

No. 18-

IN THE
Supreme Court of the United States

GERARDO OMAR FRANCO-DE LA CRUZ ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner, GERARDO OMAR FRANCO-DE LA CRUZ, pleaded guilty pursuant to a plea agreement to one count of possession with intent to distribute 100 kilograms or more of marijuana. The District Court sentenced him to 58 months confinement with the Bureau of Prisons despite the Government's request for a departure to 47 months. The Government made this request pursuant to U.S.S.G. § 5K1.1 based on the cooperation of Mr. Franco-De La Cruz during the prosecution of his case.

On direct appeal to the United States Court of Appeals for the Fifth Circuit ("the Fifth Circuit"), Mr. Franco-De La Cruz argued the District Court committed reversible error because it applied non-assistance-related concerns to the determination of the degree of the departure. He asserted that, pursuant to the Fifth Circuit's previous ruling, "the extent of a 5K1.1 departure must be based solely on assistance-related concerns." *United States v. Desselle*, 450 F.3d 79, 82 (5th Cir. 2006) (emphasis added). Nonetheless, the Fifth Circuit concluded there was no error because Mr. Franco-De La Cruz did "not show that the error affected his substantial rights." (Appendix A, page 2).

As asserted below, Mr. Franco-De La Cruz argues the correct standard of review is for abuse of discretion. Alternatively, he continues to assert that if review is for plain error, the District Court's ruling did affect his substantial rights. Therefore, he asserts the Fifth Circuit has so far departed from the accepted and judicial proceedings as to call for this Court's use of its supervisory powers. Finally, regardless of the appropriate standard of

review, Mr. Franco-De La Cruz respectfully contends that he has shown this Court should exercise its supervisory powers and proceed with further review of this case.

In sum, the Fifth Circuit has entered a decision which has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power, and decided an important federal question in a way that conflicts with the relevant decisions of this Court. This Court has explained the Fifth Amendment to the United States Constitution requires that no person be deprived of liberty without due process of law. *Jones v. Flowers*, 547 U.S. 220, 226-239 (2006). Mr. Franco-De La Cruz respectfully submits he was deprived of this right and, hence, there is thus a compelling reason to grant this petition. SUP. CT. R. 10(a), (c)

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Gerardo Omar Franco-De La Cruz:	Petitioner (Defendant-Appellant in the lower Courts)
United States of America:	Respondent (Plaintiff-Appellee in the lower Courts)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, GERARDO OMAR FRANCO-DE LA CRUZ, respectfully requests this Honorable Court grant this petition and issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit. To this end, Mr. Franco-De La Cruz submits the Court applied a plain error analysis, which is not the correct standard of review. Respectfully, this so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power and is contrary to precedent of this Court and precedent of the Fifth Circuit that it requires further review. In the alternative, regardless of the correct standard of review, Mr. Franco-De La Cruz asserts there was reversible error which calls for this Court to exercise its supervisory power.

CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

From the Federal Courts:

The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Gerardo Omar Franco-De La Cruz*, No. 17-40339 (5th Cir. Mar. 14, 2018), appears at Appendix A to this petition and is unreported.

The Judgment in a Criminal Case of the United States District Court for the Southern District of Texas, Brownsville Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

None.

GROUND FOR JURISDICTION

This petition arises from a direct appeal which granted final and full judgment against Petitioner, GERARDO OMAR FRANCO-DE LA CRUZ. This action is on a criminal prosecution initiated by the Government. Mr. Franco-De La Cruz pleaded guilty to one count of possession with intent to marijuana. (Exhibit A, p. 1). The District Court sentenced Mr. Franco-De La Cruz to serve 58 months in the custody of the Bureau of Prisons. The Fifth Circuit affirmed the District Court's decision. (Exhibit A, p. 3). The jurisdiction of this Court is respectfully involved under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION

U.S. CONST. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Mr. Franco-De La Cruz pleaded guilty to Count One of an indictment alleging that he possessed with intent to distribute more than 100 kilograms of marijuana. ROA.60-61. The remaining counts were dismissed. ROA.2-3. The Government moved for a downward departure at sentencing to a 47-month sentence. ROA.154-55.

