APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-40227

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

JOSE PRISCILIANO GRACIA-CANTU,

Defendant – Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Apr. 2, 2019)

Before KING, ELROD, and GRAVES, Circuit Judges.

PER CURIAM:

We WITHDRAW our prior panel opinion and SUBSTITUTE this opinion. Jose Prisciliano Gracia-Cantu appeals the district court's determination that a conviction under Texas Penal Code §§ 22.01(a)(1) and (b)(2) for "Assault – Family Violence" qualifies as a crime of violence under 18 U.S.C. § 16, and is therefore an aggravated felony for purposes of 8 U.S.C. § 1101(a)(43)(F) and U.S.S.G. § 2L1.2(b)(1)(C). Consistent with our recent *en banc* decision in *United States v. Reyes-Contreras*,

910 F.3d 169 (5th Cir. 2018) (en banc), we hold that a conviction under Texas Penal Code §§ 22.01(a)(1) and (b)(2) falls within the definition of a crime of violence under 18 U.S.C. § 16(a). We therefore AFFIRM Gracia-Cantu's sentence.

Section 16(a) defines a "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). We recently explained *en banc* that this definition does not include a "directness-of-force requirement." *Reyes-Contreras*, 910 F.3d at 183. Even indirect applications of force will do. Instead, all that this definition requires is that the statute of prior conviction criminalize only conduct that: (1) is committed intentionally, knowingly, or recklessly; and (2) "employs a force capable of causing physical pain or injury"; (3) against the person of another. *Id.* at 183, 185; *see also United States v. De La Rosa*, No. 17-10487, 2019 WL 177958, at *3 (5th Cir. Jan. 11, 2019) (unpublished).

Texas "Assault – Family Violence" fits the bill. First, the statute requires that the offense be committed "intentionally, knowingly, or recklessly." Tex. Penal Code § 22.01(a)(1). Second, the statute requires that the defendant "cause[] bodily injury," *id.*, which is defined as "physical pain, illness, or any impairment of physical condition," *id.* § 1.07(a)(8). Third, the statute requires that the injury be caused to "another," *id.* § 22.01(a)(2) – specifically, against a family member, as defined by certain provisions of the Texas Family Code, *id.* § 22.01(b)(2). This statute therefore meets the

definition of a "crime of violence" under § 16(a). *See also United States v. Gomez*, 917 F.3d 332, 334 (5th Cir. 2019) (holding that aggravated assault – which shares the same predicate offense, simple assault, as the statute in the instant case – is a "crime of violence" under § 16(a)); *De La Rosa*, 2019 WL 177958, at *3 (holding that assault against a peace officer, which also shares simple assault as a predicate offense, is a "crime of violence" under § 16(a)).

Post-*Reyes-Contreras*, Gracia-Cantu has only two remaining arguments. We reject both. First, he asserts that the *degree* of force required by the Texas statute – reaching to "any impairment of physical condition," Tex. Penal Code § 1.07(a)(8), even minor injuries – is too minimal to constitute a crime of violence. *See Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010) ("[I]n the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force – that is, force capable of causing physical pain or injury to another person.") (emphasis in original). But Gracia-Cantu must show more than a "theoretical possibility" that the statute could be enforced and applied this way; he must show a "realistic probability . . . that the State would apply its statute to conduct that falls outside the [use-of-force clause]." *Reyes-Contreras*, 910 F.3d at 184 & n.35. In the absence of "supporting state case law, interpreting a state statute's text alone is simply not enough to establish the necessary 'realistic probability.'" *United States v. Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

Gracia-Cantu fails to provide that case law. The state-court cases he relies on – two finding bodily injury when defendants knowingly transmitted HIV[1] and one finding bodily injury when a defendant knowingly injected bleach through an IV into a victim's bloodstream[2] – involve force "capable of causing physical pain or injury" to the degree contemplated by *Curtis Johnson. Reyes-Contreras*, 910 F.3d at 185. These instruments – HIV and intravenous bleach – are no different from the "deadly instruments" in Mr. Reyes-Contreras's state-court case law: a gun, poison-laced orange juice, and a plastic bag. *Id.* Just as in *Reyes-Contreras*, the state-court case law that Gracia-Cantu relies on involves the "knowing[] employ[ment of] deadly instruments . . . with the understanding that those instruments were substantially likely to cause physical pain, injury, or . . . death."[3] *Id.*

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[1] *Billingsley v. State*, No. 11-13-00052-CR, 2015 WL 1004364, at *1-2 (Tex. App.–Eastland Feb. 27, 2015, pet. ref'd) (unpublished); *Padieu v. State*, 05-09-00796-CR, 2010 WL 5395656, at *1 (Tex. App.–Dallas Dec. 30, 2010, pet. ref'd) (unpublished).

