No. _____

In The
Supreme Court of the United States

TIFFANY LAY, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Federal District Court judges properly comply with FRCP 52(a) in conducting complex bench trials, by issuing ostensible "findings" which fail to specially and specifically state and provide any citations to the thousands of pages of record, transcript testimony, and exhibits, to appropriately allow parties and appellate Courts to examine, understand, and/or challenge the bases for the trial Court's "findings."

2. Whether the Circuit Courts of Appeal should properly distinguish *obiter dictum* (*dicta*), from precedential value under *stare decisis*, when the predicate basis for decision, was a sentence or two in a lengthy and inapposite forty-year-old case, never before cited in support by any District or Circuit Court, and appears to contradict at least three subsequent precedents of the Fifth Circuit requiring trial judges in bench trials, to issue detailed findings and citations in support.

PARTIES TO THE PROCEEDINGS

Petitioners Tiffany and Robert Lay, were the plaintiffs in the district court and the appellants in the Fifth Circuit. Petitioners are individuals, and there is no corporate ownership to disclose.

Respondent United States was the defendant in the district court and the appellee in the Fifth Circuit Court of Appeals. Respondent United States was involved as the responsible Governmental entity for agents, representatives and/or employees of G .V. (Sonny) Montgomery Veteran's Medical Center, located in Mississippi.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States District Court for the Southern District of Mississippi (Northern Division), and the United States Court of Appeals for the Fifth Circuit.

1. *Tiffany Lay and Robert Lay v. United States*, No. 3:19-CV-188 (J. Kristi H. Johnson)(Final Judgment and Memorandum Decision Entered Closing Case on August 11, 2021); *Lay v. United States*, No. 3:19-CV-188-KHJ-LGI, 2021 WL 4771460, (S.D. Miss. Aug. 11, 2021).

2. *Tiffany Lay and Robert Lay v. United States,* (Affirming Dismissal of Case) 2022 WL 1613004 (5th Cir. May 20, 2022); *Petition for Rehearing Denied,* July 22, 2022.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Introduction

This case is from the United States District Court for the Southern District of Mississippi. Under the Federal Tort Claims Act (FTCA), Petitioners Tiffany and Robert Lay filed a medical malpractice claim for failure to timely diagnose Tiffany Lay's *cauda equina* condition at the local Veteran's hospital, causing severe and permanent injuries. After a four-day non-jury trial, Federal Judge Kristi Johnson requesting both parties provide a "Supplemental Proposed Findings of Fact and Conclusions of Law." The [Respondent United States'] Supplemental Proposed Findings of Fact and Conclusions of Law, was 23 pages long. The [Petitioners'] Supplemental Proposed Findings of Fact and Conclusions of Law, was 37 pages long. Petitioners had 118 Proposed Findings of Fact, most with numerous citations for each proposed finding, totaling many hundreds of direct citations to the Record via transcripts, medical records, and exhibits. *See* Appendix D (Excerpted Portions of Plaintiff's' Supplemental Proposed Findings of Fact and Conclusions of Law) (App. 28-56) [1]

Though a 21-page Memorandum was issued by the trial Court two months later, this Memorandum

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[1] The full Proposed Findings by both parties, are located in the Fifth Circuit's Record on Appeal. For the Respondent/Government at ROA.3950-3972, and for Petitioners Lay, at ROA.3973-4009.

contained not a single citation to both parties' hundreds of citations to the Record, in the over 4000-page Record on Appeal in this case. Appendix B. This Memorandum therefore lacked appropriate findings under FRCP 52(a), especially when there were zero citations or references to the Record given throughout, to properly ascertain the location of any and all potentially discernible District Court's findings within the lengthy trial record.

As part of the timely appeal presented the Fifth Circuit, Petitioner argued the proper standard of review, was found in their recent decision of *Vikas WSP, Ltd. v. Econ. Mud Prod. Co.*, 23 F.4th 442 (5th Cir., Jan. 10, 2022). *Vikas* held,

> "[T]he findings of fact must show "the factual basis for the ultimate conclusion reached by the court." *S.S. Silberblatt, Inc. v. United States*, 353 F.2d 545, 549 (5th Cir. 1965) (cleaned up). The parties cannot waive those requirements, because they ensure that we can meaningfully review the district court's judgment. If the sparseness of the findings inhibits our review, we usually vacate and "remand ... to permit the trial court to make the missing findings." [Under […] "1 Steven Alan Childress & Martha S. Davis, Federal Standards of Review § 2.11 (3d ed. 1999) […] Rule 52(a) permits two types of challenges to findings of fact: (1) the findings are clearly erroneous; and (2) the findings are "missing or legally faulty")." *Id. at* 456-57, Ftnt. 11.

