No. 18-1186

IN THE

Supreme Court of the United States

ANTHONY JOHNSON,
Petitioner,

v.

EDWARD WINSTEAD, ET AL.,
Respondents.

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

BRIEF FOR CROSS-RESPONDENTS IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should decline to consider cross-petitioner's contention that the rule of *Heck v. Humphrey*, 512 U.S. 477 (1994) – that a section 1983 claim necessarily implying the invalidity of a conviction is not cognizable until that conviction has "been invalidated" – continues to defer accrual of the claim even after the conviction has been invalidated, where that contention was neither presented nor considered below.

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STATEMENT

On December 5, 2003, cross-respondents Winstead and Las Cola questioned cross-petitioner about his involvement in the murder of Brandon Baity. App. 1a, 4a; R. 25 at 3; R. 38-3 at 27-35; *People v. Johnson*, 2014 IL App (1st) 122459-B ¶2.[1] Cross-petitioner admitted to each detective that he

[1] Citations to "App. ___" are to the appendix to our petition in No. 18-1013.

drove the shooter to and from the scene of the shooting. App. 2a, 4a-5a. Cross-petitioner was charged with Baity's murder under an accountability theory, App. 2a, 6a; and a grand jury indicted cross-petitioner on June 29, 2004, App. 6a; R. 38-5 at 3.

Cross-petitioner was tried twice. App. 2a, 6a. At his first trial, which began October 1, 2007, App. 2a, 6a; R. 38-5 at 41, Detectives Winstead and Las Cola testified about his incriminating statements, App. 2a, 6a; R. 38-3 at 27-34. The jury found him guilty on October 10, 2007. App. 2a, 7a; R. 38-3 at 48. He appealed, App. 2a, 7a, asserting several errors during his trial, R. 38-3 at 4, but did not challenge the use of his statements to the detectives, App. 7a. On September 30, 2010, the Illinois Appellate Court reversed his conviction based on the trial judge's failure to clarify the law in response to a question from the jury. App. 7a; R. 38-3 at 5.

Cross-petitioner was retried on March 22, 2012. App. 2a, 7a; R. 38-5 at 81. At that second trial, Detectives Winstead and Las Cola repeated their testimony about his incriminating statements. App. 2a, 7a; *Johnson*, 2014 IL App (1st) 122459-B ¶¶81-98. On March 22, 2012, he was convicted a second time. App. 2a, 7a; R. 38-5 at 83. He appealed again, but again did not challenge the use of his statements to the detectives. *People v. Johnson*, 2013 IL App (1st) 122459 ¶2. On December 31, 2013, the appellate

court reversed his second conviction, this time based on insufficient evidence of accountability. App. 2a, 7a; *Johnson*, 2013 IL App (1st) 122459 ¶159. The Illinois Supreme Court vacated that decision and ordered it reconsidered in light of intervening precedent; and on reconsideration, the appellate court, on December 31, 2014, again reversed. App. 7a-8a; *Johnson*, 2014 IL App (1st) 122459-B ¶¶3-4.

On August 15, 2015, cross-petitioner filed this suit. App. 2a, 8a; R. 1. In relevant part, he alleged that Detectives Winstead and Las Cola violated his Fifth Amendment right against self-incrimination by interrogating him without *Miranda* warnings and then testifying about his unwarned statements at trial. App. 2a, 8a; R. 25 at 4, 9-11. Cross-respondents moved to dismiss these self-incrimination claims as untimely. App. 2a, 8a; R. 38 at 14. Cross-respondents explained that, under standard accrual rules, a claim accrues when the plaintiff has a complete and present cause of action. App. 2a, 8a; R. 38 at 14 (citing *Wallace v. Kato*, 549 U.S. 384, 388 (2007)). Cross-respondents also explained that because cross-petitioner had a complete and present cause of action when his incriminating statements were introduced at trial, the two-year statute of limitations for section 1983 claims in Illinois began running at that time, App. 2a; R. 38 at 14-15, and thus that those claims, filed more than two years later, were time barred, App. 2a, 8a; R. 38 at 15. Cross-respondents further explained

that accrual of cross-petitioner's claims was not deferred under *Heck v. Humphrey*, 512 U.S. 477 (1994). R. 38 at 15-17, 19-20. The district court agreed and dismissed the claims as untimely. App. 2a, 8a, 37a.

On appeal, cross-petitioner acknowledged that self-incrimination claims ordinarily accrue when the criminal defendant's statements are used at trial, but argued that, "under *Heck*, a plaintiff who has been convicted of a crime is barred from bringing a § 1983 claim that is inconsistent with the validity of that conviction until the conviction has been set aside." 7th Cir. Dkt. 22 at 15; accord *id.* at 16 ("[W]here *Heck* bars a § 1983 claim, the claim does not begin to accrue until the conviction is invalidated."). On that basis, cross-petitioner asserted that his self-incrimination claim "did not accrue in 2007 because it would have impugned the validity of his conviction and could not be raised until that conviction was overturned." *Id.* at 20. In addition to the grounds set forth in our petition regarding accrual of cross-petitioner's claims, cross-respondents emphasized that his claims regarding the use of his statements at the first trial were necessarily untimely because they "accrued no later" than when his first conviction was set aside. 7th Cir. Dkt. 33 at 34-35 (quoting 7th Cir. Dkt. 22 at 20). Cross-petitioner did not file a reply brief, and did not address this argument during oral argument before the court of appeals.

