No. _____

In the

Supreme Court of the United States

Bryan Montalvo,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether a circuit court of appeals has jurisdiction to review the denial of a motion for downward departure?

PARTIES TO THE PROCEEDING

Petitioner is Bryan Montalvo, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit:

- *United States v. Montalvo*, No. 19-11306 (5th Cir. Dec. 7, 2020)
- *United States v. Montalvo*, No. 4:19-MJ-236 (N.D. Tex. Nov. 22, 2019)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brent Anderson seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *United States v. Montalvo*, 836 F. App'x 300 (5th Cir. 2020). The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit entered judgment on December 7, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES AND GUIDELINES PROVISIONS

This case involves 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291:

> (a) Appeal by a defendant.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or
>
> (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

18 U.S.C. § 3742(a).

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1291.

STATEMENT OF THE CASE

On March 7, 2019, officers arrested Bryan Montalvo, Petitioner, and an accomplice in possession of 1.074 kilograms of methamphetamine. (ROA.134). Mr. Montalvo admitted that he possessed the methamphetamine with an intent to distribute it to others. (ROA.30).

Federal prosecutors charged Mr. Montalvo by Information with possession with intent to distribute 50 grams or more of a mixture and substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). (ROA.20). On June 7, 2019, Mr. Montalvo pleaded guilty to the one-count Information (ROA.90).

Based on the drug quantities found in Mr. Montalvo's possession as well as a calculation of the quantities described in Facebook messages, U.S. Probation applied a base offense level of 34. (ROA.137). Probation then added two 2-level enhancements, one for possession of a dangerous weapon under U.S. Sentencing Guidelines Manual (USSG) § 2D1.1(b)(1), and one for maintaining a drug premises under USSG § 2D1.1(b)(12). (ROA.137). After a 3-level reduction for acceptance of responsibility, Mr. Montalvo's total offense level was 35. (ROA.138). In combination with a Criminal History Category of VI (ROA.146), Mr. Montalvo's advisory sentencing range was 292 to 365 months. (ROA.151).

Between his arrest and sentencing, Mr. Montalvo cooperated extensively with federal agents, sitting for four interviews. Over the course of these interviews, Mr. Montalvo revealed information about his co-conspirators that led to ten federal arrest warrants and, at the time of sentencing, eight arrests with pending charges.

(ROA.106-08). According to the government, although some of the offenders were already known to state investigators, it was Mr. Montalvo's cooperation that "spurred the federal investigation that allowed us to investigate and establish that they were part of an overarching conspiracy." (ROA.108). An agent testified further at the sentencing hearing that "[Mr. Montalvo's] information was the foundation of our federal investigation." (ROA.109).

Mr. Montalvo's cooperation generated a ripple-effect of government knowledge, allowing the government to acquire cooperation from six of the eight new arrestees. (ROA.109-10). There were an additional eight offenders—bringing the sum total to 18—about which Mr. Montalvo provided substantial assistance to the government. (ROA.111). Defense counsel did not exaggerate when he explained, at the sentencing hearing, that Mr. Montalvo had "burned all of his bridges." (ROA.112).

In response to Mr. Montalvo's substantial assistance, the government moved for a downward departure under U.S. Sentencing Guidelines Manual § 5K1.1. (*See* ROA.105-12). The district court found substantial assistance (ROA.111-12) but denied the government's motion (ROA.169) because the district court believed—based on Mr. Montalvo's statements in his proffer interviews—that Mr. Montalvo was more culpable than the advisory sentencing range reflected. (ROA.37-38). The district court also appeared to consider a hypothetical Guidelines range, reflecting what the range *should have been*, as a sentencing factor supporting an upward variance. (ROA.37-38). Ultimately, after denying the motion for downward departure, the district court imposed a within-Guidelines sentence of 292 months. (ROA.123).

The Fifth Circuit affirmed. It held that the within-Guidelines sentence was not substantively unreasonable. It then held that it did not have jurisdiction to consider whether the district court abused its discretion when denying the government's motion for downward departure. Mr. Montalvo now asks that this Court grant his Petition.

REASON FOR GRANTING THIS PETITION

I. This Court Should Grant The Petition In Order To Resolve The Conflict Over Appellate Jurisdiction To Review Discretionary Denials of Downward Departures.