The District Court, however, did not follow the Government's recommendation. The Judge sentenced Mr. Franco-De La Cruz to serve a term of 58 months in the custody of the Federal Bureau of Prisons. ROA.161.

Before sentencing, a United States Probation Officer prepared a Presentence Investigation Report ("PSR" or "the report"), which was later revised. ROA.171-87, 190-206. In relevant part, the PSR provides the recognition of potential sentencing Guideline provisions for Mr. Franco-De La Cruz and a conclusion as to which Guidelines are applicable in this case. ROA.190-206. More specifically, the PSR provides:

21. In the instant offense, Franco-De La Cruz was the driver of a vehicle loaded with 119.1 kilograms of marihuana. Additionally, he is accountable for the 215.32 kilograms of marihuana seized on February 16, 2016, and the 257.64 kilograms of marihuana seized on April 18, 2016. Therefore, he is accountable for the total amount of 592.06 kilograms of marihuana seized. The investigation revealed Franco-De La Cruz works for a DTO as the driver of narcotics load vehicles. His role is that of a paid drug courier responsible for transporting narcotics to a predetermined location in the United States. There is no evidence to establish Franco-De La Cruz exercised managerial authority over any other participant in the instant case. He was an active, knowing, and willing participant, instrumental in the preparation of the offense. The defendant's conduct does not merit an aggravating or mitigating role adjustment.
22. Franco-De La Cruz recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from CBP officers on three (3) separate occasions. On each occasion, the defendant drove his vehicle at high rates of speed through intersections, a University Campus, and a school zone during operational hours. Additionally, on one (1) instance, Franco-De La Cruz disregarded a stop sign and his vehicle collided with another vehicle.

23. An accident report received from the Brownsville Police Department identifies the occupants of the vehicles involved in the collision on April 18, 2016. However, attempts to contact the listed victims have been futile. It is noted that the accident report indicates that all the individuals involved in the collision refused medical attention.

ROA.195.

The Probation Officer determined a base offense level assessment of 26 due to relevant conduct. ROA.197. The Officer concluded that Mr. Franco-De La Cruz was to be held accountable for “at least 400 but less than 700 kilograms of marihuana.” ROA.197. Hence, as set forth in the PSR, U.S.S.G. § 2D1.1(b)(17) set the base offense level at 26. ROA.197.

Mr. Franco-De La Cruz was then assessed a 2-level adjustment upward because he “recklessly created a substantial risk of death or serious bodily injury to another person.” ROA.197. Consequently, a 2-level adjustment was imposed in accordance with U.S.S.G. § 3C1.2. ROA.197. The end result was an adjusted offense level subtotal of 28. ROA.197.

Finally, the Probation Officer deducted 3 levels from the base offense level for acceptance of responsibility under U.S.S.G. § 3E1.1(a) and § 3E1.1(b). ROA.197. The deduction of these 3-levels reduced Mr. Franco’s assessed base offense level to 25. ROA.198.

The Probation Officer then calculated criminal history. ROA.198. To this end, Mr. Franco-De La Cruz was assessed 3 criminal history points. ROA.198-200. This placed Mr. Franco-De La Cruz’s criminal history at Category II. ROA.200. Hence, Mr. Franco-De La Cruz’s imprisonment range was calculated by the Probation Officer to be 63 to 78 months in custody. ROA.203.

Significantly relevant to this Petition was the Probation Officer's acknowledgment that the mandatory statutory minimum in this case was a term of 5-years' imprisonment in the custody of the Bureau of Prisons. ROA.200.

The Government filed a motion for downward departure from this statutory minimum based on substantial assistance by Mr. Franco-De La Cruz to the Government. ROA.217-18.

