No. 17-9276

IN THE
Supreme Court of the United States

THILO BROWN,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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

# SUPPLEMENTAL BRIEF FOR PETITIONER

PARKS NOLAN SMALL
Federal Public Defender

ALICIA VACHIRA PENN
*Counsel of Record*
Assistant Federal Public Defender
145 King Street, Suite 325
Charleston, SC 29401
(843) 727-4148
Alicia_Penn@fd.org

*Counsel for Petitioner*

## SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner filed his reply brief on August 20, 2018, and filed a supplemental brief on September 4, 2018 informing the Court that the Seventh Circuit had denied the government's petition for rehearing and rehearing en banc in *Cross v. United States*, 892 F.3d 288 (7th Cir. 2018). On September 12, 2018, the Solicitor General filed a letter also reporting the denial of the government's petition for rehearing and rehearing en banc in *Cross*. The government had argued in its memorandum in opposition that its petition for rehearing in *Cross* may resolve the circuit conflict without this Court's intervention. *See Brown* Mem. Opp. 3 (citing *Gipson* Br. Opp. 15). The government argues in its letter that the Court should nonetheless deny Mr. Brown's petition because "the question presented is 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." U.S. Supp. Letter (Sept. 12, 2018). This supplemental brief replies to the arguments in the government's letter.

1. Even if the Seventh Circuit were a "solitary outlier," that would not be a reason to deny certiorari. The Court often grants certiorari to resolve conflicts created by just one circuit. *See, e.g., Beckles v. United States*, 137 S. Ct. 886, 891-92 & n.2 (2017); *Dean v. United States*, 137 S. Ct. 1170 (2017); *Lockhart v. United States*, 136 S. Ct. 958, 961 (2016); *United States v. Woods*, 571 U.S. 31, 37 (2013). Indeed, cases on the Court's calendar this Term involve minor circuit splits, or none

at all. *See, e.g.*, *Gundy v. United States*, No. 17-6086 (certiorari granted although "[e]very court of appeals to decide [the challenge at issue] has rejected it" (U.S. Br. in Opposition at 21)); *Stokeling v. United States*, No. 17-5554 (certiorari granted although only "a shallow conflict exists between the Ninth and Eleventh Circuits" (U.S. Br. in Opposition at 14)); *United States v. Stitt*, No. 17-765 (certiorari granted where "[t]he Fourth, Eighth, and Ninth Circuits have adopted the same [view] as the decision below. . . . In contrast, the Tenth Circuit has held [otherwise]. . . . The Fifth Circuit has also so held, but it has recently granted rehearing en banc on that question." (Pet. for Writ of Certiorari at 18-19)).

2. The government's assertion that the question presented is of "limited applicability," if it means that the class of defendants sentenced under the mandatory guidelines' residual clause will not increase, is not a valid reason to deny certiorari. This Court granted certiorari in *Beckles* to decide whether a class of people that would not increase in size would be able to challenge their sentences on collateral review. *See* Brief in Opposition at 17, *Beckles v. United States*, 137 S. Ct. 886 (2017) (arguing issue was of limited importance because Sentencing Commission had deleted the residual clause). Similarly, this Court granted certiorari in *Bousley v. United States,* 523 U.S. 614 (1998) after the amendment to § 924(c) in response to *Bailey v. United States*, 516 U.S. 137 (1995), had been introduced in the Senate, and decided the case shortly before it was enacted into law.[1]

[1] *See* S. 191, 105th Cong. (Jan. 22, 1997); *Bousley v. Brooks*, 521 U.S. 1152 (Sept. 29, 1997) (granting certiorari); Pub. L. No. 105-386 (Nov. 13, 1998).

3. The government's assertion that the question presented is of "limited applicability," if it means it will have limited impact, is incorrect.

First, the class of persons and the length of potentially unconstitutional imprisonment are significant. Of all defendants sentenced as career offenders from 1992 through 2004 (before *Booker*) who remain in prison, the average sentence was 316 months, the median sentence was 281 months, and 13 percent were sentenced to life.[2] Over 1,000 such prisoners have motions under 28 U.S.C. § 2255 or appeals pending in the ten circuits other than the First and Seventh Circuits (which have both ruled that § 2255 motions in mandatory guidelines cases are timely). *See* Amicus Brief of Fourth Circuit Federal Defenders, Add. 1a-5a, *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017). This number does not include what is likely hundreds of prisoners subject to currently unreviewable denials in the Eleventh Circuit under *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016).[3]

Second, unlike *Beckles* and *Bousley*, the impact of the unresolved question of the proper interpretation of the timeliness provision at 28 U.S.C. § 2255(f)(3) is not confined to one class of cases that will not increase in size. The issue is already recurring and broadening with respect to provisions that have the same two features that rendered the ACCA's residual clause unconstitutionally vague, and it will recur

---

[2] U.S. Sent'g Comm'n, Individual Offender Datafiles, Fiscal Years 1992-2004.