"In bygone days—when the federal sentencing guidelines were thought to comprise a mandatory sentencing regime—[appellate courts] routinely held that discretionary departure decisions were not reviewable unless the sentencing court misunderstood its authority or committed an error of law." *United States v. Anonymous Defendant*, 629 F.3d 68, 73 (1st Cir. 2010). As this Court recognized in 2002, "[e]very Circuit" had held that it lacked power to consider a defendant's claim "that the district court abused its discretion in refusing to depart" as long as the court understood it had the authority to do so. *United States v. Ruiz*, 536 U.S. 622, 627 (2002). This restriction was deemed "jurisdictional," and involved a narrow construction of an appellate court's power under § 3742(a). *Id.*

But the so-called "jurisdictional" limit was not solely based on § 3742(a)'s text. Chiefly, the "jurisdictional" limitation arose from the *mandatory* nature of the guidelines. A district court's within-range sentence was insulated from further appellate review. When a defendant complained that the district court refused to depart below the guideline range, the "gist" of the argument was "that the district court gave him precisely the sentence required by law." *United States v. Rojas*, 868 F.2d 1409, 1410 (5th Cir. 1989); *United States v. Buenrostro*, 868 F.2d 135, 139 (5th Cir. 1989).

"Developments in the law have overtaken this argument." *Anonymous Defendant*, 629 F.3d at 73. In *Booker*, this Court "severed and excised" all provisions

of federal law that depended upon the mandatory status of the Guidelines. *United States v. Booker*, 543 U.S. 220, 245 (2006); *see also Pepper v. United States*, 562 U.S. 476, 495 (2011) (recognizing that 18 U.S.C. § 3742(g)(2) was invalid because "the rationale we set forth in [*Booker*] for invalidating §§ 3553(b)(1) and 3742(e) applies equally to § 3742(g)(2)").

Now that the Guidelines are advisory, a defendant is free to argue on appeal that the district court should have imposed a sentence below the advisory range. An appellate court must review that claim on direct appeal:

> Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.

Gall v. United States, 552 U.S. 38, 51 (2007). *Gall* and *Booker* directly overrule the pre-*Booker* consensus described in *Ruiz*, 536 U.S. at 627. A district court's discretionary decision to impose a within-guideline-range sentence is now fair game for a defendant's sentencing appeal.

The so-called jurisdictional limit "made sense when the Guidelines were considered mandatory." *United States v. Plouffe*, 445 F.3d 1126, 1130 (9th Cir. 2006). "However, it would not make sense to so restrict jurisdiction on appeal now that the Guidelines must be viewed, per the Supreme Court's *Booker* holding, as merely

advisory, with sentencing courts exercising discretion within and beyond Guidelines ranges, guided by the statutory purposes of sentencing." *Id.* At this time, there is simply no reason to retain the so-called "jurisdictional" limit.

Oddly, the limit survives in the Fifth Circuit, and the court continues to invoke the rule and describe it as "jurisdictional." Pet. App. 3a–4a; s*ee United States v. Valencia-Cardenas*, 588 F. App'x 330, 331 (5th Cir. 2014) (unpub.) (citing *United States v. Hernandez*, 457 F.3d 416, 424 (5th Cir.2006)) ("To the extent that Valencia–Cardenas contends that the district court erred in denying him a downward departure under Application Note 8 to U.S.S.G. § 2L1.2 based upon cultural assimilation, we lack jurisdiction to review his claim."); *see also United States v. Tuma*, 738 F.3d 681, 691 (5th Cir. 2013); *United States v. Alaniz*, 726 F.3d 586, 627 (5th Cir. 2013); *United States v. Lucas*, 516 F.3d 316, 350–351 (5th Cir. 2008); *United States v. Sam*, 467 F.3d 857, 861 (5th Cir. 2006).

Thus, when a defendant argues "that the district court should have granted a downward departure," the Fifth Circuit will "reject" the argument due to lack of jurisdiction and will "not reach its merits." *United States v. Jefferson*, 751 F.3d 314, 322–323 (5th Cir. 2014). That is precisely what happened in this case. Pet. App. 3a–4a. The so-called "jurisdictional" limit resembles nothing so much as a vestigial organ: it may have served our ancestors well, but no longer serves any useful function. Its continued existence causes problems and excision is necessary.