In addition to the standards and normal criteria re-affirmed recently in *Vikas* by the Fifth Circuit, (which itself relied on established precedent from 1965 in *S.S. Silberblatt*), other established precedents were quoted extensively in Appellants' Brief to that Court. This included:

1. *Eni US Operating Co., Inc. v. Transocean Offshore Deepwater Drilling, Inc.*, 919 F.3d 931, 935 (5th Cir. 2019)(""After a bench trial, a district court must make factual findings. Federal Rule of Civil Procedure 52(a) makes that clear. The question before us is how detailed those factual findings need to be. Is the district court required to make subsidiary findings? Or can it announce only its ultimate factual conclusion? We long ago answered that question: Rule 52(a) compels a district court to lay out enough subsidiary findings to allow us to understand "the basis of the trial court's decision." *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 515 (5th Cir. 1969). Put differently, "the findings ... must be sufficiently detailed to give us a clear understanding of the analytical process by which [the] ultimate findings were reached and to assure us that the trial court took care in ascertaining the facts." *Golf City, Inc. v. Wilson Sporting Goods, Co.*, 555 F.2d 426, 433 (5th Cir. 1977). When the district court fails to do this, remand for additional fact finding is proper.")[2]

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[2] *Eni* was reversed and remanded, despite the trial judge giving 102 separately numbered paragraphs,

2. *Chandler v. City of Dallas*, 958 F.2d 85, 89–90 (5th Cir. 1992)("The record in this case is massive and the issues complicated, which makes the task of articulating the findings of fact and conclusions of law quite burdensome. *But that is exactly why we need detailed findings of fact and thorough conclusions of law.* Our resolution of this threshold issue *flows from our inability to ascertain the factual and legal bases for the district court's decision*. This inability prevents our review of the remaining issues raised by the City in this appeal. Our precedents teach that we must, therefore, vacate the judgment of the district court and remand for the district court to fully articulate its findings of fact and conclusions of law. *The findings of fact and conclusions of law play a duet; the district court tunes one to the other.* Under Federal Rule of Civil Procedure 52(a), the district court must record appropriate portions of the musical selection for us to hear on appeal. When we hear a blank tape, however, we cannot evaluate the tenor of the melody." [Emphasis Added])

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each with citations to the Record, and most with corresponding endnotes providing even more details as to the bases of the Court's trial decisions and findings. *Eni US Operating Co., Inc. v. Transocean Offshore Deepwater Drilling, Inc.*, 2017 WL 10647751 (U.S. Dis., S.D. Texas (Decision, Dec. 8, 2017).

The Fifth Circuit, at best, fails to consistently apply the rationales and goals of FRCP 52 (a), which differ from other Circuit's clear application of case law precedent, and a proper subject of this Court's Certiorari authority under Supreme Court Rule 10(a).

Two subsections are implicated in this case. (A)(1) has been subject to numerous but uneven application of precedents, which "general[ly]" requires the findings of facts by Article III Federal Judges to be found "specially." (A)(5) is a more unusual violation of the Rule, but is clearly presented here, and an ideal vehicle for Certiorari, when the "Questioning the Evidentiary Support" is made *impossible* by the trial judge's refusal, even in a lengthy and complex bench trial under the FTCA, *to say what is the evidentiary support* so "[a] party may question the sufficiency of the evidence supporting the findings…"

The Fifth Circuit has never adopted (a)(5) specifically, though has language that appears to adopt this language in other FRCP 52(a) cases. *See e.g. Chandler v. City of Dallas*, 958 F.2d 85, 89 (5th Cir. 1992). Nevertheless, as the Fifth Circuit has adopted in the *Lay* decision[3], *Ruiz v. Estelle*, 679 F.2d 1115, 1133 (5th Cir. 1982), is now considered by the Fifth Circuit to be of precedential import, for *Lay* and

[3] Albeit in an unpublished opinion, without even oral arguments to argue or attempt to distinguish what appears to be contrary on-point precedent.

all other District Court judges within the jurisdiction and supervision of the Fifth Circuit.

