

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

In re Jose Prisciliano Gracia-Cantu,  
Petitioner

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PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT, AND TO THE HONORABLE CAROLYN  
DINEEN KING, THE HONORABLE JENNIFER WALKER ELROD, AND THE  
HONORABLE JAMES E. GRAVES, JR., JUDGES OF THE FIFTH CIRCUIT COURT  
OF APPEALS

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### QUESTION PRESENTED

After it has issued a decision holding that a federal prisoner is entitled to resentencing due to a Sentencing Guidelines calculation error, can a federal court of appeals stay its mandate for more than five months, thereby keeping the defendant in jail under an unreasonable sentence, to see if the law might change in the future?

## TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED .....	i
TABLE OF CONTENTS .....	ii
TABLE OF CITATIONS .....	iv
OPINION BELOW .....	1
JURISDICTION .....	1
STATUTORY PROVISIONS INVOLVED .....	1
STATEMENT OF THE CASE .....	2
REASONS FOR GRANTING THE WRIT .....	6
I.    Petitioner meets all the conditions necessary for this Court to issue a writ of mandamus to the Fifth Circuit to require that court to issue its mandate in his case. ....	7
A.    The Fifth Circuit has clearly abused its discretion by withholding its mandate for several months, thereby continuing petitioner’s confinement under a vacated sentence, in case it might later change its mind about the correct outcome of the appeal. ....	8
B.    Issuance of the writ of mandamus is appropriate in the circumstances of this case. ....	12
C.    There are no other adequate means for petitioner to obtain the relief he seeks. ....	15
II.    Issuance of a writ of mandamus will be in aid of this Court’s jurisdiction. ....	15
CONCLUSION .....	17

## TABLE OF CONTENTS – (Cont’d)

	<u>Page</u>
APPENDIX A: Opinion and Judgment of the Court of Appeals, <u>United States v. Gracia-Cantu</u> , No. 15-40227 (5th Cir. May 9, 2018) .....	1a
APPENDIX B: Relevant Statutes Federal Rule of Appellate Procedure 41 .....	10a
APPENDIX C: Relevant Fifth Circuit Filings Unopposed Motion for Issuance of the Mandate Forthwith .....	16a
Special Letter Notifying Parties of Abeyance .....	23a
Order Denying Motion for Issuance of the Mandate Forthwith .....	24a

## TABLE OF CITATIONS

### Page

### CASES

Barber v. Thomas, 560 U.S. 474 (2010) .....	13
Beckles v. United States, 137 S. Ct. 886 (2017) .....	4
Bell v. Thompson, 545 U.S. 794 (2005) .....	9-10
Chandler v. Judicial Council of the Tenth Circuit of the United States, 398 U.S. 74 (1970) .....	16
Charpentier v. Ortco Contractors, 480 F.3d 710 (5th Cir. 2007) .....	15
Cheney v. United States Dist. Court, 542 U.S. 367 (2004) .....	7-8
Ex parte Fahey, 332 U.S. 258 (1947) .....	8
Ex parte U.S., 242 U.S. 27 (1916) .....	14
Ex parte U.S., 287 U.S. 241 (1932) .....	14, 16
Gall v. United States, 552 U.S. 38 (2007) .....	12
Glover v. United States, 531 U.S. 198 (2001) .....	13
In re U. S., 194 U.S. 194 (1904) .....	14
Johnson v. Bechtel Assocs. Prof'l Corp., D.C., 801 F.2d 412 (D.C. Cir. 1986) .....	15
McClellan v. Carland, 217 U.S. 268 (1910) .....	14
Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943) .....	7, 15
Rosales Mireles v. United States, 138 S. Ct. 1897 (2018) .....	12-13
Ryan v. Schad, 570 U.S. 521 (2013) .....	9-11

TABLE OF CITATIONS – (Cont’d)

Page

CASES – (Cont’d)