A. The Circuits are Divided on This Important Jurisdictional Question.

As noted above, the First Circuit properly recognized that the so-called "jurisdictional" limit holds no place under modern sentencing jurisprudence. *Anonymous Defendant*, 629 F.3d at 73–75. The Ninth Circuit has also rejected the "jurisdictional" argument, at least where the departure issue implicates the overall reasonableness of the sentence. *United States v. Crowe*, 563 F.3d 969, 978 n.19 (9th Cir. 2009). The Fifth Circuit and many other circuits continue to dismiss appeals or ignore departure-based arguments under a "jurisdictional" reasoning. Pet. App. 3a–4a; *see also Jefferson*, 751 F.3d at 322–323; *United States v. Storey*, 595 F. App'x 822, 825 (10th Cir. Dec. 17, 2014) (quoting *United States v. Fonseca*, 473 F.3d 1109, 1112 (10th Cir.2007)); *United States v. Vallejo*, 593 F. App'x 586, 589 (8th Cir. 2014) (citing *United States v. Patten*, 397 F.3d 1100, 1105 (8th Cir.2005)); and *United States v. Handerhan*, 739 F.3d 114, 122 (3d Cir. 2014) (quoting *United States v. Vargas*, 477 F.3d 94, 103 (3d Cir.2007)). These courts cite and rely upon pre-*Booker* precedent without acknowledging that *Booker* undermined or removed the statutory foundation for those decisions. The conflict between the First Circuit and the other circuits, including the court below, is sufficient to warrant certiorari under Supreme Court R. 10(a).

B. This Court Should Grant The Petition To Continue Refining Lower Courts' Use Of The "Jurisdictional" Label.

"Only Congress may determine a lower federal court's jurisdiction." *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004); *see also Kline v. Burke Constr. Co.*, 260 U.S. 226,

234 (1922) ("Only the jurisdiction of the Supreme Court is derived from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress."). The Court of Appeals cannot shrink from or shirk its duty to decide all cases and issues properly presented. The lower courts have a "virtually unflagging obligation" to exercise statutory appellate jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

A federal court therefore errs if it imbues a court-made rule with "jurisdictional" significance. *See Snyder v. Harris*, 394 U.S. 332, 334–342 (1969) (holding that an amendment to court rule concerning aggregation of damages could not overcome statutory amount-in-controversy requirement for diversity jurisdiction); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 40 (1941) (recognizing "the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute"). In *Kontrick*, this Court warned lower courts against using "the label 'jurisdictional' for non-statutory rules." *Kontrick*, 540 U.S. at 455. In the interest of "[c]larity," the Court admonished, the "jurisdictional" label must apply only to those "prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Id*.

This Petition presents an opportunity to correct an improper assignment of jurisdictional significance. That opportunity would independently justify certiorari jurisdiction even without the entrenched circuit split.

To assist lower courts with the process of re-labeling, this Court has propounded a "clear-statement principle," which "makes particular sense" when dealing with statutes conferring appellate jurisdiction: "A rule is jurisdictional '[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional.' But if 'Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional.'" *Gonzalez*, 132 S. Ct. at 648–649 (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515–516 (2006)). Following *Gonzalez* and *Arbaugh*, then, any "jurisdictional" limit on appellate jurisdiction must be clearly stated in a statute. *Id.*

C. The Fifth Circuit had statutory jurisdiction under 28 U.S.C. § 1291.

Congress has granted jurisdiction to the circuit courts to hear "appeals from all final decisions of the district courts" within their respective circuits. 28 U.S.C. § 1291. "Final judgment in a criminal case . . . means sentence. The sentence is the judgment." *Corey v. United States*, 375 U.S. 169, 174 (1963) (quoting *Berman v. United States*, 302 U.S. 211, 212 (1937)). Thus, even before the Sentencing Reform Act, circuit courts had subject-matter jurisdiction to hear appeals based on challenges to a criminal sentence.

Even so, federal courts traditionally refused to consider appeals based on claims that a sentence (within statutory limits) was nonetheless too harsh. This refusal was not really "jurisdictional" in the modern sense. *See Koon v. United States*, 518 U.S. 81, 96 (1996) ("Before the Guidelines system, a federal criminal sentence within statutory limits was, *for all practical purposes*, not reviewable on appeal.")