The entirety of the Fifth Circuit's discussion is found in Appendix A, and reprinted below.

"The Lays' first argument lacks merit. *Ruiz v. Estelle*, 679 F.2d 1115, 1133 (5th Cir. 1982) ("However convenient it might be for counsel and the appellate court to have 'specific citations to the record' ... such citations are not required."), *amended and vacated in part on other grounds*, 688 F.2d 266 (5th Cir. 1982); *see also* Fed. R. Civ. P. 52(a) (containing no requirement that district court include record citation in findings of fact)."

Lay v. United States, No. 21-60776, 2022 WL 1613004, at *1 (5th Cir. May 20, 2022)

As discussed further in the Petition, the *Ruiz* case is an approximately 69-page long decision when printed out in Westlaw, of which at most two sentences are quoted as precedent by the Fifth Circuit in support. These two sentences in *Ruiz* have now been elevated to precedent by the Fifth Circuit, despite (1) zero support being given for this *dicta* within the single paragraph from *Ruiz* itself, and (2) applying legal research principles, this has to be *dicta,* because according to Westlaw, it has never been quoted, cited, or grounded in support by *any case the past forty years.* [4]

[4] *Ruiz,* admittedly, is a very consequential case when it comes to arguments of prison overcrowding in

Supreme Court Rule 10 (a) is thus satisfied as a Circuit Split for this Court's consideration. The Fifth Circuit also now conflicts with the Seventh Circuit, which has adopted Petitioner's position since at least *Featherstone v. Barash*, 345 F.2d 246 (10th Cir. 1965). *See also, Colchester v. Lazaro,* 16 F.4th 712, 727-729 (9th Cir., Oct. 21, 2021)(reversing District Court judge's failure to scrupulously follow FRCP 52 (a)).

Petitioners respectfully suggest even if perceptible as more an "intra-Circuit Split" wholly within the Fifth Circuit, it should be regarded as "so far departed from the accepted and unusual course of judicial proceedings, or sanctioned such a departure

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Texas as potentially violating the Eighth and Fourteenth Amendments. There are approximately 800 citations related to those weighty issues, and this lengthy decision of *Ruiz* has 103 Headnotes in Westlaw. However, an examination of the actual headnotes where the two sentences quoted in *Lay* are found, *only Headnote 18* deals with the position the Fifth Circuit adopted in *Lay,* which at most has 3 citations the past 40 years. Two are listed as "mentioned" but those cases when examined, have nothing to do with the *dicta* cited in *Lay*. The *Lay* case, is the first time any Court, including the Fifth Circuit, has adopted this language from *Ruiz* as precedent. According to Westlaw, the Fifth Circuit's position on *Ruiz,* to be adopted as longstanding precedent in *Lay, is made out of whole cloth*.

by a lower court, as to call for an exercise of this Court's supervisory power." S.Ct. R. 10.

The Grant of Certiorari for oral arguments or alternatively for Summary Reversal without oral arguments, is well suited and situated here. The *Lay* case not only addresses an entrenched and differing application of FRCP 52(a) by the Circuits, (that sometimes is found within the Circuits as well, as discussed further *infra,* in the Fifth Circuit)—this Petition represents a remarkably straightforward and ideal vehicle for this Court's confirmation of basic good governance and public policy principles of FRCP 52(a).

Trial judges confirmed under Article III of the United States Constitution, should be able, and are required under FRCP 52(a), to explain the bases of their decisions, including citations to the Record, especially in complex cases. Furthermore, the need for guidance in addressing a consistent application of actual holdings of Federal Courts of Appeals, versus what's a classic case of *dicta,*[5] is also well presented in this case, and should be considered and addressed by this Court.

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[5] *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 443 (1987) ("The sentence [in a prior decision] relied upon [by petitioners for a contention] is classic *obiter* [*dicta*]: something mentioned in passing, which is not in any way necessary to the decision of the issue before the Court [in the prior decision].")

OPINIONS BELOW

The Fifth Circuit's decision below is unpublished but available at 2022 WL 1613004 (5th Cir. May 20, 2022); *Petition for Rehearing Denied,* July 22, 2022. App. 1-3, 27 The district court's opinion is also available at *Lay v. United States*, No. 3:19-CV-188-KHJ-LGI, 2021 WL 4771460, (S.D. Miss. Aug. 11, 2021) and reprinted at App. 4-26.

