

STATE OF MINNESOTA

IN THE DISTRICT COURT

COUNTY OF LYON

FIFTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

FILE NO. 42-CR-08-220

Olga Marina Franco del Cid,
aka Alianiss Nunez Morales,

**NOTICE OF MOTION
AND MOTION TO DEPART**

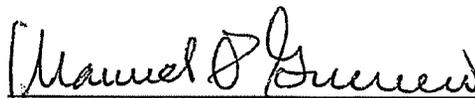
Defendant.

TO: THE DISTRICT COURT JUDGE OF THE ABOVE NAMED COURT,
Lyon County Government Center, and Rick Maes, Esq., Lyon County
Attorney, 607 W. Main St., Marshall, MN 56258.

PLEASE TAKE NOTICE that Manuel P. Guerrero, counsel for
defendant, moves the Court to dispositionally depart from the
Minnesota Sentencing Guidelines at the Sentencing to be held on
October 8, 2008.

Said Motion is based upon the pleadings, evidence at trial,
Presentence Investigation Report and all contents of the file
cited above.

Date: September 30, 2008



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Attorney for Defendant

FILED IN THIS OFFICE

10-08-08

Karen J. Bierman
COURT ADMINISTRATOR
Marshall, Lyon County, Minnesota

STATE OF MINNESOTA

COUNTY OF LYON

State of Minnesota,

Plaintiff,

vs.

Olga Marina Franco del Cid,
aka Alianiss Nunez Morales,
Defendant.

IN THE DISTRICT COURT

FIFTH JUDICIAL DISTRICT

Cause No. 42-CR-08-220

**MEMORANDUM IN SUPPORT
OF DEFENDANT'S MOTION
FOR DOWNWARD DEPARTURE**

INTRODCUTION

This memorandum is submitted in support of Ms. Franco's motion for a downward departure and concurrent sentencing under the State Sentencing Guidelines. The Guidelines under concurrent sentences presumes a 78-month prison sentence, wherein consecutive sentencing presumes 212 months for the 24 offenses that the jury found Ms. Franco guilty of on August 6, 2008. In sum, because Ms. Franco is particularly amenable to treatment and probation, has no prior record, will never again be in a position to operate a motor vehicle in a grossly negligent manner, and presents a minimal risk to public safety, a downward dispositional departure is reasonable, permissible and warranted.

Also, a compelling reason is that the Guidelines themselves exist for sentencing parity within all Minnesota judicial districts. The Minnesota Sentencing Guidelines Commission has shown, during the period 2001-2007, that trial courts have

mitigated the sentence in more than 50 per cent of the cases dealing with criminal vehicular homicide. (See attached Exhibit A).

This is a compelling case where substantial reasons exist for a downward departure, which reasons justify that Ms. Franco's sentence deserves to be considered for a downward departure and to be sentenced concurrently.

ARGUMENT

I. BECAUSE DEFENDANT IS AMENABLE TO TREATMENT AND OR PROBATIONARY SUPERVISION, DOWNWARD DEPARTMENT IS WARRANTED.

The sentencing court may depart dispositionally from the sentencing guidelines if the defendant is "particularly amenable to probation or if offense-related mitigating circumstances are present." State v. Love, 350 N.W.2d 359, 361 (Minn.1984).

Amenability to probation may alone support a departure, but "a finding of amenability is not a prerequisite." State v. Donnay, 600 N.W.2d 471, 474 (Minn.App.1999). See also State v. Gebeck, 635 N.W.2d, 389-90 (Minn.App.2001). (Affirming downward dispositional departure in a case involving criminal vehicular homicide).

The Supreme Court has delineated several factors the trial court may use to gauge a defendant's amenability to probation:

"Numerous factors, including the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family, are relevant to a determination whether a defendant is particularly suitable to individualized treatment in a probationary setting."

State v. Trog, 323 N.W.2d 28, 31 (Minn.1982). Importantly, the decision to depart focuses more on the individual and on whether the presumptive sentence would be best for the defendant and society. State v. Heywood, 338 N.W.2d 243, 244 (Minn.1983).

Here, the record supports a finding that Ms. Franco is amenable to probation or treatment. She will be 24 years old when sentenced. She has never married and has no dependents except her parents who are residents of Guatemala. She was gainfully employed prior to her arrest but will no longer be able to be employed in this country. She is remorseful and realizes the horrendous impact and widespread injury of these crimes.

II. Because the Minnesota Sentencing Guidelines are rightly designed to eliminate disparity of sentences, downward departure is warranted.

The purpose of the Minnesota Sentencing Guidelines is:

"to establish rational and consistent sentencing standards which reduce sentencing disparity and ensure that sanctions following conviction of a felony are proportional to the severity of the offense of conviction and the extent of the offender's criminal history..."