(Emphasis added). Instead, these cases reflected a reluctance to invade the sentencing judge's prerogatives. For example, in the watershed double-jeopardy case *Blockburger v. United States*, 284 U.S. 299 (1932), this Court stated:

> Under the circumstances, so far as disclosed, it is true that the imposition of the full penalty of fine and imprisonment upon each count seems unduly severe; but there may have been other facts and circumstances before the trial court properly influencing the extent of the punishment. In any event, the matter was one for that court, with whose judgment there is no warrant for interference on our part.

Blockburger, 284 U.S. at 305*; see also Gore v. United States*, 357 U.S. 386, 393 (1958) ("First the English and then the Scottish Courts of Criminal Appeal were given power to revise sentences, the power to increase as well as the power to reduce them. This Court has no such power.") (internal citations omitted) and *Townsend v. Burke*, 334 U.S. 736, 741 (1948) ("The sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction."). This reluctance was not a "jurisdictional" limitation under the modern label; it was nowhere stated in statute, and certainly not in a statute that clearly denominated the rule as jurisdictional. Likewise, the reluctance did not displace the appellate courts' authority to hear appeals from "final decisions" in criminal cases under § 1291. This was more a shorthand way of describing deferential review.

In passing the Sentencing Reform Act, Congress sought "to expand appellate review over sentencing." *United States v. Hahn*, 359 F.3d 1315, 1322 (10th Cir. 2004) (en banc). The Senate Report stated, in relevant part:

> Appellate courts have long followed the principle that sentences imposed by district courts within legal limits should not be disturbed. The sentencing provisions of the reported bill are designed to preserve the

> concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court. At the same time, they are intended to afford enough guidance and control of the exercise of that discretion to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing.

S. Rep. No. 98-225 at 150 (1983). In other words, § 3742 was designed to address appellate courts' traditional reluctance to revisit discretionary decisions, not to limit the statutory discretion conferred by 28 U.S.C. § 1291. Consistent with that design, circuit courts habitually assume jurisdiction over sentencing appeals through both § 1291 and § 3742. *Hahn*, 359 F.3d at 1320–1321. "Thus, even assuming that the government's § 3742(a)(1) analysis is correct," a Court of Appeals "ha[s] statutory subject matter jurisdiction under § 1291 over sentencing appeals." *Id.* at 1322; *see also United States v. Jacobo Castillo*, 496 F.3d 947, 951 (9th Cir. 2007) (en banc) ("Finally, Congress has conferred jurisdiction on the courts of appeals to hear 'appeals from all final decisions of the district courts of the United States.' In the absence of some other provision that would deprive us of appellate jurisdiction, we have both the constitutional power and congressional authorization to hear the instant appeal.") (citations omitted).

D. Title 18, Section 3742 contains no "clear statement" depriving the Fifth Circuit of subject-matter appellate jurisdiction.

The Sentencing Reform Act's appellate review provision, which was designed to expand appellate review, cannot provide the statutory foundation for the so-called "jurisdictional" limit at issue here. As noted previously, § 3742(a) provides that a defendant may file a notice appeal if his sentence: (1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; (3) is greater than the sentence specified in the applicable guideline range; or (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable. *See* 18 U.S.C. § 3742(a). But if those four categories exhaust the circuit courts' sentencing jurisdiction, then how is it that those courts perform substantive reasonableness review of within-guideline-range sentences? Where a district court abuses its sentencing discretion (e.g. by entering a substantively unreasonable sentence or unreasonably refusing to grant a downward departure), then that sentence is reversible under *Booker* or *Gall*.

Under the mandatory guideline regime, a defendant could not challenge the severity a sentence that fell within a properly calculated guideline range. There was no "reasonableness" or "abuse-of-discretion" review for a sentence within the guideline range. Unless the judge departed or made an error in the calculation of the guideline range, the defendant was out-of-luck. But that all changed after *Booker*: "Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must" now "review the sentence under an abuse-of-discretion standard." *Gall*, 552 U.S. at 51. These points are non-controversial.

Critically, section 3742(a) remains unchanged after *Booker*. The substantive analysis has shifted mightily, but appellate jurisdiction remains the same. If § 3742(a) were truly jurisdictional (it isn't), and if it truly prohibited courts from reviewing within-guideline-range sentences (it doesn't), then *Booker* necessarily

excised that provision just as it necessarily and implicitly excised § 3742(g)(2). *See Pepper*, 562 U.S. at 495–496.