[2] *Saenz v. State*, 479 S.W.3d 939, 949-50 (Tex. App.–San Antonio 2015, pet. ref'd)).

[3] Gracia-Cantu also suggests that the Texas statute criminalizes assault through the use of force that is non-physical altogether. For this claim, he points to an indictment of a defendant who sent a tweet with an animation of strobe lights designed to trigger the recipient's epileptic seizures, which they did. *See* Indictment, *State v. Rivello*, Case No. F-1700215-M (Crim. Dist. Ct. No. 5, Dallas Co., Tex. Mar. 20, 2017). Even if an indictment alone can show a realistic probability that a state criminal statute will be interpreted a certain way – an issue we need not address today – this argument would fall short. In *United States v. Castleman*, the Supreme Court explained that "the knowing or intentional

Gracia-Cantu's second remaining argument post-*Reyes-Contreras* is that applying *Reyes-Contreras* "retroactively" to his sentence would violate the Constitution's protection against "unforeseeable judicial enlargement[s] of . . . criminal statute[s]." *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964). Gracia-Cantu, however, is not the first to raise this defense against the application of *Reyes-Contreras*, and our court has already rejected it. *Gomez*, 919 F.3d at 33 ("*Reyes-Contreras* did not make previously innocent activities criminal. It merely reconciled our circuit precedents with the Supreme Court's decision in *Castleman*.").

* * *

Reyes-Contreras applies to Gracia-Cantu's sentence and renders his prior conviction for Texas "Assault – Family Violence" a "crime of violence" under 18 U.S.C. § 16(a). Accordingly, we AFFIRM the district court's sentence.

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causation of bodily injury necessarily involves the use of physical force." 572 U.S. 157, 169 (2014); *see also Reyes-Contreras*, 910 F.3d at 182 ("We hold that, as relevant here, *Castleman* is not limited to cases of domestic violence . . . "). Seizures are a form of bodily injury. Knowingly or intentionally causing them, therefore, necessarily involves the use of physical force.

APPENDIX B

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

October 15, 2018

Ms. Kayla Gassmann
Federal Public Defender's Office
440 Louisiana Street
Suite 1350
Houston, TX 77002

Re: In Re Jose Prisciliano Gracia-Cantu
No. 18-5968

Dear Ms. Gassmann:

The Court today entered the following order in the above-entitled case:

The petition for a writ of mandamus is denied.

Sincerely,

/s/ Scott S. Harris
Scott S. Harris, Clerk

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-40227

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

JOSE PRISCILIANO GRACIA-CANTU,

Defendant – Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:14-cr-815-1

(Filed May 9, 2018)

Before KING*, ELROD, and GRAVES, Circuit Judges.

PER CURIAM:**

We WITHDRAW our prior panel opinion and SUBSTITUTE this opinion. Jose Prisciliano Gracia-Cantu appeals the district court's determination that a conviction under Texas Penal Code sections 22.01(a)(1)

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* Concurring in the judgment only.

** Pursuant to Fifth Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Fifth Circuit Rule 47.5.4.

and (b)(2) for "Assault – Family Violence" qualifies as a crime of violence under 18 U.S.C. § 16, and is therefore an aggravated felony for purposes of 8 U.S.C. § 1101(a)(43)(F) and U.S.S.G. § 2L1.2(b)(1)(C). Consistent with our binding precedent, we determine that a conviction under Texas Penal Code sections 22.01(a)(1) and (b)(2) does not fall within the definition of a crime of violence under 18 U.S.C. § 16(a). In light of the Supreme Court's holding that as incorporated in the Immigration and Nationality Act context 18 U.S.C. § 16(b) is unconstitutionally vague, and because the government forfeited the argument that § 16(b) continues to apply in the Guidelines context, we determine that the sentence cannot be supported by § 16(b) either.[1] Therefore, we VACATE Gracia-Cantu's sentence and REMAND for resentencing.

