No. _____

IN THE SUPREME COURT FOR THE UNITED STATES

IN RE DAMON GRAHAM,
Petitioner

PETITION FOR WRIT OF MANDAMUS TO COMPEL THE FIRST CIRCUIT COURT OF APPEALS TO DECIDE CERTIFICATE OF APPEALABILITY

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RELIEF SOUGHT

Petitioner Damon Graham respectfully requests that the Court grant this petition for a writ of mandamus and direct the appeals court to promptly rule on Mr. Graham's Certificate of Appealability.

QUESTION PRESENTED

(1) Whether this Court should compel the First Circuit Court of Appeals to rule on Mr. Graham's long-pending fourteen months certificate of appealability?

JURISDICTIONAL STATEMENT

This Court has jurisdiction to issue the requested petition for writ of mandamus under 28 U.S.C. § 1651(a) and Supreme Court Rule 20.

FACTS NECESSARY TO UNDERSTAND PETITION

On January 4, 2017, petitioner Graham filed a petition to vacate, set aside, or correct sentence pursuant to Title 28 U.S.C. § 2255 which was docketed with the district court as timely filed.

On June 19, 2017, the district court entered a final unappealable judgment and order against Mr. Graham's petition to vacate, set aside, or correct sentence denying him relief.

On July 11, 2017, Mr. Graham filed a notice of appeal seeking to have the court of appeals review the denial of his petition by the district court but he must first receive permission from the appeals court by requesting for a certificate of appealability.

On August 21, 2017, Mr. Graham received a legal correspondence from the court of appeals notifying him that the court has docketed the motion for certificate of appealability on August 17, 2017 and will be sudmitted to the court for a determination on whether a certificate of appealability should issue.

On August 3, 2018, Mr. Graham filed a motion for clarification or in the alternative a request for conference pursuant to Rule 33 of the Fed. R. App. P. in an attempt to spur action on the almost year long wait period from the First Cirucit Court of Appeals for a answer on the certificate of appealability but still to no avail was a answer or decision given on the recent filed motion or the certificate of appealability.

ARGUMENT

I. THE COURT SHOULD DIRECT THE FIRST CIRCUIT COURT OF APPEALS TO PROMPTLY DECIDE MR. GRAHAM'S CERTIFICATE OF APPEALABILITY.

[The writ of mandamus] is a "drastic and extraordinary" remedy "reserved for really extraordinary causes". Cheney v. United States District Court, 542 U.S. 367, 380, 159 L. Ed. 2d 459, 124 S. Ct. 2576(2004). "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] 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, 319 U.S. 21, 26, 87 L. Ed. 1185(1943).

A writ of mandamus is properly granted to correct the 'judicial usurpation of power', or a "clear abuse of discretion,"

"will justify the invocation of this extraordinary remedy" **Cheney**, supra, 542 U.S. at 380, 159 L. Ed. 2d 459, 124 S. Ct. 2576. As the writ is a extraordinary remedy by this Court and authorized to do so by 28 U.S.C. § 1651(a), "it is not a matter of right, but of discretion sparingly exercised," and one of "the most potent weapons in the judicial arsenal." **Ibid**.

Before a writ of mandamus will be issued, a petitioner must meet three conditions for the writ to succeed. See **U.S. Sup. Ct. Rule 20.1**. This Petitioner will explain how he is able to satisfy the three required requisites for this Court to make a proper decision and exercise its appropriate authority and discretion in Petitioner's case. "The [three] hurdles, however demanding, are not insuperable." **Cheney**, 542 U.S. at 381, 159 L. Ed. 2d 459, 124 S. Ct. 2576.

A. The Writ Will Be In Aid of The Court's Appellate Jurisdiction.

The first criteria for this Petitioner to surmount the odds of having this Court grant the mandamus in his favor is the Petitioner must satisfy "the burden of showing that his right to issuance of the writ is "clear and indisputable"": **Kerr v. United States District Court**, 426 U.S. 394, 403, 48 L. Ed. 725, 96 S. Ct. 2119(1976).

