable than the average
27

1 participant." Even where a defendant is only held accountable
2 for the conduct in which he "personally was involved and who
3 performs a limited function in concerted criminal activity", that
4 defendant is not precluded from an adjustment for minor
5 participant. The example given in the note is directly on point
6 with the facts in the instant case. The example indicates that
7 even where a defendant is convicted of a drug trafficking offense
8 wherein his role was limited to transportation and where he is
9 only held accountable under U.S.S.G. § 1B1.3 for the quantity of
10 drugs the defendant transported, he may, nevertheless, receive an
11 adjustment under this guideline. Webster requires that the
12 defendant's conduct be relatively minor as compared to the other
13 participants.

14 In the instant case, assuming the position least favorable
15 to the defendant, his role in the offense was that of a courier.
16 Emmanuel was expected to do nothing more than simply move the
17 drugs across the border. He had no information regarding the
18 value of or payment for the drugs. He did not know where or to
19 whom the drugs would be delivered. He was the most expendable
20 participant. The others shielded themselves from danger and from
21 being arrested. Emmanuel was a minor participant.

22 Paragraph 12, page 4, of the pre-sentence report provides no
23 adjustment for role in the offense. Paragraph 9 sets the
24 advisory base offense level at 32 based on the quantity of
25 cocaine. The Justification section on page 10 of the pre-
26 sentence report discusses a hypothetical offense level of 24,
27

1 should Emmanuel be determined to be a minor participant pursuant
2 to U.S.S.G. § 3B1.2(b). Section 2D1.1(a)(3) of the guidelines
3 states that if the base offense level is 32 and the defendant
4 receives an adjustment for minor role, the base offense should be
5 reduced by 2 levels to a level 30. According to the pre-sentence
6 report, the offense level would then be reduced 2 levels for
7 safety-valve and 2 levels for acceptance of responsibility,
8 resulting in a level 24. This is the proper guideline
9 calculation to begin the statutory sentencing analysis.

10 2. 18 U.S.C. § 3553(a)

11 Emmanuel Perez-Ozuna was born to Marina Perez-Ozuna, a
12 single mother, 26 years ago. She was working in Guaymas, Sonora
13 Mexico in the shipyard when she was swept off her feet by Manoliy
14 Raramarduis, a Greek merchant marine. Marina became pregnant
15 with Emmanuel. Manoliy stayed in Mexico for about 8 months and
16 helped with his new son but he did not have permission to live
17 there and he eventually returned to Greece. Until Emmanuel was
18 about 4 years old Manoliy send Marina money to help support their
19 son but as time passed he faded from their lives.

20 Marina had other sons and took in a relative's son also, who
21 she is raising as her own. The family has very strong ties to
22 the United States. Marina's mother was born in Phoenix, Arizona
23 and lived in the United States for approximately 28 years until
24 she returned to Guaymas and married. Based on that information
25 it is possible that Marina has derivative United States
26 citizenship, and thus Emmanuel may also be a United States

27

28

1 citizen.¹ Emmanuel's older brother Jorge lives in Tucson,
2 Arizona. His youngest brother Michael is a United States citizen
3 by birth. Emmanuel has entered the United States with his
4 passport through the port of entry on many occasions.

5 Emmanuel is a very intelligent young man. He graduated from
6 12 years of school at the Centro de Estudios Tecnologicos with
7 half of his grades either 9's or 10's, 10 being a perfect score.
8 Unfortunately, because of the desperate economic situation of his
9 family, Emmanuel had to start working when he was only 11 years
10 old. He has assisted his mother and younger siblings financially
11 ever since. He also served his country as a member of the
12 Mexican military.

13 Emmanuel met his wife Miriam in 2004. They have two
14 children, Grecia their 3 year old daughter, and Emmanuel their 1
15 year old son. The family resides in a 3 room house that belongs
16 to Miriam's mother. Emmanuel, his wife and 2 children sleep in 1
17 room. There is a central room that serves as the kitchen and
18 family room and another bedroom occupied by Miriam's mother and
19 sometimes her step-father. The home has no indoor plumbing.
20 Water is trucked in but there is not always enough to last until
21 the next delivery, especially when the weather is hot. Recently
22 Emmanuel saved enough money to put glass windows in the window
23 frames. The stove is connected through a hole in the wall to a
24 propane cylinder that leans against the outside of the house.

25

26 ¹Counsel is attempting to obtain the information necessary
27 to assist the family in making this determination.

28

1 The oven doesn't work.

2 Emmanuel and his family are very uncomfortable living with
3 Miriam's mother and her husband because they do not get along.
4 There is a lot of tension and pressure on Emmanuel to save enough
5 money to move his family to a place of their own. Miriam has
6 worked in the past but she suffers from debilitating migraine
7 headaches. She used to work in a factory but the loud noise and
8 bright lights triggered her migraines and eventually should could
9 not continue. Miriam explained that when she is sick Emmanuel
10 does everything. He takes care of her and both children. He is
11 a hands-on father and the children are very attached to him.

