

No. 17-9276

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IN THE  
Supreme Court of the United States

THILO BROWN,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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

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**SUPPLEMENTAL BRIEF FOR PETITIONER**

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**SUPPLEMENTAL BRIEF OF PETITIONER**

Pursuant to this Court's Rule 15.8, Petitioner Thilo Brown submits this supplemental brief to call the Court's attention to a case decided after Petitioner filed his petition for certiorari.

On May 29, 2018, Petitioner filed a petition for certiorari, asking the Court to resolve two questions over which the courts of appeals are divided: (1) whether a § 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-*Booker* career offender guideline, asserts a "right . . . initially recognized" in *Johnson* within the meaning of 28 U.S.C. § 2255(f)(3); and (2) whether the residual clause of the pre-*Booker* career offender guideline is unconstitutionally vague.

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, and further demonstrates that the decision below is wrong. On the question of timeliness, the Seventh Circuit's opinion directly conflicts with the divided panel decision in this case, and with the Sixth and Tenth Circuits' decisions in *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017) and *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018), and agrees with the First Circuit's decision in *Moore v. United States*, 871 F.3d 72 (1st Cir. 2017). On the merits question, the Seventh

Circuit disagrees with the Eleventh Circuit's decision in *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016).

As in Petitioner's case, the district courts in Cross's and Davis's cases increased their sentences as required by the pre-*Booker* mandatory career offender guideline. U.S.S.G. § 4B1.1. Like Petitioner, their career offender status depended on prior convictions that were crimes of violence only under the residual clause. *Id.* § 4B1.2(a)(2). Like Petitioner, Cross and Davis each filed a first § 2255 motion within one year of *Johnson*, claiming that they were sentenced in violation of the Constitution in light of *Johnson*. The Seventh Circuit held that their motions complied with § 2255(f)(3) and were thus timely because they asserted a right recognized in *Johnson*, and that they were both entitled to relief under *Johnson* because the residual clause of the pre-*Booker* mandatory career offender guideline is void for vagueness. *Cross*, slip op. at 6-8, 18-33.

In holding the motions timely, the court 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 court noted that the Fourth and Sixth Circuits had accepted the government's view, *id.* (citing *United States v. Brown*, 868 F.3d 297, 301-04 (4th Cir. 2017); *Raybon*, 867 F.3d at 629-31), and that the First Circuit had rejected it, *id.* (citing *Moore*, 871 F.3d at 80-84). The court explained that the approach of the government, and 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 court held that the right asserted “was recognized in *Johnson*.” *Id.* “Under *Johnson*, a person has a right not to have his sentence *dictated* by the unconstitutionally vague language of the mandatory residual clause.” *Id.* at 8. Davis and Cross “assert precisely that right,” and therefore “complied with the limitations period of section 2255(f)(3) by filing their motions within one year of *Johnson*.” *Id.*

The court also held that both Cross and Davis were entitled to relief on the merits. The court concluded that the “same two faults” that render the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii)—the combined indeterminacy of how much risk the crime of conviction posed and the degree of risk required—“inhere in the residual clause of the guidelines.” *Cross*, slip op. at 19. It “hardly could be otherwise” because the clauses are identically worded and the categorical approach applies to both. *Id.* at 19-21. The court further explained that the majority and concurring opinions in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) “reconfirm[ed]” its view that the guidelines’ residual clause “shares the weaknesses that *Johnson* identified in the ACCA.” *Id.* at 22; *id.* at 22-25.

Finally, the Seventh Circuit held that the mandatory guidelines’ residual clause implicated the twin concerns of the vagueness doctrine because it fixed the permissible range of sentences. *Id.* at 28-33. The court explained that *Beckles v.*

*United States*, 137 S. Ct. 886 (2017) “reaffirmed that the void-for-vagueness doctrine applies to ‘laws that *fix the permissible sentences* for criminal offenses.’” *Cross*, slip op. at 30 (quoting *Beckles*, 137 S. Ct. at 892). “As *Booker* described, the mandatory guidelines did just that. They fixed sentencing ranges from a constitutional perspective.” *Id.* at 30-31. Because the guidelines were “not advisory” but “mandatory and binding on all judges,” *id.* at 31 (quoting *United States v. Booker*, 543 U.S. 220, 233-34 (2005)), “[t]he *mandatory* guidelines did . . . implicate the concerns of the vagueness doctrine.” *Id.* at 30. “[T]he residual clause of the mandatory guidelines did not merely guide judges’ discretion; rather, it mandated a specific sentencing range and permitted deviation only on narrow, statutorily fixed bases.” *Id.* at 32. The court added that “even statutory minimum sentences are not exempt from departures,” *id.* (citing 18 U.S.C. § 3553(e) and § 3553(f)), yet “as we know from *Johnson’s* treatment of the ACCA, statutory minima must comply with the prohibition of vague laws,” and the same is true of the pre-*Booker* mandatory guidelines. *Id.* The court held that because the residual clause of the mandatory guidelines implicated the “twin concerns” of the vagueness doctrine, it is “thus subject to attack on vagueness grounds.” *Id.* at 32-33 (quoting *Beckles*, 137 S. Ct. at 894–95).

The Seventh Circuit’s decision deepens the circuit conflicts concerning whether *Johnson* recognized a right not to have one’s sentence increased by the pre-*Booker* mandatory guidelines’ residual clause and whether the mandatory guidelines’ residual clause is unconstitutionally vague, and further demonstrates that the

decision below is wrong. It therefore confirms the reasons for granting the petition for a writ of certiorari in this case.

Respectfully submitted,

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JUNE 8, 2018