Petitioner avers that he is currently confined to a state of 'abeyance' with his pending certificate of appealability in the court of appeals and cannot proceed to a proper appeal to the denial of his § 2255 petition unless the court of appeals

makes a formal ruling to potentially grant (or deny) the certificate of appealability required by Fed. R. App. P. 22(b)(2) and Title 28 U.S.C. § 2253(c)(1), (B)(2) & (3) as the district court judge did not issue a certificate of appealability.

The Petitioner has waited fourteen months for a ruling on his certificate of appealability but has not received a answer to date and Petitioner has no other choice but to seek relief with this Court's assistance through a writ of mandamus to direct the court of appeals to issue a ruling on Petitioner's certificate of appealability. This problem falls squarely within this Court's power, discretion, and appellate jurisdiction to issue the writ of mandamus to rectify this matter. The power to issue the writ of mandamus to the circuit courts is exercised by this Court to compel the circuit court to proceed to a final judgment or decree in a cause, in order that this Court may exercise the jurisdiction of review given by law. **Insurance Co. v. Comstock**, 83 U.S. (16 Wall) 258, 270, 21 L. Ed. 493(1872). The writ of mandamus is the sole vehicle to accomplish the task sought by Petitioner as "a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal." **Roche**, supra, 319 U.S. at 26, 87 L. Ed. 1185. The Petitioner cannot move forward to appeal the denial of his § 2255 petition unless the court of appeals makes a decision on Petitioner's request for a certificate of appealability which is strictly limited to a "threshold inquiry into the underlying merit of [the] claims," and ask "only if the District Court's decision was debatable." **Buck v. Davis**, 197 L. Ed.

2d 1, 4(2017). Petitioner has followed all necessary steps of the procedures stipulated to obtain the right to appeal and does not request the writ of mandamus from this Court in bad faith such as to circumvent the appeal process or to use the writ of mandamus as a substitute for an appeal because such a act will not be allowed by this Court, **Bankers Life & Cas. Co. v. Holland**, 346 U.S. 379, 383, 98 L. Ed. 106, 74 S. Ct. 145(1953), but to use the mandamus for one of its intended purposes as "[t]he mandamus does not direct the inferior court how to proceed, but only that it must proceed, according to its own judgment, to a final determination, otherwise it cannot be reviewed in the Appellate Court." **Kendall v. United States**, 37 U.S. 524, 12 Peters 524, 526, 9 L. Ed. 1181(1838).

B. That Exceptional Circumstances Warrant The Exercise Of the Court's Discretionary Powers.

Petitioner asserts that exceptional circumstances exist with the issue at hand due to the fact that Petitioner's 'hands are tied' on proceeding forth to appeal the erroneous denial of § 2255 petition by the district court because the court of appeals has refused to issue a decision on Petitioner's pending certificate of appealability. Petitioner has not been the cause of the delay or impeding the court of appeals in reaching a conclusion on the certificate of appealability as Petitioner has not filed for an extension, a supplemental motion, or any other document on his behalf requiring a delay in the court's ruling other than a Rule 33 motion in accordance with Fed. R. App. P. only striving

to initiate the court to take some form of action on the certificate of appealability pending at the time of the filing of the Rule 33 motion for almost a year to the date.

The court of appeals has either decided to ignore both the pending documents before the court or has refused to exercise jurisdiction pertaining to the matters. Either action seems to be done "arbitrarily and capricious," producing a miscarriage of justice to occur to Mr. Graham. The only viable solution for this problem is the writ of mandamus as "[i]t issues to the judges of any inferior court commanding them to do justice according to the powers of their office whenever the same is delayed." Ex Parte Crane, 5 Pet. 190, 192, 8 L. Ed. 92, 94(1832).

The unwarranted and uncalled for delay in ruling on the certificate of appealability by the court of appeals should not be allowed to continue to occur by this Court where "issuance of such writs is proper where a court has exceeded or refused to exercise its jurisdiction, or where appellate review will be defeated if a writ does not issue." La Buy v. Howes Leather Co., 352 U.S. 249, 260, 1 L. Ed. 2d 290, 77 S. Ct. 309(1957).

