

NO: 17-8878

**In the
Supreme Court of the United States**

JEROME RAYBON,

Petitioner,

v.

UNITED STATES of AMERICA,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

**SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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Cases

<i>Cross v. United States</i> , No. 17-2282, __ F.3d __, 2018 WL 2730774 (7th Cir. June 7, 2018).....	3, 4, 5
<i>In re Griffin</i> , 823 F.3d 1350 (11th Cir. 2016)	3
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015)	2
<i>Moore v. United States</i> , 871 F.3d 72 (1st Cir. 2017).....	3, 4
<i>Raybon v. United States</i> , 867 F.3d 625 (6th Cir. 2017).....	3, 4
<i>United States v. Brown</i> , 868 F.3d 297 (4th Cir. 2017)	3, 4
<i>United States v. Greer</i> , 881 F.3d 1241 (10th Cir. 2018)	3

Statutes

28 U.S.C. § 2255 (2012)	2, 3, 4
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Other Authorities

U.S.S.C. § 4B1.2 (2004)	3
U.S.S.G. § 4B1.1 (2004)	3

Pursuant to this Court's Rule 15.8, Petitioner Jerome Raybon submits this supplemental brief to call the Court's attention to a case decided after the petition for certiorari was filed on May 7, 2018.

Mr. Raybon petitions this Court to grant certiorari to address whether a 28 U.S.C. § 2255 motion filed within one year of *Johnson v. United States*, 135 S. Ct. 2551 (2015), claiming that *Johnson* invalidates the residual clause of the pre-*[United States v. Booker*, 543 U.S. 220 (2005)] career-offender guideline, asserts a "right . . . initially recognized" in *Johnson* within the meaning of 28 U.S.C. § 2255(f)(3). This Court is scheduled to discuss Mr. Raybon's petition during the June 14, 2018 conference.

On June 7, 2018, the United States Court of Appeals for the Seventh Circuit issued an opinion in the consolidated cases of *Cross v. United States*, No. 17-2282, and *Davis v. United States*, No. 17-2724, __ F.3d __, 2018 WL 2730774 (7th Cir. June 7, 2018). The decision deepens the conflict among the courts of appeals on both questions. On the question of timeliness, the Seventh Circuit directly conflicts with the decision below in this case, and with the Fourth and Tenth Circuits' conclusion that petitions like Mr. Raybon's are untimely. *United States v. Greer*, 881 F.3d 1241, 1247–49 (10th Cir. 2018); *Raybon v. United States*, 867 F.3d 625, 630–31 (6th Cir. 2017); *United States v. Brown*, 868 F.3d 297, 301–04 (4th Cir. 2017). The Seventh Circuit agreed with the First Circuit's decision in *Moore v. United States*, 871 F.3d 72, 80–84 (1st Cir. 2017), holding that these motions are timely under 28 U.S.C.

§ 2255(f)(3). On the merits question, the Seventh Circuit disagreed with the Eleventh Circuit's decision in *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016), and held that sentences imposed in accordance with the residual clause of the mandatory career-offender guideline violate Due Process. *Cross*, slip op. at 32–33.

As in Mr. Raybon's case, in *Cross* and *Davis*, district courts had to increase the movants' sentences in accordance with the pre-*Booker* mandatory career-offender guideline, U.S.S.G. § 4B1.1. Both men had prior convictions which were "crimes of violence" under the residual clause. *Id.* § 4B1.2(a)(2). Like Mr. Raybon, both men filed a first § 2255 motion within one year of *Johnson*, claiming their sentences are unconstitutional because *Johnson* recognized "[t]he right not to be sentenced under a rule of law using [the] vague language" of the residual clause. *Cross*, slip op. at 7.

The Seventh Circuit held that these motions complied with § 2255(f)(3) and were thus timely because the movants asserted the right recognized in *Johnson*, *i.e.*, the "right not to have [a] sentence *dictated* by the unconstitutionally vague language of the mandatory residual clause." *Id.* at 8. In holding the motions timely, the court identified the disagreement among the circuit courts, *id.* at 7 (comparing *Brown*, 868 F.3d at 301–04; *Raybon*, 867 F.3d at 629–31, with *Moore*, 871 F.3d at 80–84), and sided with the First Circuit, *Cross*, slip op. at 7–8.

The Seventh Circuit rejected the government's argument that § 2255(f)(3)'s requirements could not be met "unless and until the Supreme Court explicitly extends the logic of *Johnson* to the pre-*Booker* mandatory guidelines." *Cross*, slip op. at 7. The

approach of the government, the Fourth, Sixth, and Tenth Circuits “suffers from a fundamental flaw” because:

It improperly reads a merits analysis into the limitations period. Section 2255(f)(3) runs from “the date on which the right *asserted* was initially recognized by the Supreme Court.” 28 U.S.C. § 2255(f)(3) (emphasis added). It does not say that the movant must ultimately *prove* that the right applies to his situation; he need only claim the benefit of a right that the Supreme Court has recently recognized. An alternative reading would require that we take the disfavored step of reading “asserted” out of the statute.

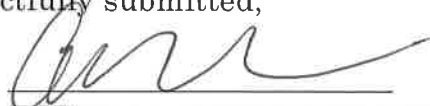
Id. at 7.

The Seventh Circuit acknowledged that the right the movants asserted, like Mr. Raybon, “was recognized in *Johnson*.” *Id.* at 7. By filing their petitions within one year of *Johnson*, Davis and Cross “complied with the limitations period of section 2255(f)(3).” *Id.* at 8.

In light of the deepening circuit split and the important nature of the question presented, Mr. Raybon’s petition for a writ of certiorari should be granted.

Respectfully submitted,

By:


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