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[1] We do not address the government's untimely argument, raised in two sentences for the first time in its 28(j) letter after the issuances *of Sessions v. Dimaya*, 138 S.Ct. 1204 (2017), that *Dimaya* is not dispositive because Gracia-Cantu's § 16(b) challenge is essentially a challenge to the Guidelines, which are not subject to a void for vagueness challenge under *Beckles v. United States*, 137 S. Ct. 886 (2017). *See United States v. Scroggins*, 599 F.3d 433, 447 (5th Cir. 2010) (noting that [i]t is not enough to merely mention or allude to a legal theory" and hold that the party forfeited the argument where he "merely mention[ed] it in conclusory sentences tacked to the end of paragraphs"). The government did not argue at any point in its briefing that the Guidelines are not subject to a void-for-vagueness challenge or file a 28(j) letter in this case after *Beckles* was issued. The government forfeited the argument that the Guidelines context precludes Gracia-Cantu's argument that § 16(b) is unconstitutionally vague and cannot support his sentence.

I.

Gracia-Cantu pleaded guilty to a single-count indictment for being an alien unlawfully present in the United States following deportation in violation of 8 U.S.C. §§ 1326(a) and (b)(1). Gracia-Cantu had a prior Texas felony conviction for "Assault – Family Violence" under Texas Penal Code sections 22.01(a)(1) and (b)(2). The pre-sentence report recommended an eight-level increase pursuant to 8 U.S.C. § 1101(a)(43)(F) and U.S.S.G. § 2L1.2(b)(1)(C) because Gracia-Cantu had been previously convicted of an aggravated felony prior to deportation. Gracia-Cantu filed an objection to the pre-sentence report, arguing that because his prior Texas conviction was not a crime of violence under 18 U.S.C. § 16, the conviction did not qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) and U.S.S.G. § 2L1.2(b)(1)(C). As to § 16(a), Gracia-Cantu objected that the use of force is not an element of the offense under Fifth Circuit precedent, and as to § 16(b), he objected that the offense does not always entail a substantial risk that force will be used. The government argued that the statutes presented a risk of force, even if they did not require the use of force, and that the statutes do require the use of force under intervening Supreme Court caselaw.

The district court overruled the objection, finding that the prior offense was a crime of violence qualifying as an aggravated felony for purposes of U.S.S.G. § 2L1.2(b)(1)(C). In doing so, the district court looked at the prior judgment of conviction, which stated that the bodily injury occurred by "striking said Maria

Garcia on or about the head with an object: to wit, a can." The district court then stated: "And by striking and, you know, clearly, common sense tells you that you strike somebody with—I mean, first of all, causing bodily injury by striking her with a can is—requires force." Gracia-Cantu timely appealed his 41-month sentence.

II.

We first address whether Gracia-Cantu's prior conviction qualifies as a crime of violence under 18 U.S.C. § 16(a). When, as here, a defendant properly preserves an objection to the classification of a prior offense as an aggravated felony, our review is *de novo*. *United States v. Medina-Anicacio*, 325 F.3d 638, 643 (5th Cir. 2003); *see also United States v. Sanchez-Ledezma*, 630 F.3d 447, 449 (5th Cir. 2011) (stating that review is *de novo* where an "appeal concerns only the interpretation of the United States Sentencing Guidelines and statutory provisions incorporated in the Sentencing Guidelines by reference").

Section 16(a) defines a "crime of violence" as: "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). During the pendency of this appeal, multiple Supreme Court and Fifth Circuit decisions interpreting the term "crime of violence" in different statutory and Guidelines contexts have shifted the legal landscape. The government argues that the court's precedent that a conviction under Texas Penal Code section 22.01(a)(1) is not a crime

of violence for § 16(a) purposes has been abrogated by *United States v. Castleman*, 134 S. Ct. 1405 (2014), and *Voisine v. United States*, 136 S. Ct. 2272 (2016). *See United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006) (holding that the "use of force is not an element of assault under section 22.01(a)(1), and the assault offense does not fit subsection 16(a)'s definition for crime of violence"); *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (en banc) (stating that there is "a difference between a defendant's causation of an injury and the defendant's use of force").