STATEMENT OF JURISDICTION

The Fifth Circuit issued its decision on May 20, 2022, denying relief to Petitioners. As the Government is a party, timely rehearing was sought within 45-days under FRAP 40(a)(1), and was ultimately denied by the Fifth Circuit on July 22, 2022.

This denial of rehearing, made the original deadline for Certiorari due under this Court's Rule 13(1) and (3), "within 90 days after the entry of the judgment" due on October 20, 2022. Extensions of Time Request were filed with this Court and granted, extending the time to file the Petition for Writ of Certiorari through December 19, 2022. (No.22A305) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISION INVOLVED IN THE CASE

Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings

(a) FINDINGS AND CONCLUSIONS.
(1) *In General.* In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58

(2) *For an Interlocutory Injunction.* In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) *For a Motion.* The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(4) *Effect of a Master's Findings.* A master's findings, to the extent adopted by the court, must be considered the court's findings.

(5) *Questioning the Evidentiary Support.* A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) *Setting Aside the Findings.* Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) AMENDED OR ADDITIONAL FINDINGS. On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(c) JUDGMENT ON PARTIAL FINDINGS. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

NOTES

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

STATEMENT OF THE CASE

On March 15, 2019, Petitioners Tiffany Lay and her husband Robert Lay, filed suit against the United States of America, for the "acts, omissions and other legal fault of agents, representative and/or employees" of the G.V. (Sonny) Montgomery Veteran's Medical Center, a Veteran's Hospital located in Jackson, Mississippi. This was for Petitioner Tiffany Lay's permanent injuries from *equina cauda* syndrome, a treatable condition justifying emergency surgery, but would likely result in paralysis and related permanent symptoms if not timely treated.

At trial, it appeared uncontested *equina cauda* should be part of the differential diagnosis of the emergency treatment provider. There does not appear to have been anything written down saying it was part of the differential diagnosis by the responsible Veteran's Hospital Internist at the emergency room department. Standard non-invasive tests were also not done, such as an MRI or post-void residual ultrasound test, used in an ER to diagnose or rule out *equina cauda.*

As part of the Complaint for Damages, as later testified to and/or discussed by experts, parties, and the medical records, a specific timeline existed along with the contended medical malpractice:

September 23, 2015—Tiffany Lay meets with Neurosurgeon Dr. Eric Amundson, who agreed a regular herniated disc, justified corrective surgery

in about six (6) weeks' time, with no other emergency symptoms associated with *Cauda Equina* Syndrome.

September 25, 2015—Appellant Tiffany Lay went to the emergency room of the Veteran's Hospital, and was treated by Internist Dr. Rachel Peery. Medical records and Petitioners' medical experts support numerous "red flag" symptoms directly and indirectly evocative of *Cauda Equina* syndrome, including severely worsened back pain, some urinary incontinence, and numbness in the upper leg/thigh. ROA.14-15; RPA 291. Many tests used to help diagnose *Cauda Equina* syndrome, were not performed on Ms. Lay by Dr. Peery, including standard non-invasive tests such as a MRI, a pin-prick test, and a "post-void residual," which is a sonogram test performed over the bladder area of the stomach, taking a few minutes to accomplish. ROA.17; ROA.844. [6]

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[6] Petitioners' Counsel (to Dr. Peery): "That's a very noninvasive test. You do an ultrasound on the outside of the bladder; you tell Tiffany "Go in the bathroom, try to pee; she comes back out; you put on ultrasound; you basically get a reading. Correct?"

Dr. Peery: Correct.

Petitioner's Counsel: That could have been done in, what, two minutes?

September 27, 2015—the symptoms of *Cauda Equina* syndrome worsened still, and Petitioner Tiffany Lay went back to the same emergency room, and a different doctor made the diagnosis of *Cauda Equina* syndrome with the MRI showing a massive enlargement of the disc herniation and fragments of the disc compressing the spinal canal. App. 45. Emergency surgery was performed, and Ms. Lay suffered severe permanent nerve damage and other injuries as a result, adversely affecting her daily life through the present. App. 45-46

Trial Under Federal Tort Claims Act (FTCA)

On the first day of trial, the trial Court discussed the proposed schedule for the parties. The Court noted complications created as "[w]e are doing our best with some COVID protocols." The Court then directed the parties "schedule-wise" its procedure on "findings of facts and conclusions of law" and "closing arguments."