The motion, which is of great importance to this Petition, provides:

The United States hereby requests that, pursuant to Title 18, United States Code, Section 3553(a) and Rule 5K1.1 of the Sentencing Guidelines, this Honorable Court consider reducing defendant's sentence in light of his assistance. The defendant has debriefed and cooperated with the United States and has assisted agents with the Department of Homeland Security on their continued investigation of the narcotics smuggling organization involved in the offense charged as follows:

1. Defendant has provided the identity of co-conspirators located in the Rio Grande Valley. Agents were able to identify a target of investigation based on this information. The target, Alejandro Quezada, is responsible for the transportation of over 1,000 kilograms of marihuana into the United States and was the manager of a failed narcotic load that resulted in a rollover death on June 29, 2016. The investigation of Alejandro Quezada is incomplete, but the Government expects to seek an indictment against Alejandro Quezada in the near future.
2. Defendant has agreed to testify as a witness before any Grand Jury as may be requested by the United States.
3. Defendant has agreed to testify [at] any other judicial proceeding when called upon to do so.
4. Defendant has agreed to continue to provide assistance to the United States as necessary for investigation and prosecution purposes.

This assistance was significant and useful. The information was truthful, complete, reliable, and timely offered. Based on the nature, extent and significance of the defendant's assistance, the United States would

respectfully request that this Honorable Court grant a downward departure of **up to one-fourth (1/4)** from the advisory Sentencing Guidelines, that are applicable to the defendant. The United States respectfully requests no additional departure based on substantial assistance.

ROA.219-20 (emphasis in original). Mr. Franco-De La Cruz also filed a motion joining in the downward departure request which had been made by the Government. ROA.157-58.

At sentencing, the Court granted the Government's motion for a downward departure.

ROA.154. The prosecution then argued:

With that, Your Honor, Defendant scores an offense level of 25, his criminal history category of two. Prior to the downward departure, his guideline range would be [at] 63 to 78. After the Court's granting of the departure, his new guideline range is 47 to 58 months.

The Government recommends the low end of 47 months.

ROA.155 (emphasis added). The attorney for Mr. Franco-De La Cruz next addressed the Court. He also stated:

We would respectfully that the Court follow the agreement and recommendation of the U.S. Attorney and sentence [Mr. Franco-De La Cruz] to 47 months.

ROA.158-59 (emphasis added).

The District Court then adopted the factual findings and Guideline applications in the PSR. ROA.160-61. However, despite the substantial assistance provided to the Government by Mr. Franco-De La Cruz, and the request by both the Government and Mr. Franco, the Judge declined to sentence him to 47 months. Instead, contrary to the Government's 5K1.1 recommendation, the District Court in determining the extent of the sentence reduction applied non-assistance-related concerns to determine the amount of time Mr. Franco-De La

Cruz would spend in prison. ROA.161. Specifically, the Judge stated he was imposing the 58-month-sentence because Mr. Franco-De La Cruz had been involved in the car chase with law enforcement. ROA.161. In this regard, the Judge stated:

It's the judgment of the Court that Defendant, Gerardo Omar Franco-DeLaCruz, is hereby committed to the custody of the Bureau of Prisons for a term of 58 months.

I'm granting the Government's downward departure, but I'm sentencing Mr. Franco at the high end due to the violence he brought to this country when he endangered officers and civilians in the car chase.

I'm not granting any further downward departure because of those reasons, the nature and circumstances of this offense.

ROA.161.