The government's argument, however, is foreclosed by our rule of orderliness. *See United States v. Tanksley*, 848 F.3d 347, 350 (5th Cir. 2017) (stating that under the rule of orderliness "one panel of this Court may not overrule another" unless a "Supreme Court decision 'expressly or implicitly' overrules one of our precedents" (first quoting *United States v. Segura*, 747 F.3d 323, 328 (5th Cir. 2014); and then quoting *United States v. Kirk*, 528 F.2d 1057, 1063 (5th Cir. 1976))). In *United States v. Rico-Mejia*, the court held that "*Castleman* does not disturb this court's precedent regarding the characterization of crimes of violence. . . ." 859 F.3d 318, 322-23 (5th Cir. 2017). We again confirmed that *Castleman* did not overrule our precedent in *United States v. Reyes-Contreras*, 882 F.3d 113, 123 (5th Cir. 2018) ("A post-*Castleman* panel, in *United States v. Rico-Mejia* . . . , has already held that *Castleman* does not abrogate our decisions on the use of force under the Guidelines, binding us by the rule of orderliness."). While the government contends that *Rico-Mejia* itself

does not adhere to the rule of orderliness, the *Reyes-Contreras* decision already determined that *Rico-Mejia* is the court's controlling precedent.[2] *See id.* Therefore, under our binding precedent, Gracia-Cantu's conviction is not a crime of violence under § 16(a).[3]

III.

We next address whether Gracia-Cantu's conviction qualifies as a crime of violence under 18 U.S.C. § 16(b).[4] During the pendency of this appeal, the Court held in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), that § 16(b) as incorporated in the Immigration and Nationality Act is unconstitutionally vague. *Id.* at 1211-12, 1223. The parties agree that Gracia-Cantu did not object at the time of sentencing that § 16(b) is void for vagueness and that review is for plain error. Puzzlingly though, the government utterly fails to brief the plain-error issue and instead relies on the foreclosure argument, which is not enough, as the Supreme Court has

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[2] The government acknowledged at oral argument that it raised its argument that *Rico-Mejia* did not adhere to the rule of orderliness in its *Reyes-Contreras* briefing.

[3] Since oral argument in the instant case, the government has filed a petition for rehearing en banc in *Reyes-Contreras,* which remains pending.

[4] Gracia-Cantu raised two arguments as to § 16(b): (1) that § 16(b) is unconstitutionally vague; and (2) that Gracia-Cantu's Texas assault conviction does not present a substantial risk of using physical force. Because the government has forfeited the argument that post-*Dimaya* § 16(b) nonetheless continues to apply in the Guidelines context, we determine that the first argument is dispositive of the appeal and do not reach the second.

the last word. Under these circumstances, we are satisfied that appellant has established plain error.

To obtain relief under plain-error review, an appellant must show: (1) an error or defect that was not affirmatively waived; (2) the legal error is clear or obvious; (3) the error affected the appellant's substantial rights; and (4) if the first three prongs are satisfied, that the court should exercise its discretion to correct the error because it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Carlile*, 884 F.3d 554, 556-57 (5th Cir. 2018) (quoting *United States v. Prieto*, 801 F.3d 547, 549-50 (5th Cir. 2015)).

Dimaya held that § 16(b) is unconstitutionally vague and therefore void—at least in certain contexts. The government forfeited its argument that Gracia-Cantu's challenge to § 16(b) is essentially a challenge to the Guidelines, which are not subject to a void-for-vagueness challenge under *Beckles v. United States*, 137 S. Ct. 886 (2017). *See United States v. Scroggins*, 599 F.3d 433, 446 (5th Cir. 2010) ("A party that asserts an argument on appeal, but fails to adequately brief it, is deemed to have waived it." (quoting *Knatt v. Hosp. Serv. Dist. No. 1*, 327 F. App'x 472, 483 (5th Cir. 2009))). At the time of sentencing, Supreme Court precedent foreclosed the objection that § 16(b) is unconstitutionally vague, and after an intervening change in the law, that argument was again foreclosed by this court during the pendency of Gracia-Cantu's appeal. However, "the error became clear in light of a decision announced while this case was still on direct appeal." *United States*

v. Hornyak, 805 F.3d 196, 199 (5th Cir. 2015) (citing *Henderson v. United States*, 568 U.S. 266, 269 (2013)). This error affected Gracia-Cantu's substantial rights, as he received a 41-month sentence that is 11 months above the Guidelines range that applies for Gracia-Cantu's criminal-history level if a conviction under Texas Penal Code sections 22.01(a)(1) and (b)(2) is not a crime of violence under 18 U.S.C. § 16. *See United States v. Reyes-Ochoa*, 861 F.3d 582, 589 (5th Cir. 2017) ("[A] sentence under an incorrect Guidelines range 'can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error.'" (quoting *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016))).