Sessions v. Dimaya, 138 S. Ct. 1204 (2018) .....	3-4
United States v. Cook, 997 F.2d 1312 (10th Cir. 1993) .....	15
United States v. Gracia-Cantu, No. 15-40227, 2018 WL 2182716 (5th Cir. May 9, 2018) .....	iii, 1
United States v. Jenkins, 854 F.3d 181 (2d Cir. 2017) .....	13
Welsh v. United States, 404 F.2d 333 (5th Cir. 1968) .....	15

STATUTES AND RULES

8 U.S.C. § 1101(a)(43)(F) .....	2-4
8 U.S.C. § 1326(a) .....	2
8 U.S.C. § 1326(b)(1) .....	2
18 U.S.C. § 16 .....	2-4
18 U.S.C. § 16(a) .....	4, 13
18 U.S.C. § 16(b) .....	3-4
18 U.S.C. § 3553(a)(4) .....	12
18 U.S.C. § 3624(b) .....	12
28 U.S.C. § 1651(a) .....	1, 7
28 U.S.C. § 2255 .....	15

TABLE OF CITATIONS – (Cont’d)

Page

STATUTES AND RULES – (Cont’d)

Fed. R. App. P. 41 .....	iii, 1, 5, 9, 11
Fed. R. App. P. 41(b) .....	9
Fed. R. App. P. 41(d) .....	9

SENTENCING GUIDELINES

USSG § 2L1.2 .....	13
USSG § 2L1.2(a) .....	3
USSG § 2L1.2(b)(1)(C) .....	2-4
USSG § 2L1.2(b)(1)(D) .....	2-3
USSG § 3E1.1(a) .....	3
USSG Ch. 5, Pt. A (Sentencing Table) .....	3

MISCELLANEOUS

Appellant’s Supplemental Brief upon Rehearing <u>En Banc</u> 11-17, <u>Reyes-Contreras</u> , 5th Cir. No. 16-41218, Dkt. Entry No. 123 .....	5, 11, 13-14
T. Tyler, <u>Why People Obey the Law</u> 164 (2006) .....	13

### OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, United States v. Gracia-Cantu, 5th Cir. No. 15-40227, Pet. App. 1a-8a, is unpublished but reported at 2018 WL 2182716.

### JURISDICTION

The Fifth Circuit issued its opinion and judgment in Mr. Gracia-Cantu's favor on May 9, 2018. On June 8, 2018, Mr. Gracia-Cantu filed a motion for issuance of the mandate in the Fifth Circuit. On July 17, 2018, the clerk of the Fifth Circuit notified the parties that the case had been placed in abeyance pending the resolution of the en banc rehearing of a different case. On August 2, 2018, the Fifth Circuit denied Mr. Gracia-Cantu's motion for issuance of the mandate. This Court has jurisdiction to grant a writ of mandamus pursuant to 28 U.S.C. § 1651(a). The Court's jurisdiction is further addressed in Part III of the argument below.

### STATUTORY PROVISIONS INVOLVED

The text of Federal Rule of Appellate Procedure 41 is set forth in the appendix. Pet. App. 10a-15a.

## STATEMENT OF THE CASE

Defendant-Appellant Jose Prisciliano Gracia-Cantu was convicted by guilty plea of being an alien found unlawfully present in the United States after deportation, in violation of 8 U.S.C. § 1326(a) and (b)(1). Pet. App. 2a.

Using the 2014 edition of the United States Sentencing Guidelines (“USSG”), the presentence report (“PSR”) applied an eight-level increase under the illegal-reentry guideline, § 2L1.2(b)(1)(C), on the ground that Mr. Gracia-Cantu’s 2007 Texas conviction for “assault—family violence” qualified as a pre-deportation “aggravated felony” under 8 U.S.C. § 1101(a)(43)(F) and 18 U.S.C. § 16. Pet. App. 2a-3a. Although the determination of whether an offense qualifies as an “aggravated felony” is a categorical one, the district court overruled Mr. Gracia-Cantu’s objection to the enhancement by relying on the facts underlying Mr. Gracia-Cantu’s prior conviction. Pet. App. 3a. Including this enhancement, Mr. Gracia-Cantu’s total offense level was 13 which, together with a Category VI criminal history, produced an advisory Guidelines imprisonment range of 33 to 41 months. See EROA.173, 195 (PSR ¶ 75).<sup>1</sup> Without the eight-level enhancement, Mr. Gracia-Cantu would have been subject to only a four-level enhancement for having a prior felony conviction, and his Guidelines range would have been 24 to 30 months. See USSG

