

# In the Supreme Court of the United States

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EDWARD WINSTEAD, ET AL.,  
*Applicants,*  
v.

ANTHONY JOHNSON,  
*Respondent.*

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## **Application For Extension Of Time To File A Petition For A Writ Of Certiorari**

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**To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Seventh Circuit:**

Pursuant to Rules 13.5 and 30.2 of this Court, applicants Edward Winstead, Dave Evans, Chester Bach, Brian Lutzow, Robert Garza, James Las Cola, and the City of Chicago (collectively, “petitioners”) respectfully request that the time to file a petition for a writ of certiorari be extended by 30 days to, and including, February 1, 2019. The Seventh Circuit entered its judgment, with opinion, on August 14, 2018. App. 1-20. On August 22 and 24, 2018, the Seventh Circuit extended the time to petition for rehearing to September 18, 2018. App. 21-22. On September 18, 2018, petitioners filed a timely petition for panel rehearing and rehearing en banc, and respondent Anthony Johnson filed a timely petition for panel rehearing. The

Seventh Circuit denied both petitions on October 3, 2018. App. 23. Petitioners intend to file a petition for writ of certiorari seeking review of the Seventh Circuit’s judgment; this Court will have jurisdiction over that petition under 28 U.S.C. § 1254(1). Ninety days from the denial of the petition for rehearing is January 1, 2019; because that day is a federal holiday under 5 U.S.C. § 6103(a), the date for filing is January 2, 2019. This application is filed at least ten days before that date, pursuant to Supreme Court Rule 13.5.

This case presents two important questions of federal law arising from *Heck v. Humphrey*, 512 U.S. 477 (1994), in which this Court held that there is no cause of action under 42 U.S.C. § 1983 for constitutional claims that, if successful, necessarily undermine the plaintiff’s criminal conviction or sentence. The first question concerns the accrual date of respondent’s claim that his Fifth Amendment right against self-incrimination was violated when his un-*Mirandized* statements were used against him at trial. In *Wallace v. Kato*, 549 U.S. 384 (2007), the Court held that *Heck* never defers or tolls the accrual of a section 1983 claim unless there is an “extant conviction” at the time the constitutional violation occurs, *id.* at 393; see *id.* at 393-95. And under *Chavez v. Martinez*, 538 U.S. 760 (2003), a Fifth Amendment self-incrimination violation occurs when the criminal defendant’s statements are introduced against him in his criminal case. *Id.* at 772-73. Plainly, no conviction has occurred at that time. With no extant conviction at the time respondent’s statements were used against him, the holding below that *Heck* barred his Fifth Amendment claim conflicts with *Wallace*.

The second important question of federal law concerns the proper application of *Heck* footnote seven to Fifth Amendment claims. In that footnote, this Court stressed that some section 1983 claims are not barred by the plaintiff's criminal conviction because such claims, "even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful," due to "doctrines like independent source and inevitable discovery, . . . and especially harmless error." *Heck*, 512 U.S. at 487 n.7 (citing *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991)). While Fifth Amendment claims are subject to harmless-error analysis, *Fulminante*, 499 U.S. at 307-12, the Circuits are deeply divided on how harmless error should be taken into account for purposes of accrual. In this case, the Seventh Circuit acknowledged that its conclusion that respondent's Fifth Amendment claim was barred by *Heck*, App. 18, "creates a circuit conflict" with the Eighth Circuit, App. 19 n.2, in *Simmons v. O'Brien*, 77 F.3d 1093, 1095 (8th Cir. 1996), see *id.* at 11, 18-19.

Both of these issues warrant review under Supreme Court Rule 10, but they cannot be adequately presented for this Court's consideration absent a thirty-day extension of time. This case was briefed and argued in the Seventh Circuit by an attorney who moved out-of-state before the case was decided and is no longer employed by the City of Chicago. It was reassigned to another attorney to prepare the petition for rehearing. To draft the petition for certiorari, a second attorney has been assigned as well, based on familiarity with the issues. Both attorneys have been handling several other matters while preparing the petition. Since the petition for rehearing was denied, these two attorneys have collectively filed five

briefs and substantive motions, presented or assisted another attorney in five oral arguments, participated in the Seventh Circuit's mandatory settlement process in the City's appeal from a \$47.3 million judgment, and begun review of a case involving 1.8 million investigatory stops conducted by thousands of Chicago Police Department officers over a 2½-year period, with an eye toward a potential petition for interlocutory appeal under Fed. R. Civ. P. 23(f). They have made preparation of the petition a priority, but researching and preparing the petition has proven extremely time-consuming. A draft is nearly complete, but even when complete will need to be reviewed by supervisors and the City's outside counsel, who represented petitioners in the district court. Both of the assigned attorneys will also be out of the office for more than a week each around the holidays, and one will not return to the office until the day after the petition is presently due.

For the foregoing reasons, petitioners respectfully request an additional thirty days, up to and including February 1, 2019, to file a petition for certiorari.

Dated: December 19, 2018

Respectfully submitted,

  
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