12 Just before Emmanuel was arrested a couple of things
13 happened that contributed to his desperation. He spoke with his
14 mother about wanting to continue his education to become a pilot.
15 She explained that she could not assist him financially because
16 she still supports 2 children with his help. Marina suggested
17 that Emmanuel contact his father in Greece to see if he might
18 help. He hadn't helped since Emmanuel was 4 years old. Marina
19 gave him a telephone number. Emmanuel spoke with his father who
20 insisted that he had no children in Mexico, in spite of all the
21 photographs Marina has of Manoliy holding his son in Guaymas.
22 Emmanuel was heart-broken.

23 Shortly after that Emmanuel spoke with Miriam about spending
24 \$20.00 on a pair of shoes that he desperately needed. She told
25 him that they only had enough money for milk for the babies. He
26 left the house that day and Miriam never saw him again. She did

27

28

1 not know what happened to him until she received a call that he
2 had been arrested and was in prison. Miriam said that was the
3 worst night of her life.²

4 A correct guideline calculation is only a starting point.
5 Gall v. United States, 128 S.Ct. 586, 596 (2007). The Court must
6 then consider all of the 3553(a) factors to determine if they
7 support the sentence requested by either party. Id. The Court
8 must consider arguments that the guidelines should not apply in a
9 given case. Rita v. United States, 127 S.Ct. at 2763, 2465,
10 2467-68. The judge "may not presume that the Guidelines range is
11 reasonable." Gall, 128 S.Ct. at 596-97 (2007); see also Rita,
12 127 S.Ct. at 2465. The Court must avoid unwarranted sentencing
13 disparities as well as unwarranted sentencing similarities. 18
14 U.S.C. § 3553(a)(6); Gall, 128 S.Ct. at 598-602.

15 The judge "must make an individualized assessment based on
16 the facts presented," and "must adequately explain the chosen
17 sentence to allow for meaningful appellate review and to promote
18 the perception of fair sentencing." Gall, 128 S.Ct. at 597.

19 Courts must impose sentences that are sufficient but not
20 greater than necessary to fulfill the statutory purposes of
21 sentencing, must treat the guidelines as just one of several
22 considerations, and must be free to disagree with the guidelines
23 based solely on policy considerations. Kimbrough v. United
24 States, 128 S.Ct. 558, 564 (2007), 570; Rita, 127 S.Ct. at 2463,

25
26 ²Supporting evidence will be provided prior to sentencing
27 through letters, certificates and a video of the family and
their living conditions.

1 2465, 2468; Gall, 128 S.Ct. at 602.

2 Generally, the Commission used an empirical approach, "based
3 on data about past practices, including 10,000 presentence
4 investigation reports" to devise the guidelines, but it "did not
5 use this empirical approach in developing the Guidelines
6 sentences for drug-trafficking offenses." Kimbrough, 128 S.Ct.
7 at 567. When the guideline itself is unsound and the Commission
8 did not rely on "empirical data and national experience" as a
9 basis for the guideline, it is not an abuse of discretion to
10 determine that the resulting sentence is greater than necessary
11 to achieve the purpose of 18 U.S.C. § 3553, even in a run-of-the-
12 mill case. Kimbrough, Id. at 575.

13 Disagreement with a guideline that does "not exemplify the
14 Commission's exercise of its characteristic institutional role"
15 is entitled to as much appellate "respect" as a fact-based
16 departure or variance. See *Spears v. United States*, 129 S.Ct.
17 840, 843 (2009); *Kimbrough*, 128 S.Ct. At 574-75. See *United*
18 *States v. Thomas*, 595 F.Supp.2d 949 (E.D. Wis. 2009)(imposing
19 below-guideline sentence for attempted distribution of powder
20 cocaine because the Sentencing commission "departed from the
21 empirical approach when setting the Guidelines range for drug
22 offenses, and chose instead to key the Guidelines to the
23 statutory mandatory minimum sentences that Congress established
24 for such crimes," and "sentences in drug cases have since
25 increased far above pre-guideline practice"); *Unites States v.*
26 *Urbina*, 2009 WL 565485, *3(E.D. Wis. March 5, 2009)(following

1 Thomas in conspiracy to distribute powder cocaine case); *United*
2 *States v. Cabrera*, 567 F.Supp.2d 271 (D.Mass. 2008)(disagreeing
3 with over-emphasis on drug quantity, under-emphasis on minimal
4 role).

5 In the present case the guidelines relied upon in
6 determining the advisory guideline range are not based on
7 empirical data. The Court is not obliged to impose a within
8 guidelines sentence. Based on all of the factors set forth in
9 the statute, the intent will be fulfilled if the Court imposes a
10 sentence substantially below the advisory guideline range set
11 forth in the pre-sentence report. A sentence of 60 months, as
12 recommended in the pre-sentence report, is far greater than
13 necessary to comply with the statutory sentencing purposes in
14 this case. "Guidelines are not only *not mandatory* on sentencing
15 courts; they are also not to be *presumed* reasonable. *Nelson v.*
16 *United States*, 129 S.Ct. 890, 892 (2009)

17 Conclusion

18 In conclusion, Mr. Perez-Ozuna prays this Court find that
19 his participation was minor and that based on all of the
20 mitigating factors a sentence of 36 months in prison is
21 sufficient.

22 Respectfully submitted May 27, 2009.

23 /s/ Leslie A. Bowman
24 Leslie A. Bowman
25 Attorney for Defendant

26 Copy delivered by ECF this date to:

27 Ann L. Demarais, AUSA

28 Lisa S. Hage, USPO