SUMMARY OF THE ARGUMENT

Mr. Franco-De La Cruz contends the District Court, as affirmed by the Fifth Circuit, committed reversible error by using non-assistance-related concerns in determining the departure at sentencing as is required by the principles governing § 5K1.1 departures and sentencing matters in general. Additionally, the Fifth Circuit's decision that Mr. Franco-De La Cruz has not shown this error affected his substantial rights is an error over which this Court should exercise jurisdiction and grant this Petition.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

The Decision by the Fifth Circuit

The Fifth Circuit did not find that the District Court did not reversibly err, but rather concluded that, if there were error, Mr. Franco-De La Cruz failed to show the error affected

his substantial rights. (Appendix A, page 2). The decision by the Fifth Circuit provides in its entirety:

Gerardo Omar Franco-De La Cruz appeals the 58-month sentence imposed on his guilty plea conviction of possession with intent to distribute marijuana. Because Franco-De La Cruz did not alert the district court to the specific issues he now raises on appeal, we review for plain error. *See United States v. Neal*, 578 F.3d 270, 270 (5th Cir. 2009).

First, Franco-De La Cruz argues that the district court improperly limited the extent of his downward departure by considering improper factors. *See United States v. Desselle*, 450 F.3d 179, 182 (5th Cir. 2006). If we assume without deciding that the district court's comments at sentencing reflect a clear or obvious error, we nonetheless conclude that Franco-De La Cruz has not shown that the error affected his substantial rights. *See United States v. Escalante-Reyes*, 689 F.3d 415, 424 (5th Cir. 2012) (en banc); *United States v. Malone*, 828 F.3d 331, 341 (5th Cir.), *cert. denied* 137 S. Ct. 526(2016) (finding harmless error where the district court merely "muddled the steps" in formulating the sentence).

Second, Franco-De La Cruz disagrees with how the district court balanced the pertinent § 3553(a) sentencing factors. We perceive no reversible error. *See Gall v. United States*, 552 U.S. 38, 51 (2007); *Malone*, 828 F.3d at 342 & n.41.

AFFIRMED.

(Appendix A, pages 1-2) (emphasis in original).

II.

Harm and Affect on Mr. Franco-De La Cruz's Substantial Rights

As noted above, the Fifth Circuit did not address error, finding instead there was no harm. This finding was apparently based on the Government's argument before the Fifth Circuit that any error was harmless because, if the Fifth Circuit remanded for resentencing, the "district court would simply grant Franco-De La Cruz a larger § 5K1.1 departure and then adjust [the sentence] upward in light of the § 3553(a) factors to reach its intended

sentence of 58 months.” (Government’s Brief, pages 17-18). Apparently, the Fifth Circuit agreed with this conclusion because it found that Mr. Franco-De La Cruz had not shown harm. Respectfully, the Government’s argument and the Fifth Circuit’s conclusion are based on pure speculation rather than evidence showing there was no harm.

In fact, the evidence of record when properly considered demonstrates Mr. Franco-De La Cruz has shown his rights were substantially violated when the District Court considered non-assistance-related-factors when determining the extent of the downward departure in his sentence. In this regard, the evidence shows the District Judge never stated he was applying only assistance-related factors in determining the extent of the sentence imposed. Indeed, the Judge specifically stated on the record that he was **not** relying on such factors when determining the extent of the departure in Mr. Franco-De La Cruz’s sentence. (ROA.161). Thus, Mr. Franco-De La Cruz has been harmed because he has shown the sentence might have been different once the District Judge applied the proper sentencing factors pursuant to § 5K1.1. Accordingly, it cannot be concluded the error was harmless or that Mr. Franco-De La Cruz’s substantial rights were not violated. *United States v. Carrillo*, 660 F.3d 914, 926-27 (5th Cir. 2011). Therefore, whether there was error at sentencing must be addressed.

III.