[3] *See* Pet. 31 & n.17; Petition for Writ of Certiorari at 21, *Wilson v. United States*, No. 17-8746 (over 20 percent of all people sentenced as career offenders before *Booker* who remain in prison were sentenced in the Eleventh Circuit, more than in any other circuit); *In re Jones*, 830 F.3d 1295, 1302 (11th Cir. 2016) (stating that between April 18, 2016 and July 15, 2016, the Eleventh Circuit received 1,826 *Johnson*-based requests for authorization, and "denied hundreds" of those) (Rosenbaum and Pryor, Jill, JJ., concurring in the result).

in every case in the future in which movants assert a right "initially recognized" by this Court in a closely analogous case. Thus, the issue will not disappear if prisoners in some circuits are left to serve potentially unconstitutional mandatory guidelines sentences of decades or life.

The government is arguing that in order to satisfy § 2255(f)(3) in any case in which a movant challenges his conviction or sentence under a residual clause with an ordinary-case requirement and an ill-defined risk threshold, this Court must announce another new rule. According to the government, *Johnson* recognized only a right not to be sentenced under the residual clause in the ACCA, *Dimaya* recognized only a right not to be deported under the residual clause at 18 U.S.C. § 16(b), and this Court has not yet recognized a right not to be convicted and sentenced under the residual clause of § 924(c)(3)(B). Some district courts have accepted the government's rigid interpretation of § 2255(f)(3), while others have rejected it, including in circuits that had adopted the government's interpretation in mandatory guidelines cases. *See* Reply at 13-14 & n.11.

In a case decided by a district court in the Fourth Circuit after Petitioner filed his reply, the movant filed a § 2255 motion challenging his conviction and sentence under § 924(c)(3)(B) shortly after this Court decided *Dimaya*. The court, correctly in Petitioner's view, rejected the government's argument that the motion was filed too early, rejected the movant's argument that it was filed on time, and held that it was filed too late: "[T]he right that Petitioner seeks to invoke was not recognized in *Dimaya*. Rather, it was recognized in *Johnson* and applied in *Dimaya*. . . .

Because *Johnson* recognized the right that Petitioner invokes and this instant Motion was not raised within a year of *Johnson*, the Motion is untimely under § 2255(f)(3)." *Thomas v. United States*, 11-CR-58, 2018 WL 3999709, at *3 (E.D. Va. Aug. 21, 2018).

The lower courts are in need of guidance before further confusion develops and spreads. For example, one week after the Fifth Circuit held that a § 2255 motion challenging § 924(c)(3)(B) under *Johnson* was filed too early because this Court had not yet determined that the provision is unconstitutional, *United States v. Williams*, 897 F.3d 660, 662 (5th Cir. 2018), it held that "§ 924(c)'s residual clause is unconstitutionally vague." *United States v. Davis*, __ F.3d __, 2018 WL 4268432, at *3 (5th Cir. Sept. 7, 2018). Litigants and district courts in the Fifth Circuit are now left to wonder whether and when a § 2255 motion challenging § 924(c)(3)(B) will be deemed too early or too late.

Unless this Court resolves the proper interpretation of § 2255(f)(3), the issue will recur in every case in the future in which movants assert a right "initially recognized" by this Court in a closely analogous case. In some circuits, if movants file within a year of the initial new rule, they will have filed too early. In other circuits, if movants wait for this Court to expressly apply the initial rule in a closely analogous context, they will have filed too late. In circuits that have not decided, their motions may be deemed too early or too late.