Determining that Gracia-Cantu satisfies the first three prongs of plain-error review, we turn to whether prong four is satisfied. Gracia-Cantu argues that we should exercise our discretion on prong four because the district court did not indicate that it would have imposed an above-Guidelines sentence if it had considered the correct range. The government has not argued here that we should not exercise our fourth-prong discretion.[5] Gracia-Cantu's sentence was 11 months above the top of his correct Guideline range—a 36% increase. "We conclude 'that the substantial disparity

[5] The government's April 25, 2018 28(j) letter contends that the court must consider whether Gracia-Cantu prevails under the fourth prong but does not contain any argument as to why Gracia-Cantu does not prevail other than directing the court to approximately fifteen seconds of audio during oral argument. This is insufficient to contest Gracia-Cantu's fourth-prong arguments. *See Scroggins*, 599 F.3d at 446.

between the imposed sentence and the applicable Guidelines range warrants the exercise of our discretion to correct the error.'" *Reyes-Ochoa*, 861 F.3d at 589 (quoting *United States v. Mudekunye*, 646 F.3d 281, 291 (5th Cir. 2011)). Moreover, counseling in favor of exercising our discretion here is that the higher sentence resulted from the application of a statute declared unconstitutionally void by the Supreme Court while the claim was on direct appeal. *See United States v. Maldonado*, 638 F. App'x 360, 363 (5th Cir. 2016) (exercising fourth-prong discretion because requiring the appellant to serve additional prison time based on an unconstitutional statute "would cast significant doubt on the fairness of the criminal justice system" (quoting *Hornyak*, 805 F.3d at 199)); *Hornyak*, 805 F.3d at 199 (stating that if the error resulting in a higher sentence is of a "constitutional magnitude," it is a factor that favors exercising fourth-prong discretion); *see also United States v. Torres*, 856 F.3d 1095, 1100 (5th Cir. 2017) (stating that the exercise of fourth-prong discretion is appropriate when there is a significant disparity in time to be served and the presence of an additional element that "raises a question as to the 'fairness of judicial proceedings'" (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)). Here, under the totality of circumstances of this case, including that the government has briefed no argument as to why we should not exercise our discretion, the increased sentence resulted from applying an unconstitutionally vague statute, and there was a substantial disparity between Guidelines ranges, we determine that we should exercise our discretion to correct the error.

IV.

For the foregoing reasons, we VACATE Gracia-Cantu's sentence and REMAND for resentencing consistent with this opinion.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-40227

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

JOSE PRISCILIANO GRACIA-CANTU

Defendant – Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:14-CR-815-1

(Filed May 2, 2018)

Before KING*, ELROD, and GRAVES, Circuit Judges.

PER CURIAM:**

Jose Prisciliano Gracia-Cantu appeals the district court's determination that a conviction under Texas Penal Code sections 22.01(a)(1) and (b)(2) for "Assault – Family Violence" qualifies as a crime of violence under 18 U.S.C. § 16, and is therefore an aggravated

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* Concurring in the judgment only.

** Pursuant to Fifth Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Fifth Circuit Rule 47.5.4.

felony for purposes of 8 U.S.C. § 1101(a)(43)(F) and U.S.S.G. § 2L1.2(b)(1)(C). Consistent with our binding precedent, we determine that a conviction under Texas Penal Code sections 22.01(a)(1) and (b)(2) does not fall within the definition of a crime of violence under 18 U.S.C. § 16(a). In light of the Supreme Court's holding that 18 U.S.C. § 16(b) is unconstitutionally vague, we determine that the sentence cannot be supported by § 16(b) either. Therefore, we VACATE Gracia-Cantu's sentence and REMAND for resentencing.

I.