The court of appeals ruled that a "§ 1983 claim for violation of the Fifth Amendment right against self-incrimination . . . necessarily implies the invalidity of the conviction and under *Heck* is neither cognizable nor accrues until the conviction has been overturned." App. 20a-21a. In our petition, we challenge that ruling as applied to cross-petitioner's claims relating to his second trial. Applying that ruling to cross-petitioner's self-incrimination claims relating to his first criminal trial, the court held that the claims were untimely because his conviction from that trial "was reversed in 2010, and the two-year time clock" applicable to section 1983 claims in Illinois "expired long before he filed this suit in 2015." App. 22a.

REASONS FOR DENYING THE CROSS-PETITION

The conditional cross-petition should be denied. Cross-petitioner says he filed the cross-petition for the sole "purpose of preserving the issue of whether the accrual of a Fifth Amendment [self-incrimination] claim should be deferred until a defendant has finally been exonerated, notwithstanding the interim reversal of an earlier conviction." Cross-Pet. 5. In this connection, cross-petitioner asserts that his self-incrimination claims relating to his first trial were timely because after his 2007 conviction was set aside in 2010, he "was in custody awaiting his second

trial," Cross-Pet. 7, and "the existence of detention forbids a suit for damages contesting that detention's validity," *id.* at 6. In addition, according to cross-petitioner, *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Edwards v. Balisok*, 520 U.S. 641 (1997), deferred the accrual of his self-incrimination claims arising out of use of his inculpatory statements at the first trial until his release from custody. Cross-Pet. 7.

All of these arguments are waived. Cross-petitioner did not make any of them below, and neither of the lower courts addressed them. He therefore may not present them in this Court. Arguments "not raised in the Court of Appeals" are not properly before this Court. *E.g.*, *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986).

Indeed, far from arguing that accrual was deferred until exoneration and release from custody, cross-petitioner argued in the court of appeals that, "under *Heck*, a plaintiff who has been convicted of a crime is barred from bringing a § 1983 claim that is inconsistent with the validity of that conviction *until the conviction has been set aside*," 7th Cir. Dkt. 22 at 15 (emphasis added), and that such a claim therefore "does not begin to accrue *until the conviction is invalidated*," *id.* at 15-16 (emphasis added). On that basis, cross-petitioner asserted that his claims pertaining to his 2007 conviction "could not be raised

until *that conviction* was overturned." *Id.* at 20 (emphasis added). "That conviction" was overturned in 2010, at which point cross-petitioner nonetheless remained in custody awaiting a second trial. His new arguments that the *Heck* bar instead survives the reversal of a conviction and persists until complete exoneration, and that he could not sue over the use of his statements at the first trial until he was released from custody after reversal of his second conviction, are therefore waived.

In addition to presenting waived arguments, cross-petitioner does not identify a conflict among the circuits on the issue he presents. Indeed, he does not identify a single case involving accrual of a claim similar to his – arising from an alleged constitutional violation occurring at a trial preceding a conviction that was reversed on other grounds and remanded for a new trial, after which the arrestee was convicted again but exonerated on appeal, likewise on other grounds.[2]

Finally, cross-petitioner is also wrong on the merits; after his first conviction was overturned in 2010, there was no *Heck* bar, even though he

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[2] Cross-petitioner asserts without explanation that this case "is related to that before the court [sic] in *McDonough v. Smith*, 18-485." But as we explain, Pet. 21 n.3, this case concerns the legal effect of a reversed conviction on accrual, while *McDonough* involves a claim by an individual who, unlike cross-petitioner, was never convicted.

remained in custody awaiting a second trial. He cites nothing for his contention that he could not sue at that time. *Preiser* and *Edwards* do not support his position. In those cases, the plaintiffs, while incarcerated pursuant to convictions, brought claims seeking restoration of good-time credits; and the Court held that those claims were barred because the plaintiffs' success would have terminated or shortened their incarcerations for those extant convictions. *Edwards*, 520 U.S. at 646-48; *Preiser*, 411 U.S. at 500; see also *Muhammad v. Close*, 540 U.S. 749, 751 (2004) (refusing to apply *Edwards* to inmate good-conduct challenges that "threate[n] no consequence for [the inmate's] conviction or the duration of his sentence").

The claims in *Preiser* and *Edwards* are not like cross-petitioner's self-incrimination claims for use of his inculpatory statements at his first criminal trial. If he had brought his claims relating to the first criminal trial during the period between the reversal of his first conviction and his second criminal trial, his success on the claims could not have affected the fact or duration of his incarceration for that already-reversed conviction. As for the fact or duration of his detention awaiting his second criminal trial, that, too, was plainly not the result of his 2007 conviction – again, because it had already been reversed. Indeed, cross-petitioner makes no claim, and never has, that the use of his inculpatory statements at his first criminal trial caused his

detention after his 2007 conviction was reversed.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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