> The Court: "The other thing I'm going to add schedule-wise and for something for you-all to think about for *purposes of closing, I'm not going to ask that you-all prepare formal closing arguments. Instead, I'm simply going to ask that you do supplemental findings of fact and*

Dr. Peery: It would have taken us longer than that, but, yeah, it would not have taken a long period of time." (ROA.844)

> *conclusions of law*. So that also may assist in preparation and time-saving for this week."
> [Emphasis Added]

On the fourth and final day of trial, Judge Kristi Johnson discussed matters, which form the main issues argued to the Fifth Circuit and Question Presented One in this Court.

> The Court: "The only other thing I think we need to discuss before we adjourn is the supplement of the proposed findings of fact and conclusions of law. I have discussed with the court reporter [the] timing on that, and I think what's best, to make sure we have plenty of time for the transcripts to be prepared, is to give the court reporter 30 days from today's date to prepare transcripts. I am going to ask that Ms. Candice turn those over as they're completed. That way […] if she completes a couple of witnesses, then she can slowly turn those over to you-all so you have the ability to start drafting those prior to receiving all of the transcripts.
>
> From the last day, I'm going to docket a date certain as to when I want the transcripts fully completed, and then I'm going to give you-all 14 days from that date to supplement the proposed findings of fact and conclusions of law. I realize that's a short period of time, but I have a law clerk that will be rolling off in August, and you have all seen this, Kimberly [Redacted in Original] has sat through all of

> the testimony, as have I. I think it would benefit all of the parties for her to be able to collaborate with me in working on an opinion.
>
> So even though that will delay things some, you know, waiting on the transcript, I ask that you—as quickly as possible, let's turn over those supplemental findings. If extension of time is needed, I will entertain it, but I do ask that you try to turn those over by the initial deadline, and those are going to be sent to me contemporaneously, meaning by 5:00 p.m. on that date, which I will put in the docket entry, the parties need to email your proposal to chambers box copying counsel opposite. I would also ask, just for the record, that on that same day you file a notice of service of the proposed findings of fact and conclusions of law." Judge Johnson also noted her appreciation "both sides have been very prepared…[and the] agreement on the exhibits. It made the trial smoother and go faster than the week and a half that we anticipated."

About seven weeks after the trial testimony, on June 8, 2021, Petitioners and Respondent separately filed with Court chambers, a copy of the respective "Supplemental Proposed Findings of Fact and Conclusions of Law." Respondent's was 23 pages, while Petitioners' was 37 pages length.

Of the 118 Proposed Findings prepared by Petitioners, are the following examples, on the

complicated and detailed information requested by the Court, and provided to assist the trial court's review of the matter. Particular attention was given to the following highly supportive and persuasive citations directed to Judge Johnson. Yet, instead, Petitioners received the Memorandum, which lacked any specific citations to the Record in which to properly gauge the basis upon Judge Johnson's determination to rule in favor of the Government, when a non-invasive MRI or post-void residual sonogram test, would have likely detected the *cauda equina* syndrome.

1. Paragraph 37 (New numbness as Red Flag Symptom) (App. 39)
2. Paragraph 50 (Post-void Residual sonagram test could have been easily and quickly performed to detect or rule out) (App. 40)
3. Paragraph 52 (Dr. Peery could have ordered an MRI) (App. 40-41)
4. Paragraph 68 (Two days later, Petitioner Tiffany Lay returned to same Emergency Room, an MRI immediately "showed a massive enlargement of the disc herniation and fragments of the disc compressing the spinal canal.")(App. 44)
5. Paragraphs 72, 73, and 74 (Had an MRI or sonagram been conducted two days earlier, it would have detected the developing Cauda Equina, emergency surgery would have immediately taken place, and Petitioner would likely not have been permanently and severely injured.) (App. 45-46)

Despite both Petitioners and Respondent United States providing citations of the "evidence in support," no citations exist or were provided the parties (and for potential appellate review), as to any and all "findings" by Judge Johnson in her 21-page Memorandum Opinion. A more lengthy Excerpt of these Proposed Findings are included in Appendix D with this Court.