Gracia-Cantu pleaded guilty to a single-count indictment for being an alien unlawfully present in the United States following deportation in violation of 8 U.S.C. §§ 1326(a) and (b)(1). Gracia-Cantu had a prior Texas felony conviction for "Assault – Family Violence" under Texas Penal Code sections 22.01(a)(1) and (b)(2). The pre-sentence report recommended an eight-level increase pursuant to 8 U.S.C. § 1101(a)(43)(F) and U.S.S.G. § 2L1.2(b)(1)(C) because Gracia-Cantu had been previously convicted of an aggravated felony prior to deportation. Gracia-Cantu filed an objection to the pre-sentence report, arguing that because his prior Texas conviction was not a crime of violence under 18 U.S.C. § 16, the conviction did not qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) and U.S.S.G. § 2L1.2(b)(1)(C). As to § 16(a), Gracia-Cantu objected that the use of force is not an element of the offense under Fifth Circuit precedent, and as to § 16(b), he objected that the offense does not always entail a

substantial risk that force will be used. The government argued that the statutes presented a risk of force, even if they did not require the use of force, and that the statutes do require the use of force under intervening Supreme Court caselaw.

The district court overruled the objection, finding that the prior offense was a crime of violence qualifying as an aggravated felony for purposes of U.S.S.G. § 2L1.2(b)(1)(C). In doing so, the district court looked at the prior judgment of conviction, which stated that the bodily injury occurred by "striking said Maria Garcia on or about the head with an object: to wit, a can." The district court then stated: "And by striking and, you know, clearly, common sense tells you that you strike somebody with—I mean, first of all, causing bodily injury by striking her with a can is—requires force." Gracia-Cantu timely appealed his 41-month sentence.

II.

We first address whether Gracia-Cantu's prior conviction qualifies as a crime of violence under 18 U.S.C. § 16(a). When, as here, a defendant properly preserves an objection to the classification of a prior offense as an aggravated felony, our review is *de novo*. *United States v. Medina-Anicacio*, 325 F.3d 638, 643 (5th Cir. 2003); *see also United States v. Sanchez-Ledezma*, 630 F.3d 447, 449 (5th Cir. 2011) (stating that review is *de novo* where an "appeal concerns only the interpretation of the United States Sentencing

Guidelines and statutory provisions incorporated in the Sentencing Guidelines by reference").

Section 16(a) defines a "crime of violence" as: "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). During the pendency of this appeal, multiple Supreme Court and Fifth Circuit decisions interpreting the term "crime of violence" in different statutory and Guidelines contexts have shifted the legal landscape. The government argues that the court's precedent that a conviction under Texas Penal Code section 22.01(a)(1) is not a crime of violence for § 16(a) purposes has been abrogated by *United States v. Castleman*, 134 S. Ct. 1405 (2014), and *Voisin v. United States*, 136 S. Ct. 2272 (2016). *See United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006) (holding that the "use of force is not an element of assault under section 22.01(a)(1), and the assault offense does not fit subsection 16(a)'s definition for crime of violence"); *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (en banc) (stating that there is "a difference between a defendant's causation of an injury and the defendant's use of force").

The government's argument, however, is foreclosed by our rule of orderliness. *See United States v. Tanksley*, 848 F.3d 347, 350 (5th Cir. 2017) (stating that under the rule of orderliness "one panel of this Court may not overrule another" unless a "Supreme Court decision 'expressly or implicitly' overrules one of our precedents" (first quoting *United States v. Segura*, 747 F.3d 323, 328 (5th Cir. 2014); and then quoting *United*

States v. Kirk, 528 F.2d 1057, 1063 (5th Cir. 1976))). In *United States v. Rico-Mejia*, the court held that "*Castleman* does not disturb this court's precedent regarding the characterization of crimes of violence. . . . " 859 F.3d 318, 322–23 (5th Cir. 2017). We again confirmed that *Castleman* did not overrule our precedent in *United States v. Reyes-Contreras*, 882 F.3d 113, 123 (5th Cir. 2018) ("A post-*Castleman* panel, in *United States v. Rico-Mejia* . . . , has already held that *Castleman* does not abrogate our decisions on the use of force under the Guidelines, binding us by the rule of orderliness."). While the government contends that *Rico-Mejia* itself does not adhere to the rule of orderliness, the *Reyes-Contreras* decision already determined that *Rico-Mejia* is the court's controlling precedent.[1] *See id.* Therefore, under our binding precedent, Gracia-Cantu's conviction is not a crime of violence under § 16(a).[2]

III.

We next address whether Gracia-Cantu's conviction qualifies as a crime of violence under 18 U.S.C. § 16(b).[3] During the pendency of this appeal, the Court

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[1] The government acknowledged at oral argument that it raised its argument that *Rico-Mejia* did not adhere to the rule of orderliness in its *Reyes-Contreras* briefing.