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<sup>1</sup> “EROA” refers to the electronic record on appeal filed in the Fifth Circuit Court of Appeals. “PSR” refers to the presentence investigation report, which is cited by EROA page number and by paragraph number.

§ 2L1.2(b)(1)(D).<sup>2</sup> The district court sentenced Mr. Gracia-Cantu to 41 months of imprisonment. Pet. App. 3a.<sup>3</sup> Mr. Gracia-Cantu timely filed notice of appeal. Pet. App. 3a.

The resolution of Mr. Gracia-Cantu’s appeal has been substantially delayed, and has now taken more than three years.<sup>4</sup> Mr. Gracia-Cantu filed his notice of appeal on February 19, 2015. 5th Cir. Dkt. Entry No. 1. He filed his opening brief on July 21, 2015, challenging the eight-level “aggravated felony” sentencing enhancement and arguing that his Texas assault conviction is not a “crime of violence” under 18 U.S.C. § 16 and therefore does not qualify as an “aggravated felony” under 8 U.S.C. § 1101(a)(43)(F) and USSG § 2L1.2(b)(1)(C). See 5th Cir. Dkt. Entry No. 28.

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<sup>2</sup> Mr. Gracia-Cantu’s offense level would have been 10—base level eight, USSG § 2L1.2(a), plus a four-level enhancement, USSG § 2L1.2(b)(1)(D), reduced by two levels for acceptance of responsibility, USSG § 3E1.1(a)—which together with a Category VI criminal history, results in an advisory range of 24 to 30 months. See USSG Ch. 5, Pt. A (Sentencing Table).

<sup>3</sup> Mr. Gracia-Cantu’s sentence was ordered to run consecutive with a 24-month sentence imposed upon revocation of his supervised release in another federal case, resulting in a total imprisonment of 65 months

<sup>4</sup> In August 2015, the government moved to suspend its briefing deadline pending resolution of United States v. Gonzalez-Longoria, No. 15-40041, which raised the same issue—whether 18 U.S.C. § 16(b) is unconstitutionally vague—that this Court ultimately decided in Sessions v. Dimaya, 138 S. Ct. 1204 (2018). The briefing schedule was stayed for a year, until August 2016. The government filed a motion for summary affirmance on October 12, 2016, which Mr. Gracia-Cantu opposed. The Fifth Circuit denied the motion for summary affirmance in February 2017 and reissued a briefing notice to the government. The government finally filed its response brief on April 7, 2017. Mr. Gracia-Cantu filed his reply brief a week later, on April 14, 2017. Ten months after the completion of briefing, the parties presented oral argument to the Fifth Circuit on February 8, 2018, regarding the correctness of the eight-level “aggravated felony” sentencing enhancement. See generally 5th Cir. Docket.

Nearly three years later, the Fifth Circuit issued its initial opinion and judgment vacating Mr. Gracia-Cantu's sentence and remanding for resentencing on May 2, 2018, and issued a revised opinion on May 9, 2018, which reached the same result. See Pet. App. 1a-8a; 5th Cir. Dkt. Entry Nos. 153-54, 165-67. The Fifth Circuit held that the district court erred by classifying Mr. Gracia-Cantu's prior Texas assault conviction as a "crime of violence" under 18 U.S.C. § 16 and therefore as an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F) and USSG § 2L1.2(b)(1)(C). Pet. App. 3a-8a. The Fifth Circuit held that under controlling circuit precedent, the Texas assault offense does not have the use of force as an element under § 16(a), and that under this Court's decision in Sessions v. Dimaya, 138 S. Ct. 1204, 1211-12, 1223 (2018), the offense could not qualify under § 16(b) because that statute is unconstitutionally vague.<sup>5</sup> Pet. App. 3a-8a. The Fifth Circuit reentered judgment on May 9, 2018, at the same time that it issued its opinion. See Pet. App. 9a. The judgment provided that: "It is ordered and adjudged that the judgment of the District Court is vacated, and the cause is remanded for resentencing to the District Court for further proceedings in accordance with the opinion of this Court." Pet. App. 9a.