Furthermore, Petitioners provided the Court Eighteen (18) Proposed "Conclusions of Law." App. 52-56. It was specifically noted, Respondent did not even provide an Expert Witness challenging the violations of Standard of Care of Petitioners' Expert Witnesses. App. 53.

Conclusion #11, encapsulates the well-supported and multiple violations of the standard of care, any of which, there was sufficient evidence to support the fact-finder in this case, and thus ruling on Petitioners' behalf for liability.

> "11. Dr. Peery violated the standard of care in her care and treatment of Tiffany Lay on September 25, 2015 by;
>
> A. Failing to diagnose Tiffany Lay with the early onset of Cauda Equina Syndrome;
> B. Failing to take a complete history;
> C. Failing to perform a rectal exam to assess the anal sphincter tone;
> D. Failing to perform a pin prick examination to assess numbness or loss of sensation;

> E. Failing to perform a post void residual to assess bladder function;
> F. Failing to order an MRI;
> G. Failing to call for a neurosurgical consult or to contact Tiffany Lay's neurosurgeon;
> H. Failing to appropriately educate Tiffany Lay about the signs and symptoms of Cauda Equina Syndrome; and
> I. Discharging Tiffany Lay from the hospital." (App. 54)

Trial Judge Kristi Johnson, without oral arguments on the lengthy Proposed Findings, after the efficiently presented four-day trial, instead issued on August 11, 2021, a 21-page "Memorandum Opinion and Order." Appendix B. The location of not a single citation to any of the "Proposed Findings of Facts" *by either* Petitioners or Respondent, from thousands of pages of Record are included. *Id.* Furthermore, not a single transcript, exhibit, or medical record location is directly cited by the Court. *Id.* [7] Petitioners filed a timely appeal on October 8,

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[7] As required, and in accord with *Vikas, supra,* this appeal focused upon *the lack* of any and all proper findings, as well as the lack of citations and bases which are *part and parcel* for proper findings by the trial court in compliance with FRCP 52(a). Petitioners contend this legal argument, was a necessary prerequisite for the trial judge to have a proper Record with the "evidentiary support" of findings in the case tried by the same federal judge. Otherwise, there is not a way to gauge in complex bench trials, whether any findings were proper

2021 to the Fifth Circuit, within 60 days for cases including the United States as a party, under Federal Rules of Appellate Procedure (FRAP) 4(b).

Appeal to Fifth Circuit Court of Appeals

In Petitioners' timely appeal to the Fifth Circuit, the Appellants' Brief filed, argued in favor of fully and completely, harmonizing FRCP 52 (a), which should have examined *both* subsections (a)(1) and (a)(5).

The Government's Brief, didn't go this route. It claimed one or two sentences in *Ruiz v. Estelle,* 679 F.2d 1115 (5th Cir. 1982), was actually precedent to the Fifth Circuit, on the separate but related FRCP 52 (a)(5) issue. Government's Brief, Pg. 2, 6. This was regardless of the unusual complete lack of "evidentiary support" given by the trial Court's Memorandum, in contravention of the wording of FRCP 52 (a)(5), and appeared to violate the wording of the precedents of *Eni, S.S. Silberblatt, Inc.,* and *Chandler*.

Yet, the Government steadfastly proclaimed in their Brief "there is nothing unusual about the

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and/or "clearly erroneous." However, as the bases of any and all findings were not provided by the trial court, consistent with *Vikas, supra,* Petitioners were constrained to argue for appeal, the wholesale legal error in violation of FRCP 52(a).

absence of record citations in a district court's findings" in promoting this procedure to be used regularly at the trial level. *Id.* at pg. 18.

Petitioners' Reply Brief, discussed at length, how the two sentences of *Ruiz* were never before cited in support by any case in the Fifth Circuit, or effectively any other trial or appellate court, in the past 40 years. Appellant's Reply Brief, page 7-13. On the summary calendar, the Fifth Circuit's 3-Judge Panel issued a 2-page unpublished opinion on May 20, 2022, wholesale adopting in a few sentences, the Government's position in this case of *Ruiz* as full precedent. App. 1-3. The timely Rehearing was denied on July 22, 2022. App. 27.