There was Reversible Error at Sentencing

Generally speaking, federal courts have developed a straightforward formula to prevent constitutionally infirm and inconsistent sentencing outcomes. To this end, the Guideline range must first be determined. *Kimbrough v. United States*, 552 U.S. 85, 108-10

(2007); *Gall v. United States*, 552 U.S. 38, 51 (2007); *Rita v. United States*, 551 U.S. 338, 364 (2007). The various rules for determining the Guideline range to be applied by the District Court and how this Appellate Court reviews those findings and conclusions have been discussed by this Circuit on numerous occasions. *See e.g., United States v. Acosta*, 619 F. App'x 403, 404 (5th Cir. 2015); *United States v. Alaniz*, 726 F.3d 586, 618-19 (5th Cir. 2013); *United States v. Longstreet*, 603 F.3d 273, 275-76 (5th Cir. 2010). This process is important because, although the United States Court of Appeals for the Fifth Circuit (sometimes referred to as “this Court” or “the Fifth Circuit”) presumes sentences within the Guideline range are reasonable, the reasonableness of the sentence is the next consideration for sentencing. *Gall*, 552 U.S. at 51; *Rita*, 551 U.S. at 364.

Thus, after consulting and considering the Guidelines, the sentencing Judge must impose a “reasonable” sentence. *Gall*, 552 U.S. at 51. Whether a sentence is reasonable depends not only on the advisory sentencing range, but also on the numerous other factors listed under 18 U.S.C. § 3553(a), including, for example, “the need for the sentence imposed . . . to provide just punishment for the offense,” *id.* at § 3553(a)(2)(A), “to afford adequate deterrence to criminal conduct,” *id.* at § 3553(a)(2)(B), and “to protect the public from further crimes of the defendant.” *id.* at § 3553(a)(2); *see also Booker v. United States*, 542 U.S. 220, 261 (2005) (explaining that § 3553(a) “factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable”). It should be noted at this juncture that, in light of so much emphasis on the continued viability of the Guidelines, Sentencing Judges are nonetheless required by the Sixth Amendment to refrain

from treating the Guidelines as mandatory whether out of “ignorance, negligence . . . defiance” or for any other reason. *United States v. Rodriguez*, 406 F.3d 1261, 1273 (11th Cir. 2005).

In any event, the first step to determining the Guideline range is to determine an offense level. U.S.S.G. § 1B1.2(a). Basically, pursuant to the Guidelines Manual, determining the applicable Guideline begins with an initial score for the offense of conviction. This is calculated by adding points assigned to the offense of conviction, as well as any “relevant conduct” to the specifics of the offense. This number is then changed by any applicable adjustments under the Guidelines. These adjustments can include harm to a victim, the defendant’s role in the offense, and whether the defendant has cooperated or accepted responsibility. U.S.S.G. § 1B1.1(b)-(c).

In the ordinary course of proceedings, the Appellate Court reviews a District Court’s interpretations of the Guidelines *de novo* and its factual findings for clear error. *Longstreet*, 603 F.3d at 275-76. An argument that the Trial Judge “misapplied the guideline because [he] misunderstood the applicable legal standard” is reviewed *de novo* by this Court. *United States v. Reyna*, 777 F.3d 291, 294 (5th Cir. 2015). This standard requires such findings be “plausible in light of the record as a whole.” *United States v. Miller*, 607 F.3d 144, 148 (5th Cir. 2010) (internal quotation omitted). The District Court must determine its factual findings by a preponderance of the relevant and sufficiently reliable evidence. *Alaniz*, 726 F.3d at 618-19. By contrast, interpretation of a Guideline is reviewed *de novo*. *Longstreet*, 603 F.3d at 275-76.

IV.
The Standards for Sentencing Under U.S.S.G. § 5K1.1: Non-Assistance-Related
Factors Cannot be Considered by the Sentencing Court

In *United States v. Desselle*, 450 F.3d 179, 182 (5th Cir. 2006), the Fifth Circuit determined “that the extent of a § 5K1.1 or [18 U.S.C.] § 3553(a) departure must be based solely on assistance-related concerns.” (emphasis added). In this regard, the Fifth Circuit has provided a detailed example of how this Rule of Law is to be applied. *Malone v. United States*, 828 F.3d 331, 340-41 (5th Cir.), *cert. denied*, 137 S. Ct. 526 (2016). In *Malone*, the District Court “had chosen to depart 30% from the top of [defendant’s] guideline range when the Government had recommended a 50% departure from the bottom of the guideline range. *Id.* at 340. The Judge stated that he was not accepting the recommendation for the low end of the Guidelines because:

As the Court has noted, I am struck by the seriousness of the offense. I was struck by the harm, both potential and actual, from what were very reckless actions on the part of the defendant. It was reckless actions taken solely for the purpose of making a large amount of money. It was a huge risk taken by the defendants which didn’t work out so well.