The Fifth Circuit seems to agree that it has jurisdiction to review the substantive reasonableness of a within-range sentence, but it persists in holding that it lacks jurisdiction to consider what the Sentencing Commission's own departure provisions have to say. *See United States v. Nikonova*, 480 F.3d 371 (5th Cir. 2007). But § 3742(a) draws no such distinction.

Section 3742(a)(1) does allow a defendant to appeal a sentence imposed "in violation of law," and courts consistently held (prior to *Booker*) that this did not reach the claim that an otherwise lawful within-range sentence was simply too long. *See Ruiz*, 536 U.S. at 627. But after *Booker* and *Gall*, appellate courts *must* review within-guideline-range sentences for abuse of discretion. If *Booker* is deemed to re-interpret § 3742(a)(1) to reach abuse-of-discretion claims, then refusals to depart are reviewable in the same manner as refusals to vary. If, as Petitioner contends, the Fifth Circuit has jurisdiction under 28 U.S.C. § 1291, then it was improper to refuse to consider the departure argument for lack of jurisdiction. Pet. App. 3a–4a. Put more simply, if a sentence resulting from an abuse of discretion is "imposed in violation of law," then an unreasonable denial of a downward departure fits within that description just as easily as an unreasonable denial of a downward variance. There is certainly no clear statement within § 3742(a)(1) that distinguishes between those two kinds of challenges. Either way, the decision below was wrong.

II. Lower Courts' Refusal To Consider Departure-Based Arguments Prevents Them From Discharging Their Duties Under The Advisory Guideline Regime.

Even after *Booker*, all levels of federal courts and the Sentencing Commission continue to work toward development of more appropriate guidelines. In *Rita v. United States*, this Court explicitly stated that appellate courts have a role to play in facilitating the evolution of the guidelines, and that role *explicitly includes* consideration of decisions under the departure provisions:

> The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases, may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The courts of appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly.
>
> The result is a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice. Given the difficulties of doing so, the abstract and potentially conflicting nature of § 3553(a)'s general sentencing objectives, and the differences of philosophical view among those who work within the criminal justice community as to how best to apply general sentencing objectives, it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.

Rita v. United States, 551 U.S. 338, 350 (2007). But by removing a judge's departure decision from the appellate calculus, the Fifth Circuit's "jurisdictional" rule stymies the institutional dialogue envisioned in *Rita*. Just as the Commission benefits from appellate decisions both affirming and reversing sentences imposed under the advisory guidelines, the Commission would benefit from appellate analysis of the

departure provisions. But under the Fifth Circuit's rule, those decisions are only reviewed if the district court grants a departure.

III. The Outcome Would Be Different If The Fifth Circuit Considered the Government's Departure Motion.

Because the Fifth Circuit (mistakenly) believed it had no jurisdiction to review the district court's denial of the government's motion for downward departure, the district court's judgment was affirmed. But if the Court had reviewed the departure decision, the outcome would likely have been different.

The story of this case is a man who was caught with a substantial amount of methamphetamine and, rather than stonewall authorities, decided to give up every name he knew to assist the government in its narcotics investigations. In doing so, Mr. Montalvo provided substantial assistance to an astonishing degree. (ROA.105-12). He did so in confidence with the FBI and DEA with the hopes that the government, once it saw the impact of his information, would recommend a below-guidelines sentence. After meeting with the FBI four times and perhaps other times with the DEA, the government was satisfied that Mr. Montalvo had done enough. Accordingly, it filed a motion for downward departure under U.S. Sentencing Guidelines Manual § 5K1.1. The government also did more. At the sentencing hearing, it put on an agent in support of its motion that described, in detail, the level of assistance that Mr. Montalvo provided. (ROA.105-12).

The district court agreed, finding, on the Record, that Mr. Montalvo provided substantial assistance. (ROA.111-12). Yet the court still denied the government's motion and imposed a within-Guidelines sentence. (ROA.169). The district court had

the discretion to do so, under U.S. Sentencing Guidelines Manual § 1B1.8(b)(5) (2018). Nonetheless, when weighing the considerations the court must make in § 5K1.1(a), the district court clearly abused its discretion in this case.

CONCLUSION

For all the foregoing reasons, the Petition for a writ of certiorari should be granted. Petitioner asks that this Court either reverse the Fifth Circuit outright or set the case for oral argument.

Respectfully submitted,

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