



U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

September 12, 2018

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Terrence Smith v. United States, No. 17-9400

Dear Mr. Harris:

The above-captioned case has been distributed for the Court's consideration at its Conference of September 24, 2018. The government filed its brief in opposition to certiorari on August 15, 2018. The brief references the government's then-pending petition for rehearing en banc in *Cross v. United States*, 892 F.3d 288 (7th Cir. 2018). On Friday, August 31, 2018, the Seventh Circuit denied that petition. The government respectfully submits that the Court should deny the petition for a writ of certiorari in this case for the other reasons stated in the brief in opposition. Among other things, the question presented is one of limited applicability on which the Seventh Circuit remains a solitary outlier, as all six other circuits to directly address the issue—including the Third and Ninth Circuits, in decisions issued after *Cross*—have determined that prisoners like petitioner are not entitled to relief on a motion under 28 U.S.C. 2255. See *United States v. Blackstone*, No. 17-55023, slip op. at 14 (9th Cir. Sept. 12, 2018) (“We disagree with the interpretation of the Seventh Circuit.”); *United States v. Green*, 898 F.3d 315, 322 (3d Cir. 2018) (stating that the court was “not persuaded by the [Seventh Circuit’s] brief analysis on this issue”); *United States v. Greer*, 881 F.3d 1241, 1248-1249 (10th Cir. 2018), petition for cert. pending, No. 17-8775 (filed May 1, 2018); *United States v. Brown*, 868 F.3d 297, 303 (4th Cir. 2017), petition for cert. pending, No. 17-9276 (filed May 29, 2018); *Raybon v. United States*, 867 F.3d 625, 629 (6th Cir. 2017), cert. denied, 138 S. Ct. 2661 (2018); see also *Upshaw v. United States*, No. 17-15742, 2018 WL 3090420, at *3 (11th Cir. June 22, 2018) (per curiam).

I would appreciate your distributing this letter to the Members of the Court. Thank you for your consideration.

Sincerely,

Noel J. Francisco
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17-9400
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