Id. at 340.

The appellants in *Malone* argued that this comment by the Judge clearly demonstrated that the District Court “based the extent of his § 5K1.1 departure on non-assistance-related factors,” and the Government did not argue otherwise. *Id.* The Fifth Circuit found it was error to sentence the defendant based on non-assistance-related factors, regardless of whether the issue involved increasing or decreasing the extent of a § 5K1.1 departure. *Id.* The *Malone* opinion explained:

The Government asserts that *Desselle* should be read as imposing a “one-way ratchet.” That is, the Government argues that *Desselle* only prohibits a district court from considering non-assistance-related factors when *increasing* the extent of a defendant's § 5K1.1 departure, not when *limiting* the extent of a defendant's § 5K1.1 departure. Although this argument may find support in case law from other circuits, it finds none in this Court's case law. In *Desselle*, this Court reasoned that the plain language of § 5K1.1 prohibits a district court from considering non-assistance-related factors in determining the extent of a § 5K1.1 departure. There is nothing in the plain language of § 5K1.1 that hints at any distinction between increasing and decreasing the extent of a § 5K1.1 departure. The relevant portions of this provision are phrased in absolute terms—just like this Court's holding in *Desselle*. Accordingly, we are bound by this Court's previous statement of the law.

Id. at 340-41 (emphasis in original). Thus, *Desselle* prohibits a District Court from considering non-assistance-related factors for any reason when determining the extent of the defendant's § 5K1.1 departure. *Malone*, 828 F.3d at 340 (discussing *Desselle*, 450 F.3d at 182). Although the § 5K1.1 departure error was ultimately found to be harmless in *Malone*, the opinion cautions that “this conclusion [that non-assistance-related factors cannot be considered for purposes of assessing a request for a § 5K1.1 departure] should not be read to dismiss the importance of the segmented [sentencing] process, avoiding as it does the unnecessary difficulties illustrated by this case.” *Id.* at 341.

The next issue discussed in *Malone* is also relevant to Mr. Franco's appeal. The appellants there additionally argued the § 5K1.1 departures allowed by the Sentencing Judge “were unreasonably small given their substantial assistance to the Government.” *Id.* at 341. This Court explained, however, that it lacked jurisdiction to consider the argument because the District Court had complete “discretion to determine the extent of a departure under § 5K1.1.” *Id.* The opinion further explains that an appellate court can only hear

arguments on the extent of the departure if there is an allegation of an independent violation of the law. *Id.* Hence, this Court concluded that, because the extent of § 5K1.1 departures are not reviewed for reasonableness, it must refuse to hear the claim. *Malone*, 828 F.3d at 341.

However, this Court did hear the appellant's next point of error alleging "that the district court committed clear error in balancing the 18 U.S.C. § 3553(a) sentencing factors." *Id.* To this end, the discussion in the opinion reflects that the Court initially determined that the appellants in *Malone* were asserting that the District Court gave undue weight to the seriousness of their crime (they had pleaded guilty to one count of conspiracy to distribute and possess with the intent to distribute a controlled substance) and the resulting potential harm from their criminal activity, and ignored matters such as their "extensive cooperation" as well as a lack of criminal intent. *Id.* at 342. This Court then reviewed the District Court's of record reasons for the sentences which were imposed but nonetheless denied the claim. *Id.* The opinion explains that although a defendant "may disagree with how the district court balanced the § 3553(a) factors, [his or her] argument that these factors should have been weighed differently is not a sufficient ground for reversal." *Id.*

IV.