[2] Since oral argument in the instant case, the government has filed a petition for rehearing en banc in *Reyes-Contreras*, which remains pending.

[3] Gracia-Cantu raised two arguments as to § 16(b): (1) that § 16(b) is unconstitutionally vague; and (2) that Gracia-Cantu's Texas assault conviction does not present a substantial risk of

held in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), that § 16(b) is unconstitutionally vague. *Id.* at 1223. The parties agree that Gracia-Cantu did not object at the time of sentencing that § 16(b) is void for vagueness and that review is for plain error.[4] Puzzlingly though, the government utterly fails to brief the plain-error issue and instead relies on the foreclosure argument, which is not enough, as the Supreme Court has the last word. Under these circumstances, we are satisfied that appellant has established plain error.

To obtain relief under plain-error review, an appellant must show: (1) an error or defect that was not affirmatively waived; (2) the legal error is clear or obvious; (3) the error affected the appellant's substantial rights; and (4) if the first three prongs are satisfied, that the court should exercise its discretion to correct the error because it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Carlile*, 884 F.3d 554, 556-57 (5th Cir.

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using physical force. We determine that the first argument is dispositive of the appeal and do not reach the second.

[4] We do not address the government's untimely argument, raised for the first time in two sentences in its April 25, 2018 28(j) letter, that *Dimaya* is not dispositive because Gracia-Cantu's § 16(b) challenge is essentially a challenge to the Guidelines, which are not subject to a void for vagueness challenge under *Beckles v. United States*, 137 S. Ct. 886 (2017). *See United States v. Scroggins*, 599 F.3d 433, 446 (5th Cir. 2010) ("A party that asserts an argument on appeal, but fails to adequately brief it, is deemed to have waived it." (quoting *Knatt v. Hosp. Serv. Dist. No. 1*, 327 F. App'x 472, 483 (5th Cir. 2009))).

2018) (quoting *United States v. Prieto*, 801 F.3d 547, 549-50 (5th Cir. 2015)).

Dimaya establishes that it is error to use § 16(b) to bring an offense within the ambit of the term "crime of violence." At the time of sentencing, Supreme Court precedent foreclosed this objection, and after an intervening change in the law, that argument was again foreclosed by this court during the pendency of Gracia-Cantu's appeal. However, "the error became clear in light of a decision announced while this case was still on direct appeal." *United States v. Hornyak*, 805 F.3d 196, 199 (5th Cir. 2015) (citing *Henderson v. United States*, 568 U.S. 266, 269 (2013)). This error affected Gracia-Cantu's substantial rights, as he received a 41-month sentence that is 11 months above the Guidelines range that applies for Gracia-Cantu's criminal-history level if a conviction under Texas Penal Code sections 22.01(a)(1) and (b)(2) is not a crime of violence under 18 U.S.C. § 16. *See United States v. Reyes-Ochoa*, 861 F.3d 582, 589 (5th Cir. 2017) ("[A] sentence under an incorrect Guidelines range 'can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error.'" (quoting *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016))).

Determining that Gracia-Cantu satisfies the first three prongs of plain-error review, we turn to whether prong four is satisfied. Gracia-Cantu argues that we should exercise our discretion on prong four because the district court did not indicate that it would have imposed an above-Guidelines sentence if it had

considered the correct range. The government has not argued here that we should not exercise our fourth-prong discretion.[5]

Gracia-Cantu's sentence was 11 months above the top of his correct Guideline range—a 36% increase. "We conclude 'that the substantial disparity between the imposed sentence and the applicable Guidelines range warrants the exercise of our discretion to correct the error.'" *Reyes-Ochoa*, 861 F.3d at 589 (quoting *United States v. Mudekunye*, 646 F.3d 281, 291 (5th Cir. 2011)). Moreover, counseling in favor of exercising our discretion here is that the higher sentence resulted from the application of a statute declared unconstitutionally void by the Supreme Court while the claim was on direct appeal. *See United States v. Maldonado*, 638 F. App'x 360, 363 (5th Cir. 2016) (exercising fourth-prong discretion because requiring the appellant to serve additional prison time based on an unconstitutional statute "would cast significant doubt on the fairness of the criminal justice system" (quoting *Hornyak*, 805 F.3d at 199)); *Hornyak*, 805 F.3d at 199 (stating that if the error resulting in a higher sentence is of a "constitutional magnitude," it is a factor that favors exercising fourth-prong discretion); *see also United States v. Torres*, 856 F.3d 1095, 1100 (5th Cir. 2017)

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[5] The government's April 25, 2018 28(j) letter contends that the court must consider whether Gracia-Cantu prevails under the fourth prong but does not contain any argument as to why Gracia-Cantu does not prevail other than directing the court to approximately fifteen seconds of audio during oral argument. This is insufficient to contest Gracia-Cantu's fourth-prong arguments. *See Scroggins*, 599 F.3d at 446.