REASONS FOR ALLOWANCE OF THE WRIT

I. CERTIORARI IS DESIRABLE AND IN THE PUBLIC INTEREST ON FEDERAL RULE OF CIVIL PROCEDURE 52 (A)'S APPLICATION OF (A)(1) AND (A)(5).

Incorporating the points and authorities discussed *supra,* in the Introduction to Petition for Writ of Certiorari, the above case is well preserved and ideal vehicle for this Court to grant Certiorari. A review of Appendix B and D, finds a disconnect between the intended audience of the trial judge, seeking proposed findings of facts from a four-day medical malpractice trial, and the intended recipients of the Memorandum, contemplated under the Rule and caselaw, of the parties to the litigation and the appellate courts. The trial judge's refusal to explain

how she "did the homework" of any and all purported "findings" under FRCP 52(a), is left open to speculation and guesswork. This was not a small or simple case, where zero citations to the Record could theoretically be reasonable. This was a Federal Tort Claims Act case, seeking millions for permanent damages, which thereby requires a bench trial in adjudicating the liability and damages for the serious and permanent injuries of Ms. Lay. There was no black-box jury. The Article III trial judge, is expected and required to provide the "bases" and citations, in the greater than 4000-page Record, upon which her decision was based.

A. There is a Circuit Split

1. The Ninth and Tenth Circuits Have a Clear and Concise Approach That Should be Adopted by this Court.

The Tenth Circuit, has a longstanding support of the position requested by Petitioners Lay, tracing to *Featherstone v. Barash*, 345 F.2d 246 (10th Cir. 1965).

> "[FRCP] 52, […] requires the trial court in actions tried upon the facts without a jury, or with an advisory jury, to find the facts specially. The purposes of this rule are to aid the appellate court by affording it a clear understanding *of the ground or basis of the decision of the trial court,* to make definite what is decided in order to apply the doctrines of estoppel and res judicata to future cases, and to evoke care on the part of the trial judge in

> considering and adjudicating the facts in dispute. The sufficiency of findings must be measured by the requirements of the rule and in the light of these purposes. Proper and adequate findings of fact are not only mandatory, but highly practical and salutory in the administration of justice. It has been pointed out that the trial court is a most important agency of the judicial branch of the government precisely because on it rests the responsibility of ascertaining the facts. The Supreme Court recently underscored the responsibility of the court with respect to findings, and was critical of any indiscriminate dependence upon counsel in formulating them. Whatever difficulties there may be under various circumstances in the application of the 'clearly erroneous' rule in support of the trial court's findings, these difficulties are immeasurably compounded by dubious findings.[…] [Emphasis Added]

Featherstone v. Barash, 345 F.2d 246, 249–50 (10th Cir. 1965).

The Ninth Circuit Court of Appeals, has recently confirmed a deepening Circuit Split exists. (Especially now, on *Ruiz* being the Fifth Circuit's adopted precedent.) *Colchester v. Lazaro,* 16 F.4th 712 (9th Cir., Oct. 21, 2021), for example, though expressed as a more general violation of FRCP 52 (a), appears to have adopted the rationales of Petitioner Lay. *See Colchester,* at 727-729 (Holding reversible error, when trial court in international custody case,

merely adopted a paragraph in one parties' proposed findings, which "does not expressly address *any* of the relevant testimony or other evidence presented at the bench trial below. […] does not resolve the difficult questions of credibility, relevance and weight that are presented by the evidence […] presented in *this* proceeding […][and to] the extent [Appellee]'s Briefs filled in these blanks, "these contentions are post-hoc rationalizations of the district court decision—rather than an accurate representation of the district court's express findings and conclusions." [Emphasis as Shown])

2. The Fifth Circuit's Inconsistent Approach, Whether as a Circuit Split, or "Intra-Circuit Split" Demands Review As Well Under this Court's "Supervisory" Authority.

The Fifth Circuit has been notably inconsistent, particularly in the first instance, in demanding Article III trial judges give detailed findings of facts with citation support in compliance with FRCP 52(a). Petitioners initially sought and argued in Appellant's Brief, three main cases:

1. *S.S. Silberblatt, Inc. v. United States*, 353 F.2d 545 (5th Cir. 1965); and
2. *Eni US Operating Co., Inc. v. Transocean Offshore Deepwater Drilling, Inc.*, 919 F.3d 931 (5th Cir. 2019); and
3. *Chandler v. City of Dallas*, 958 F.2d 85 (5th Cir. 1992).