The Sentence Must be Vacated Because it was Based on Non-Assistance-Related Factors and Mr. Franco-De La Cruz was Harmed as a Result of the Imposition of the Sentence

Mr. Franco submits the District Court reversibly erred by using non-assistance-related factors in making the determination of the extent of the § 5K1.1 departure which was granted Mr. Franco and it was error for the Fifth Circuit to hold otherwise. As

established above, the Court used the high end of the range “due to violence he [referring to Mr. Franco] brought to this country when he endangered officers and civilians in the car chase.” ROA.160. Hence, non-assistance factors were not only a basis for the higher determination of the extent of the departure, it was the reason for the high end of the departure range. Therefore, it cannot be disputed that, because the Judge in *Malone* committed error by considering reckless conduct as a basis for limiting the departure, the Judge in this case committed error when he used this same type of behavior on the part of Mr. Franco to limit the reduction afforded to him under 5K1.1. *Compare Malone*, 828 F.3d at 340 (“I am struck by the seriousness of the offense. I was struck by the harm, both potential and actual, from what were very reckless actions on the part of the defendant. It was reckless actions taken solely for the purpose of making a large amount of money. It was a huge risk taken by the defendants which didn’t work out so well.”), *with* ROA.161 (“I’m granting the Government’s downward departure, but I’m sentencing Mr. Franco at the high end due to the violence he brought to this country when he endangered officers and civilians in the car chase. I’m not granting any further downward departure because of those reasons, the nature and circumstances of this offense.”). Under the Fifth Circuit’s reasoning in *Desselle*, 450 F.3d at 182, as explained in *Malone*, the extent of the § 5K1.1 departure in this case was not based solely on assistance-related concerns and, therefore, it was erroneous for the Fifth Circuit not to reverse and remand.

It should be noted Mr. Franco-De La Cruz’s assistance to the prosecution in this case was overwhelming when compared to the available facts in the *Malone* case. The

prosecution credited Mr. Franco with establishing the identity of an individual who was responsible for the transportation of 1,000 kilograms of marihuana and was the manager of a narcotics load that killed an individual as a result of a rollover death. ROA.220. The Government concluded that it expected to indict this transporter of massive amounts of contraband and probable felony murderer. ROA.220. Further, the Government determined that Mr. Franco had agreed to testify to what he knew before a Grand Jur⁷ and at any judicial proceeding which may be held in connection to these events. ROA.220. This substantial assistance led the Government to conclude that Mr. Franco's assistance was significant and useful and that Mr. Franco was truthful, completely reliable and timely-reported information. ROA.220. Moreover, as established above, the error was not harmless because it cannot be presumed the District Court would impose the same sentence instruction that the Judge cannot apply non-assistance-related concerns to Mr. Franco-De La Cruz on resentencing.

V.
Plain Error vs. Abuse of Discretion

Because there is no formal objection after the pronouncement of sentence, the Fifth Circuit reviewed for plain error. (Appendix A, page 2). Respectfully, abuse of discretion is the proper standard of review to be applied in this case. Nonetheless, if this Court determines that error was not preserved, Mr. Franco-De La Cruz respectfully submits that he has established plain error.

A.
Error was Preserved Because the Parties Requested that Mr. Franco be
Sentenced at the Low End of the Guidelines at 47 Months

Mr. Franco-De La Cruz submits his challenge to the sentence imposed in this case, and his argument that the sentence is lacking in support, are preserved for review under an abuse of discretion standard. Indeed, the Government filed its motion for a § 5K1.1 reduction in sentence, to which defense counsel joined, and then the United States took the position at sentencing, again to which defense counsel joined, that “the Government recommends the low end of forty-seven months.” ROA.155. This was always supported by the parties’ agreed conclusion that the extent of the departure should be based on assistance-related factors. Indeed, the sentencing arguments made herein were the core of the main issues before the District Court. Hence, issues regarding the § 5K1.1 matters are preserved for review because said matters were raised before the District Court by both the prosecution and the defense.