The principles embodied in the Guidelines also state: "while the guidelines are advisory to the sentencing judge, departures from the presumptive sentences established in the guidelines should be made only when substantial and compelling circumstances exist."

The guideline's purposes of parity of sentences provide the substance and the offender's character and conduct provide the compelling circumstances for departure in this case. More

District Courts than not have departed downward and thus, this Court would be advancing parity in sentencing by also departing downward. Here, there was no evidence of criminal intent, no use of mood altering drugs or alcohol by Ms. Franco. In fact, she has never used illegal drugs or alcohol in her short life, nor does she have a criminal record or a history of gross negligence of operating a motor vehicle. The horrific impact of this collision was the result of an accident rather than an intentional act.

III. Because the Minnesota Supreme Court advocates "Problem Solving District Courts", Downward Departure is warranted.

Chief Justice Russell A. Anderson wrote in the August 2006 issue of *Bench and Bar of Minnesota* that effectiveness is the focus of a new judicial branch strategic initiative to expand statewide what is known as "problem-solving" courts, starting with those courts focused on alcohol and other drug cases. He wrote "that our traditional way of handling alcohol and other drug offenders just doesn't work because it hasn't addressed the root causes of the problems that bring people to our courtrooms in the first place." Id. p. 21. In other words, the focus of the courts should be on addressing the root cause of the problem rather than punishment for its own sake. Here, the root cause was gross negligence that the Sentencing Guidelines presupposes with its presumptive sentence of 78 months in prison.

Committing the defendant to the Commissioner of Corrections for a longer period would not be solving a problem but, rather, only creating more problems inherent in the criminal corrections process such as recidivism, abusive behavior, and misuse of resources. Allowing Ms. Franco to serve a shorter time in prison and subsequent deportation to her home country where she would not be involved in our criminal justice system. Requiring Ms. Franco to serve a longer sentence serves no purpose except retribution and vengeance.

Allowing Ms. Franco to serve a short term in Prison would promote rational sentencing while maintaining the public safety by allowing the state's resources to be used for the more dangerous offenders. Such a disposition would promote fairness and proportionality in sentencing, thereby engendering respect and integrity in the District Courts of Minnesota. Indeed, lack of parity in sentencing not only leads to individual injustices but also harms the integrity and the fair and regular operation of the criminal justice system.

CONCLUSION

For the reasons set forth above, defendant, Olga Marina Franco del Cid, respectfully requests this Court to depart downward from the presumptive sentence and to allow her to serve her time in prison, settle her alleged Federal crimes and then be deported to her country of origin.

Dated: September 30, 2007

Manuel P. Guerrero

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(651) 224 4855
Lead Counsel for Defendant

EXHIBIT "A"

Minnesota Sentencing Guidelines Commission

Criminal Vehicular Homicide: 2001-2007

Minnesota Sentencing Guidelines Commission (MSGC) monitoring data are offender-based, meaning cases represent offenders rather than individual charges. Offenders sentenced within the same county in a one-month period are generally counted only once, based on their most serious offense.

Table 1 below provides dispositional departure information for cases of Criminal Vehicular Homicide (CVH), sentenced between 2001 and 2007. Departure information is provided for each statutory provision of CVH. Table 2 contains case-level information for all offenders sentenced for CVH, as well as additional counts of CVH or felony-level CVI, sentenced between 2005 and 2007.

Table 1. Dispositional Departure Information for Cases of Criminal Vehicular Homicide by Statutory Provision: 2001-2007

MN Statute		Dispositional Departure?		Total
		NONE	MITIGATED	
609.21 subd.1(1) <i>Gross Negligence</i>	Count % within statute MN Statute	26 47.3%	29 52.7%	55 100.0%
609.21 subd.1(2) <i>Negligent While Under Influence</i>	Count % within statute MN Statute	27 50.9%	26 49.1%	53 100.0%
609.21 subd.1(3) <i>Alcohol Conc. .08 or greater¹</i>	Count % within statute MN Statute	24 44.4%	30 55.6%	54 100.0%
609.21 subd.1(4) <i>Alcohol Conc. .08 or greater within 2 hrs.¹</i>	Count % within statute MN Statute	18 40.9%	26 59.1%	44 100.0%
609.21 subd.1(6) <i>Negligent: Schedule I or II Cont. Substance</i>	Count % within statute MN Statute	9 42.9%	12 57.1%	21 100.0%
609.21 subd.1(7) <i>Driver Causes Accident & Leaves Scene</i>	Count % within statute MN Statute	9 42.9%	12 57.1%	21 100.0%
Total	Count % within statute MN Statute	113 45.6%	135 54.4%	248 100.0%

¹ Alcohol concentration of .08 went into effect for offenses committed on/after August 1, 2004. For offenses committed before that date, the alcohol concentration was .10.