The certificate of appealability phase does not warrant a fourteen-month delay for a decision as the requirement for a certificate of appealability to issue is only a "substantial showing of the denial of a constitutional right", not a "definite" showing of a denial of a constitutional right. A claim can be debatable even though every jurist of reason might agree, after the certificate of appealability has been granted and the case

has received full consideration, that petitioner will not prevail. Buck, supra, 197 L. Ed. 2d at 8. The First Circuit has even considered a mandamus to be the proper remedy for a unnecessary delay where it stated "[w]e do not reject the notion that post-conviction delay might give rise to a remedy, perhaps on mandamus review." United States v. Carpenter, 781 F.3d 599, 615(CA1 2015). Other circuit courts have also took a similar stance that a unduly delay is clearly impermissible. Madden v. Myers, 102 F.3d 74, 79(CA3 1996) ("[A]n appellate court may issue a writ of mandamus on the ground that undue delay is tantamount to a failure to exercise jurisdiction."); IDS Life Ins. Co. v. SunAmerica, 103 F.3d 524, 526(CA7 1996)("Delay that is utterly unjustified and is causing irreparable harm is, it is true, a ground for mandamus."); Jones v. Shell, 572 F.2d 1278, 1280(CA8 1978)(busy court docket cannot justify fourteen-month delay in processing claim from date of remand; crowded dockets do not excuse compliance with rules and statutes); United States v. Nance, 666 F.2d 353, 359(CA9 1981)("general congestion" of court's calendar impermissible factor on which to base ends of justice continuance under Speedy Trial Act, 18 U.S.C. § 3161(h)(8)(C), cert. denied, 456 U.S. 918, 72 L. Ed. 2d 179, 102 S. Ct. 1776(1982); Johnson v. Rogers, 917 F.2d 1283, 1284-85(CA10 1990) (granting a writ of mandamus based on fourteen-month delay in district court's processing of 28 U.S.C. § 2241 petition); Telecommunications Research & Action Center v. FCC, 750 F.2d 70, 79 (CA DC 1984)(In the context of a claim of unreasonable delay, the first stage of judicial inquiry is to consider whether the [ ]

delay is so egregious as to warrant mandamus). This Court has also gave it's opinion on matters of like nature on a few occassions. La Buy, supra, 352 U.S. at 259, 1 L. Ed. 2d 290, 77 S. Ct. 309 (congestion of court docket insufficient ground to justify reference to master under Fed. R. Civ. P. 53(b)); Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 345, 46 L. Ed. 2d 542, 96 s. ct. 584(1976)(court's crowded docket impermissible ground to remand action to state court); Moses H. Cone Hosp. v. Mercury Constr., 460 U.S. 1, 10-11 n. 11, 74 L.Ed. 2d 765, 103 S. Ct. 927(1983)(holding that a stay order is appealable because it amounts to a refusal to hear and decide a case).

Any reason for a delay on ruling on Petitioner's certificate of appealability are unfounded and the court of appeals has blatantly denied Petitioner a timely and meaningful way of moving forward to litigate his claims of serving a unconstitutionally enhanced sentence causing undue distress and irreparable harm. Continued delay on a decision of the certificate of appealability by the court of appeals is affecting Petitioner's "right of redress is being severely impaired". Thermtron, supra, 423 U.S. at 341, 46 L. Ed. 2d 542, 96 S. Ct. 584. At this point, justice delayed is justice denied. Johnson, 917 F.2d at 1285.

C. That Adequate Relief Cannot Be Obtained In Any Other Form Or From Any Other Court.

Petitioner has sought relief in the First Circuit Court of Appeals, where the current certificate of appealability has been pending unreasonably for fourteen-months, by filing a Rule 33 motion of the Fed. R. App. P. requesting clarification or a

conference regarding the certificate of appealability, but two and half months later the court has not took action or made a decision on either pending motion.