B.
The Requirement of a Post-Sentence Objection

As noted, the Fifth Circuit ruled that review was for plain error because there was no post-sentence objection to the extent of Mr. Franco-De La Cruz’s sentence. (Appendix A, page 2). Respectfully, this holding constitutes reversible error.

Since the 1800s, this Court has mandated that objections which are not sufficiently specific cannot be raised on appeal. *Noonan v. Caledonia Gold Mining Co.*, 121 U.S. 393, 400 (1897). As the Fifth Circuit has explained:

It is a cardinal rule that an objection must be framed with precision sufficient to inform the trial judge as to the matter about which the objection is raised and the grounds therefore.

United States v. Haynes, 573 F.2d 236, 241 (5th Cir. 1978).

Thus, the specific objection was in 1887, and to this day remains, the key for appellate review. There is nothing in these cases which requires a specific post-ruling objection. Therefore, Mr. Franco-De La Cruz submits that, with respect to challenging a sentence on appeal, a specific objection is not required to be made after sentencing in order to preserve a pre-sentence objection to the sentence for appellate review. It is also worth noting that post-ruling “exceptions” to court rulings are not necessary to preserve matters for appeal. As the Fifth Circuit has acknowledged: “exceptions to rulings or orders of the court are unnecessary.” *United States v. Castillo*, 430 F.3d 220, 239-40 (5th Cir. 2005) (quoting FED. R. CRIM. P. 51). Indeed, “[a] party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take.” *Id.* This is exactly what happened in this case. Mr. Franco-De La Cruz’s attorney—and even the Government’s attorney—informed the Court of the sentence which was requested before the Judge imposed a different punishment. Accordingly, Mr. Franco-De La Cruz asserts abuse of discretion is the proper standard of review under these circumstances.

C.

Alternatively, Plain Error has been Established

In the event this Court agrees with the Fifth Circuit, counsel reasserts the arguments made herein to show that plain error has been demonstrated in this case. To establish plain

error, an appellant must show: (1) there was error; (2) the error was clear and obvious; and (3) the error affected the defendant's substantial rights due to a reasonable probability the outcome would have been different. *United States v. Olano*, 507 U.S. 725, 732 (1993). Even presuming these elements are established, the Court will only reverse when the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

As the above analysis establishes, the Sentencing Court in this case committed reversible error in sentencing Mr. Franco-De La Cruz by failing to comport with the Rules of Law governing § 5K1.1 departures. This error was plain, clear and obvious, and it affected the substantial rights of Mr. Franco-De La Cruz because his sentence was based on non-assistance-related factors to the exclusion of the extent of his substantial assistance. Moreover, the fairness and integrity of the sentencing process, along with the public reputation of judicial proceedings, is seriously affected because defendants will be less likely to want to substantially cooperate with the Government, especially to the extent of cooperation given by Mr. Franco-De La Cruz, when these principles are violated. Furthermore, the Fifth Circuit, as established above, cannot lawfully presume what the District Court would do on remand. Accordingly, if this Court determines plain error review is in order, Mr. Franco-De La Cruz nonetheless argues this Petition should be granted and this case ultimately remanded with instructions.

CONCLUSION

The Fifth Amendment to the United States Constitution guarantees the right to due process of law. This Court has continuously endorsed this fundamental right. *Jones*, 547

U.S. at 226-239. Respectfully, the Fifth Circuit (in affirming the District Court) has entered a decision which has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power over due process guarantees, and decided an important federal question in a way that conflicts with the relevant decisions of this Court. For the reasons set forth above, Mr. Franco-De La Cruz respectfully submits compelling reasons are presented in support of discretionary review by this Honorable Court.

WHEREFORE, Petitioner, GERARDO OMAR FRANCO-DE LA CRUZ, respectfully requests that this Honorable Court grant this petition and issue a Writ of Certiorari and review the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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