(stating that the exercise of fourth-prong discretion is appropriate when there is a significant disparity in time to be served and the presence of an additional element that "raises a question as to the 'fairness of judicial proceedings'" (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)). Here, under the totality of circumstances of this case, including that the government has briefed no argument as to why we should not exercise our discretion, the increased sentence resulted from applying an unconstitutionally vague statute, and there was a substantial disparity between Guidelines ranges, we determine that we should exercise our discretion to correct the error.

IV.

For the foregoing reasons, we VACATE Gracia-Cantu's sentence and REMAND for resentencing consistent with this opinion.

APPENDIX E

UNITED STATES DISTRICT COURT
Southern District of Texas
Holding Session in Brownville

UNITED STATES OF AMERICA **V.** **JOSE PRISCILIANO GRACIA-CANTU**	**AMENDED JUDGMENT IN A CRIMINAL CASE** CASE NUMBER: **1:14CR00815-001** USM NUMBER: 99006-079

☐ See Additional Aliases.

Date of Original Judgment:

February 2, 2015 **(Or Date of Last Amended Judgment)**	Maria Lourdes Costilla Defendant's Attorney

Reason for Amendment:

☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))	☐ Modification of Supervision Conditions (18 U.S.C. § 3563(c) or 3583(e))
☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))	☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reason (18 U.S.C. § 3582(c)(1))
☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))	☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☒ Correction for Clerical Mistake (Fed. R. Crim. P. 36)

☐ Direct Motion to District Court Pursuant to
☐ 28 U.S.C. § 2255 or
☐ 18 U.S.C. § 3559(c)(7)

☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 on October 23, 2014

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty. _____

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
8 USC §§ 1326(a) and 1326(b)(1)	Alien Unlawfully Found in the United States After Deportation, Having Previously Been Convicted of a Felony	09/15/2014	1

☐ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

February 2, 2015
Date of Imposition of Judgment

Hilda Tagle
Signature of Judge

HILDA G. TAGLE
SENIOR U. S. DISTRICT JUDGE
Name and Title of Judge

February 18, 2015
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 41 Months.

☐ See Additional Imprisonment Terms.

☒ The court makes the following recommendations to the Bureau of Prisons:

*The defendant be placed in a FCI facility at/or near Bastrop, Texas, as long as the security needs of the Bureau of Prisons were met.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY
UNITED STATES MARSHAL

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	**$** 100.00	**$** 0.00	**$** 0.00

☐ See Additional Terms for Criminal Monetary Penalties.

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

☐ See Additional Restitution Payees.

TOTALS	$0.00	$0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6, may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

☒ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, for offenses committed on or after September 13, 1994 but before April 23, 1996.

APPENDIX F

UNITED STATES DISTRICT COURT
Southern District of Texas
Holding Session in Brownsville

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	Case Number: **1:14CR00815-001**
JOSE PRISCILIANO GRACIA-CANTU	USM Number: 99006-079
☐ See Additional Aliases.	Maria Lourdes Costilla Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 on October 23, 2014

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
8 U.S.C. §§ 1326(a) and 1326(b)(1)	Alien Unlawfully Found in the United States After Deportation, Having Previously Been Convicted of a Felony	09/15/2014	1

☐ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

February 2, 2015
Date of Imposition of Judgment

/s/ Hilda Tagle
Signature of Judge

HILDA G. TAGLE
SENIOR U. S. DISTRICT JUDGE
Name and Title of Judge

February 10, 2015
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 41 months.

☐ See Additional Imprisonment Terms.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	**Fine**	**Restitution**
TOTALS	$100.00	$0.00	$0.00

☐ See Additional Terms for Criminal Monetary Penalties.

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

☐ See Additional Restitution Payees.

TOTALS $0.00 $0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

  ☐ the interest requirement is waived for the ☐ fine ☐ restitution.

  ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

☒ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.