The Fifth Circuit, however, never issued its mandate, preventing Mr. Gracia-Cantu's case from being returned to the district court for resentencing. On June 8, 2018, Mr. Gracia-Cantu filed a motion to issue the mandate, which was unopposed by the United

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<sup>5</sup> The Fifth Circuit also held that the United States had forfeited its late-added argument that the holding of Dimaya did not apply to USSG § 2L1.2(b)(1)(C)'s incorporation of § 16(b) under Beckles v. United States, 137 S. Ct. 886 (2017), because the United States had raised that argument in a single sentence in a letter filed after oral argument. Pet. App. 2a n.1, 6a.

States. Pet. App. 16a-21a. On July 17, 2018, a letter was filed by the Fifth Circuit clerk notifying the parties that the case has been placed in abeyance pending the en banc Fifth Circuit's resolution of a different case, United States v. Reyes-Contreras, 5th Cir. No. 41218. Pet. App. 23a. On August 2, 2018, nearly two months after his motion for issuance of the mandate, the Fifth Circuit denied Mr. Gracia-Cantu's unopposed motion, without prejudice to renewal of the motion after Reyes-Contreras. Pet. App. 24a.

Under Federal Rule of Appellate Procedure 41 and the Fifth Circuit's normal practice, the Fifth Circuit's mandate would have issued on May 31, 2018. See 5th Cir. Dkt. Entry No. 166. Had the mandate issued, the district court would have then set a resentencing hearing, and Mr. Gracia-Cantu would have been resentenced using the correct Guidelines range of 24 to 30 months. If Mr. Gracia-Cantu had received a high-end sentence of 30 months, he would have already completed his sentence and would have been released from custody in August 2018.<sup>6</sup>

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<sup>6</sup> The Bureau of Prisons has calculated Mr. Gracia-Cantu's projected release date as June 26, 2019, under the 41-month sentence that the Fifth Circuit has now vacated. See BOP Inmate Locator, <https://www.bop.gov/inmateloc/> (search for USM # 99006-079). Counsel estimates that if Mr. Gracia-Cantu were resentenced to 30 months, with good conduct credit, his release date would have been August 14, 2018.

### REASONS FOR GRANTING THE WRIT

In this case, more than three years after the filing of petitioner's notice of appeal, the Fifth Circuit Court of Appeals issued an opinion holding that the district court erred by applying an eight-level "aggravated felony" enhancement to petitioner under the illegal-reentry Sentencing Guideline. It accordingly entered judgment on May 9, 2018 vacating petitioner's sentence and remanding for resentencing using a lower Sentencing Guidelines range. The United States did not file a petition for rehearing in the Fifth Circuit or a petition for a writ of certiorari in this Court. However, the Fifth Circuit refused to issue the mandate in this case, thereby retaining appellate jurisdiction and preventing the case from returning to the district court for the ordered resentencing. Instead, the Fifth Circuit placed the case in abeyance pending the resolution of a different case that will be argued en banc in the Fifth Circuit on September 18, 2018, and likely will not be decided for at least several months after that.

Petitioner contends that the Fifth Circuit's refusal to issue its mandate for several months after it issued a decision holding that he is entitled to resentencing is a clear abuse of that court's discretion, results in his confinement under an unreasonable sentence, and places his direct criminal appeal in indefinite limbo. The action of the Fifth Circuit is therefore one which this Court can and should correct by a writ of mandamus.