The Circuit Court in the district is the highest court of original jurisdiction, **Kendall**, supra, 12 Peters at 526, 9 L. Ed. 1181, and action was already pursued by the Petitioner to stimulate a decision on the certificate of appealability from the court of appeals but nothing has transpired as of yet, so Petitioner is left with one last option and that is to seek assistance from this Court to intervene and direct the court of appeals to rule on the certificate of appealability. This Court has reiterated that "the rule that this Court has power to issue a mandamus, in the exercise of its appellate jurisdiction, and that the writ will lie in a proper case to direct a subordinate Federal Court to decide a pending cause." **Insurance Co. v. Comstock**, supra, 83 U.S. (16 Wall) at 270, 21 L. Ed. 493; **Thermtron**, supra, 423 U.S. at 352, 46 L. Ed. 2d 542, 96 S. Ct. 584; **Will v. Calvert Fire Ins. Co.**, 437 U.S. 655, 662, 57 L. Ed. 2d 504, 98 S. Ct. 2552(1978). Petitioning the court of appeals for mandamus relief against itself would be 'asinine' and pointless regarding the delay.

As there is no other form or court to request assistance and relief from, Petitioner's last resort to end this unnecessarily prolong period of waiting on a ruling is within this Court's overseeing jurisdiction. This Court also has a significant interest in supervising the administration of the judicial system. See this Court's Rule 10(a)(the Court will consider whether the

courts below "so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power").) **Hollingsworth v. Perry**, 558 U.S. 183, 196, 130 S. Ct. 705, 175 L. Ed. 2d 657(2010). The Court's interest in ensuring compliance with proper rules of judicial administration is particularly acute when those rules relate to the integrity of judicial processes. **Ibid**.

It has been recognized by this Court for the better part of almost two centuries that when a court has lawful jurisdiction on a matter it is to exercise that jurisdiction when it is obligated to do so. This Court has acknowledged this point on multiple rulings in the past that "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." See e.g. **Colorado River Water Conservation Dist. v. United States**, 424 U.S. 800, 821, 47 L. Ed. 2d 483, 96 S. Ct. 1236(1976)("[F]ederal courts have a 'virtually unflagging obligation ... to exercise the jurisdiction given them'"); **England v. Louisiana Bd. of Medical Examiners**, 375 U.S. 411, 415, 11 L. Ed. 2d 440, 84 S. Ct. 461(1964) ("'When a federal court is properly appealled to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction'")(quoting **Willcox v. Consolidated Gas Co.**, 212 U.S. 19, 40, 53 L. Ed. 382, 29 S. Ct. 192(1909)); **Cohens v. Virginia**, 6 Wheat 264, 404, 5 L. Ed. 257(1821)(Federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not"). **Quackenbush v. Allstate Ins. Co.**, 517 U.S. 706, 716, 135 L. Ed. 2d 1, 116 S. Ct. 1712(1996). By the court of

appeals not ruling on Petitioner's certificate of appealability in a reasonable time frame and choosing not to exercise the courts jurisdiction authorized and permissible by law, the court of appeals has disregarded the law it has a obligation to maintain and to respect the rights of Petitioner as well.

Petitioner is asking this Court to uphold the law the court of appeals has ignored thus far and enforce the rights of this Petitioner through issuing the writ of mandamus as no other avenue is there available for Petitioner to pursue or utilize. The perfect reason presently exist in Petitioner's case to use the mandamus as "it is not to "control the decision of the [] court," but rather merely to confine the lower court to the sphere of it's discretionary power". **Will v. United States**, 389 U.S. 90, 104, 19 L. Ed. 2d 305, 88 S. Ct. 269(1967).

CONCLUSION

Therefore, as Petitioner as stated in the above cited reasons based on facts and law, that "a majority of the Court will vote to grant mandamus relief" to Mr. Graham as having the solid belief he has satisfied the three required conditions for the writ of mandamus to issue by this Court, and a failure to see Petitioner point of view on this matter has the potential "likelihood that irreparable harm will result from the denial of the mandamus, also calling into question the fairness, integrity, and public reputation of the judicial proceedings. Petitioner respectfully request that this Court grant the writ of mandamus and direct the United States Court of Appeals for the First Circuit to take action on the

Petitioner's certificate of appealability within thirty (30) days to issue a decision.

Date: October 18, 2018

Respectfully submitted,

/s/ _____

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