4. In describing the Seventh Circuit as a "solitary outlier," the government fails to mention the First Circuit's decision in *United States v. Moore*, 871 F.3d 72 (1st Cir. 2017), in which the court held that the motion was timely, squarely rejected

*Brown* and *Raybon,* and found that "the right *Moore* seeks to assert is exactly the right recognized by *Johnson*." *Id.* at 77 n.3, 82-83. The government cites *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018), but fails to mention that the Tenth Circuit has granted a petition for rehearing in a mandatory guidelines case filed within a year of *Johnson* that was previously summarily dismissed based on *Greer*. *See United States v. Ward*, No. 17-3182 (10th Cir. Aug. 6, 2018). The Eleventh Circuit's unpublished decision in *Upshaw v. United States*, No. 17-15742, 2018 WL 3090420 (11th Cir. June 22, 2018), cited by the government, did not rule on timeliness, but ruled that it was constrained from overruling prior circuit precedent regarding the merits. *See id.* at *3 ("*Griffin* is a published order denying an application to file a second or successive habeas petition, and this Court recently decided that such orders are binding precedent even outside of the context of second or successive habeas applications.").

5. The government cites *United States v. Blackstone*, No. 17-55023, slip op. (9th Cir. Sept. 12, 2018), and *United States v. Green*, 898 F.3d 315 (3d Cir. 2018), as having been decided after, and disagreeing with, *Cross v. United States*, 892 F.3d 288 (7th Cir. 2018). Undersigned counsel has been advised that the movants in those cases are filing petitions for rehearing and rehearing en banc. Like the other cases the government cites, these cases were wrongly decided.

In *Blackstone*, the panel acknowledged that this Court's decisions in *Johnson*, *Beckles* and *Dimaya* "may suggest" that the residual clause of the mandatory guidelines is unconstitutionally vague, but concluded that this Court must first hold

that it is before "the right that Blackstone seeks to assert" can be "recognized." *Blackstone*, slip op. at 10-13. Like the Fourth Circuit in this case, the panel relied on 28 U.S.C. § 2254(d)(1), a provision that sharply limits relief on the merits for state prisoners and employs language that is materially different from the text of § 2255(f)(3), for the proposition that "AEDPA expressly limits our ability" to apply "Supreme Court holdings in different contexts" when applying § 2255(f)(3)'s statute of limitations. *Id.* at 12. Section 2254(d)(1), of course, does not apply to federal prisoners or any statute of limitations. Indeed, if § 2254(d)(1) supplies the meaning of the statute of limitations at § 2255(f)(3), it also supplies the meaning of the statute of limitations for state prisoners at § 2244(d)(1)(C), thus rendering § 2244(d)(1)(C) superfluous.

In *Green*, the panel relied on the government's argument that the fact that the majority in *Beckles* did not decide whether the mandatory guidelines' residual clause is unconstitutionally vague (because the question was not presented) and Justice Sotomayor's observation that the majority's reliance on the distinction between advisory and mandatory guidelines leaves the question "open," mean that this Court has not recognized the right asserted. *Id.* at 320-21. The panel said that "[i]f *Johnson* had provided the last word on this issue, we might be persuaded by Green's arguments," but it was "bound by the Court's ruling in *Beckles*." *Id.* at 321.

Unlike the First and Seventh Circuits, none of the decisions ruling that motions filed within a year of *Johnson* were filed too early, relies on the text of §

2255(f)(3). They rely either on cases interpreting inapplicable statutes, the government's misinterpretation of *Beckles*, or both.

6. Like the Fourth Circuit in this case, the panels in *Blackstone* and *Green* suggest that movants can wait for a decision by this Court expressly holding that the mandatory guidelines' residual clause is unconstitutional. *See Blackstone*, slip op. at 15; *Green*, 898 F.3d at 323 n.5. But there is no way for a mandatory guidelines case to reach this Court except through a § 2255 motion based on *Johnson*, since no one sentenced before *Booker* has a direct appeal pending. Congress has provided federal prisoners the opportunity to collaterally attack the constitutionality of their sentences. *See* 28 U.S.C. § 2255(a). It cannot be correct that § 2255(f)(3), a provision intended to encourage due diligence and prevent delays, means that a movant who was likely sentenced in violation of the Due Process Clause, as the Court strongly indicated in *Johnson*, *Dimaya*, and *Beckles*, has no opportunity even to test the merits of his argument, based on the theory that this Court must first expressly hold that his argument is correct on the merits.

In conclusion, this case presents an important question of statutory interpretation, which has not yet been considered by this Court, over which the circuits are intractably divided, and which is spreading confusion to other kinds of cases. There is in fact no valid reason to deny certiorari in this case.

Respectfully submitted,

PARKS NOLAN SMALL
Federal Public Defender

ALICIA VACHIRA PENN
*Counsel of Record*
Assistant Federal Public Defender
145 King Street, Suite 325
Charleston, SC 29401
(843) 727-4148
Alicia_Penn@fd.org

*Counsel for Petitioner*

SEPTEMBER 19, 2018