I. Petitioner meets all the conditions necessary for this Court to issue a writ of mandamus to the Fifth Circuit to require that court to issue its mandate in his case.

This Court, and the lower federal courts, have the power to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a). Such writs include writs of mandamus, which have traditionally been used at common law and in the federal courts “to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.” Roche v. Evaporated Milk Ass’n, 319 U.S. 21, 26 (1943) (citations omitted).

To obtain a writ of mandamus, Mr. Gracia-Cantu must satisfy three conditions: that his right to the writ is “clear and indisputable”; that he has “no other adequate means to attain the relief he desires”; and that the writ is otherwise “appropriate under the circumstances.” Cheney v. United States Dist. Court, 542 U.S. 367, 380-81 (2004) (citations and quotations omitted). A writ is warranted where the applicant can demonstrate a “judicial usurpation of power” or a “clear abuse of discretion.” See id. at 380.

As explained further below, Mr. Gracia-Cantu meets all the requirements for a writ of mandamus. This Court’s precedent holds that a court of appeals may not issue a decision and then stay its mandate for several months just in case it might later change its mind about the appropriate disposition of the appeal. Mr. Gracia-Cantu has no other adequate avenue to obtain the relief that he seeks, because the Fifth Circuit ruled in his favor but will not relinquish jurisdiction, which means that he can neither seek review by certiorari in this

Court nor return to the district court. And it is appropriate for this Court to issue a writ of mandamus in this case, because one consequence of the Fifth Circuit's withholding of the mandate is that Mr. Gracia-Cantu is now serving an unreasonable sentence. If he were sentenced within the correct Guidelines range, he would have already been entitled to release. Instead, the Fifth Circuit's action means that he is now serving a sentence that is above the applicable Guidelines range, without any justification by the sentencing court or any determination by the sentencing court that such a sentence is necessary.

Mr. Gracia-Cantu recognizes that a writ of mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." Ex parte Fahey, 332 U.S. 258, 259-260 (1947). Nevertheless, a court of appeals' issuance of an opinion and judgment ordering that a federal prisoner be resentenced under a more favorable Guidelines range, and its subsequent refusal to relinquish jurisdiction to allow that resentencing to occur because it might later change its mind is sufficiently extraordinary and exceptional to justify this Court's issuance of the writ of mandamus.

- A. The Fifth Circuit has clearly abused its discretion by withholding its mandate for several months, thereby continuing petitioner's confinement under a vacated sentence, in case it might later change its mind about the correct outcome of the appeal.

Mr. Gracia-Cantu's right to issuance of the Fifth Circuit's mandate is clear and undisputable under this Court's precedent, because the Fifth Circuit's stay of the mandate in this case amounts to a "clear abuse of discretion." See Cheney, 542 U.S. at 381. This Court's precedent makes clear that, even if a short stay of the mandate might be

permissible, the Fifth Circuit may not stay a mandate in a case for what will be at least five months (and is very likely to be more), just in case it might change its mind in the future about the correct disposition of the appeal. See Bell v. Thompson, 545 U.S. 794, 803-04 (2005); see also Ryan v. Schad, 570 U.S. 521, 526 (2013).

Under Federal Rule of Appellate Procedure 41, the circuit court's mandate "must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later." Fed. R. App. P. 41(b). The Rule also provides that "[t]he court may shorten or extend the time." Rule 41(d) provides specific grounds for staying a mandate: a pending petition for rehearing or a pending motion for stay of a mandate stays the mandate until that petition or motion is decided, and a party may move to stay a mandate pending a petition for certiorari in this Court. Fed. R. App. P. 41(d). In this case, no petition for rehearing was filed in the Fifth Circuit, and no petition for a writ of certiorari was filed in this Court.

This Court has twice held that a court of appeals abuses its discretion under Rule 41 when it withholds its mandate for several months and then reconsiders the same arguments at a later date to change its mind about the outcome of the appeal. See Bell, 545 U.S. at 803-04; see also Ryan, 570 U.S. at 526. This Court stated explicitly in Bell that "[e]ven assuming, however, that a court could effect a stay for a short period of time by withholding the mandate, a delay of five months is different in kind." Bell, 545 U.S. at 805.

In Bell, a habeas corpus case, the Tennessee state courts and the federal district court denied post-conviction relief on Thompson’s ineffective-assistance-of-counsel claim, and the Sixth Circuit affirmed. Bell, 545 U.S. at 797-99. The Sixth Circuit granted a motion to stay the mandate to allow Thompson to file a petition for a writ of certiorari, which the Sixth Circuit granted. Id. at 800. On December 1, 2003, the petition for a writ of certiorari was denied by this Court. Id. On June 23, 2004, seven months later, the Sixth Circuit issued an amended opinion in Thompson’s federal habeas case, vacating the district court’s judgment and remanding for an evidentiary hearing on the same claim that it had previously denied. Id. at 800-01. The Sixth Circuit noted that its mandate had not issued in the case, and thus that it retained jurisdiction to reconsider its opinion. Id. This Court held that, regardless of whether Rule 41 would permit the Sixth Circuit to withhold its mandate at all after this Court had denied a petition for a writ of certiorari, the court abused its discretion by withholding the mandate for more than five months and then reconsidering the same arguments it had previously rejected. Id. at 804-07.

The circumstances were similar in Ryan. In that case, after state and federal court proceedings concluded with this Court’s denial of a petition for certiorari, the Ninth Circuit “declined to issue its mandate as normally required by” Rule 41 and instead sua sponte construed a motion for a stay of mandate for a pending en banc case—the Ninth Circuit “declined to issue an indefinite stay of the mandate,” Ryan, 570 U.S. at 523—as a motion to reconsider an earlier-denied motion to vacate and remand to the district court in light of

a 2012 Supreme Court decision. See Ryan, 570 U.S. at 52, 523-24. This Court held that, even assuming Rule 41 would allow the mandate to be withheld in those circumstances, the Ninth Circuit abused its discretion by not issuing the mandate based on an argument that it had considered and rejected nearly seven months earlier. Id. at 526.

The Fifth Circuit's withholding of its mandate in this case and placing the mandate in abeyance pending the en banc resolution of Reyes-Contreras runs directly afoul of Bell and Ryan. The result of the Fifth Circuit's action is that the mandate is being held indefinitely, just in case the circuit law changes in the future. Given the circumstances, the stay of the mandate will certainly reach the five months that this Court has found to constitute an abuse of discretion, and will likely extend even longer. Reyes-Contreras is scheduled for oral argument before the en banc Fifth Circuit on September 18, 2018. See United States v. Reyes-Contreras, 5th Cir. No. 16-41218, Dkt. Entry No. 130 (scheduling oral argument). The mandate in Mr. Gracia-Cantu's case will have been held for four months by that date. And the en banc court's decision is likely to take at least several additional months, further extending the stay of the mandate beyond the five months that this Court has already found to be unreasonable. It is unlikely that an en banc opinion in Reyes-Contreras will be issued before the end of 2018, when the mandate in Mr. Gracia-Cantu's case will have been held for seven months.<sup>7</sup>

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<sup>7</sup> For example, in the most recent criminal case the Fifth Circuit heard en banc, United States v. Herrold, the en banc court heard oral argument on September 20, 2017, and issued its decision on February 20, 2018, five months later. See United States v. Herrold, 5th Cir. No. 14-11317, Dkt. Entry No. 220, 235. In a habeas corpus case heard at that same en banc sitting,

B. Issuance of the writ of mandamus is appropriate in the circumstances of this case.

Issuance of the writ is appropriate in this case. The Fifth Circuit may not employ an indefinite stay of its mandate and continue to confine Mr. Gracia-Cantu under an unreasonable sentence, just in case the law might change six months from now. Under the Fifth Circuit's ruling, the Guidelines range in Mr. Gracia-Cantu's case should have been 24 to 30 months. The vacated 41-month sentence, which Mr. Gracia-Cantu continues to serve, is now an upward variance without any explanation or justification by the sentencing judge, rendering it an unreasonable sentence. See Gall v. United States, 552 U.S. 38, 51 (2007) (requiring the sentencing court to provide "an explanation for any deviation from the Guidelines range"); see also 18 U.S.C. § 3553(a)(4) (requiring the sentencing court to consider the applicable Sentencing Guidelines range in selecting the sentence). Even if Mr. Gracia-Cantu were resentenced to a high-end sentence of 30 months, assuming he receives credit for good conduct, see 18 U.S.C. § 3624(b), he is now already overserving that sentence. See supra n.6.

Every day Mr. Gracia-Cantu now spends in custody is an additional irreparable harm. As this Court has recently reminded the Fifth Circuit, "[t]o a prisoner, this prospect of additional time behind bars is not some theoretical or mathematical concept." Rosales-

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Chamberlin v. Fisher, the en banc court heard oral argument on September 19, 2017, and issued its opinion on March 20, 2018, six months later. See Chamberlin v. Fisher, 5th Cir. No. 15-70012, Dkt. Entry No. 140, 149.

Mireles v. United States, 138 S. Ct. 1897, 1907 (2018) (quoting Barber v. Thomas, 560 U.S. 474, 504 (2010) (Kennedy, J., dissenting)). Instead, “any amount of actual jail time is significant, and has exceptionally severe consequences for the incarcerated individual [and] for society which bears the direct and indirect costs of incarceration.” Rosales-Mireles, 138 S. Ct. at 1907 (internal quotation marks and alterations omitted) (quoting Glover v. United States, 531 U.S. 198, 203 (2001), and United States v. Jenkins, 854 F.3d 181, 192 (2d Cir. 2017)). “It is crucial in maintaining public perception of fairness and integrity in the justice system that courts exhibit regard for fundamental rights and respect for prisoners ‘as people.’” Rosales-Mireles, 138 S. Ct. at 1907 (quoting T. Tyler, Why People Obey the Law 164 (2006)).

Moreover, the Fifth Circuit is continuing to confine Mr. Gracia-Cantu under an unreasonable sentence based on a forthcoming decision that may ultimately change nothing. The common issue between this case and Reyes-Contreras is whether a statute that has the causation of bodily injury as an element necessarily also has the use of physical force as a required element, sufficient to satisfy the use of force clauses of 18 U.S.C. § 16(a) or USSG § 2L1.2 (2014). Pet. App. 4a-5a. But the appellant in Reyes-Contreras has argued that the en banc court need not even reach that issue in deciding the case, because the Missouri statute at issue, voluntary manslaughter, includes providing the means another person uses to commit suicide, which would not satisfy the force clause under any theory.

See Appellant's Supplemental Brief upon Rehearing En Banc 11-17, Reyes-Contreras, 5th Cir. No. 16-41218, Dkt. Entry No. 123.

This Court has previously granted writs of mandamus akin to the mandamus that Mr. Gracia-Cantu seeks. He asks this Court to require the Fifth Circuit to issue its mandate to allow his case to proceed to resentencing as ordered. This Court has previously granted mandamus when the lower court's action, or refusal to act, frustrated the operation of a criminal justice proceeding. In Ex parte U.S., 242 U.S. 27, 51-52 (1916), this Court granted mandamus to correct a district court order designed to permanently suspend the execution of a criminal sentence. This Court granted mandamus in another case to compel issuance of a bench warrant for the arrest of an indicted defendant, so that the criminal case could proceed. See Ex parte U.S., 287 U.S. 241, 250 (1932). This Court has also granted mandamus to require a court to adjudicate issues properly presented to it in a pending case. See McClellan v. Carland, 217 U.S. 268, 280 (1910). And in In re U. S., 194 U.S. 194, 195 (1904), this Court granted mandamus to require a district court to file all the papers and make all the necessary docket entries that had occurred in the case, in order to allow the United States to appeal from the district court's judgment.

The writ of mandamus in this case will serve a similar purpose, to require the Fifth Circuit to issue its mandate, relinquish jurisdiction, and allow Mr. Gracia-Cantu's case to proceed according to the normal remand procedures in a criminal case.

C. There are no other adequate means for petitioner to obtain the relief he seeks.

Mr. Gracia-Cantu has no other adequate means to seek relief from the Fifth Circuit's decision to withhold the mandate in his case. The Fifth Circuit already denied his motion for issuance of the mandate. Pet. App. 24a. He cannot return to the district court because the Fifth Circuit retains jurisdiction until it issues its mandate. See, e.g., Charpentier v. Ortco Contractors, 480 F.3d 710, 713 (5th Cir. 2007); Johnson v. Bechtel Assocs. Prof'l Corp., D.C., 801 F.2d 412, 415 (D.C. Cir. 1986). He does not have grounds to petition for a writ of certiorari in this Court, since the Fifth Circuit's judgment was entirely in his favor and he does not contend that the Fifth Circuit made any legal error in its decision. He cannot file a motion under 28 U.S.C. § 2255 because his direct appeal remains pending. See Welsh v. United States, 404 F.2d 333, 333 (5th Cir. 1968) (holding that no § 2255 motion can be considered while direct appeal is pending), accord United States v. Cook, 997 F.2d 1312, 1319 (10th Cir. 1993) (collecting cases).

A writ of mandamus from this Court is Mr. Gracia-Cantu's only available avenue to require the Fifth Circuit to issue its mandate and allow his resentencing to proceed as ordered.

II. Issuance of a writ of mandamus will be in aid of this Court's jurisdiction.

Finally, a writ of mandamus will be in aid of this Court's jurisdiction. This Court's authority to issue a writ of mandamus "extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." Roche, 319 U.S. at 25; see also

Chandler v. Judicial Council of the Tenth Circuit of the United States, 398 U.S. 74, 86 (1970). “A case need not be already pending in this Court before an extraordinary writ may be issued under ' 1651(a); rather, the Court may issue the writ when the lower court’s action might defeat or frustrate this Court’s *eventual* jurisdiction, even when that jurisdiction could be invoked on the merits only after proceedings in an intermediate court.” Chandler, 398 U.S. at 112 (Harlan, J., concurring); Ex parte U.S., 287 U.S. at 245-46 (granting writ of mandamus on the ground that without the arrest this Court would never have an opportunity to exercise its potential appellate jurisdiction).

Here, the Fifth Circuit’s refusal to issue its mandate frustrates this Court’s jurisdiction because it indefinitely halts the criminal proceeding. The Fifth Circuit’s action prevents Mr. Gracia-Cantu from being sentenced in the district court and then, if warranted, appealing that sentence according to the normal appellate procedures, including an ultimate petition for a writ of certiorari in this Court. Without issuance of the mandate, Mr. Gracia-Cantu’s direct appeal is suspended in limbo, unable to be addressed by further appeal or by remand to the district court.

Mr. Gracia-Cantu accordingly petitions for a writ of a mandamus to the Fifth Circuit to require the Fifth Circuit to issue its mandate and allow his case to be returned to the district court for resentencing, in accordance with the May 9, 2018 opinion of the Fifth Circuit.

### CONCLUSION

For the reasons stated above, petitioner requests:

(1) that this Court issue a writ of mandamus directed to the Fifth Circuit Court of Appeals, and to the Honorable Carolyn Dineen King, the Honorable Jennifer Walker Elrod, and the Honorable James E. Graves, Jr., judges of the Fifth Circuit Court of Appeals, to show cause on a day to be fixed by this Court why mandamus should not issue from this Court directing said judges to issue the mandate in this case to allow the case to be returned to the district court for resentencing in accordance with the Fifth Circuit's May 9, 2018 opinion; and

(2) that petitioner have such additional relief and process as may be necessary and appropriate.

Date: September 6, 2018

Respectfully submitted,

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By 

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