These were all reasonable to argue precedents under FRCP 52(a)(1) and (5). Assuming *arguendo,* the Government's citation of the two sentences in *Ruiz v. Estelle*, 679 F.2d 1115, 1133 (5th Cir. 1982),[8] *amended and vacated in part on other grounds*, 688

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[8] "Relying upon the first sentence of Fed.R.Civ.P. 52(a), which requires the district court after a bench trial to "find the facts specially and state separately its conclusions of law thereon," TDC contends that the district court failed to make findings of fact sufficiently specific for appellate review.

The district judge should set forth preliminary and basic facts rather than "(s)tatements conclusory in nature." Ultimate findings must be specifically supported. The opinion in this case, as we have already noted, occupies 118 printed pages. More than half of it is devoted to findings of fact. Some of the factual recitals are specific. In deciding other factual issues, the district judge drew inferences concerning general conditions from specific instances. His findings are not apodictic conclusions of the kind we have found insufficient as a basis for review. They are sufficient to give us a "clear understanding of the analytical process by which ultimate findings were reached and to assure us that the trial court took care in ascertaining the facts." However convenient it might be for counsel and the appellate court to have "specific citations to the record," the absence of which TDC criticizes, such citations are not required." *Ruiz,* at 133.

F.2d 266 (5th Cir. 1982), justified consideration as precedent, as opposed to fact-specific *dicta,* the Fifth Circuit has now made it clear to trial judges in the Circuit, they *need not do any citations to the Record, in order to be affirmed on appeal*. At the very least, proper appellate practice, demanded that the Fifth Circuit attempt to harmonize its prior precedent such as *Chandler,* which says the opposite of the previously unknown precedent on this topic, in *Ruiz.*[9]

The consistent good practice to assist trial and appellate courts alike, is also unironically reflected in Federal Rule of Appellate Procedure 28 ([…]"(8) the argument, which must contain: (A) appellant's contentions and the reasons for them, with *citations* to the authorities *and parts of the record* on which the appellant relies…") [Emphasis Added]

Within the Fifth Circuit, the administrative role played by appellate courts, particularly with regard to factual finding requirements, has been a

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[9] Another example, a year after *Eni,* the Fifth Circuit in *Realogy Holdings Corp. v. Jongebloed*, 957 F.3d 523, 530 (5th Cir. 2020) summarily dismissing a contended violation of FRCP 52(a)(2), when the written findings lacked three out of the four considerations in granting or denying injunctive relief, due to the Fifth Circuit's distinguishing the case for the trial judge issuing oral pronouncements as well.

repeated source of controversy. One federal judge in Texas recently quipped "I follow Judge [Lucius Desha] Bunton's rule about Fifth Circuit opinions. "They can reverse me if they want to, but they can't make me read it," which I'm glad you all have read it. But I also -- if my recollection is correct, none of those fine judges have ever tried a case or dealt with what we deal with on the street. But, anyway, what do I know?" *United States v. McKinney*, No. 21-50308, 2022 WL 2101519, at *1 (5th Cir. June 10, 2022)(Unpublished). *McKinney* thus had his second reversal by the Fifth Circuit, both unpublished.

In a 2016 unpublished case, (involving the same judge as the recently published *Pulse Network LLC v. Visa* 2022 case, *supra*), the Fifth Circuit reversed for lack of specific findings in conjunction with citations for said findings, essentially the primary same argument made by Petitioners.[10]

> "Despite having before it a *lengthy and detailed summary judgment record, including thousands of pages of exhibits, the district court issued an eight-page opinion,* of

[10] This has some similarity to *Plumley v. Austin*, 5135 S. Ct. 828, 831 (2015) (J. Thomas and Scalia, dissenting from denial of Petition for Writ of Certiorari)("True enough, the decision below is unpublished and therefore lacks precedential force in the Fourth Circuit. [Citation Omitted]. But that in itself is yet another disturbing aspect of the Fourth Circuit's decision, and yet another reason to grant review.[…]"

> which three pages dealt with sanctions against the government, and only five pages with whether the land in question constituted "waters of the United States." [Citation Omitted] *The district court's opinion is bereft of citations to record evidence and provides this court virtually no guidance as to how the court applied the facts to the law."*
> [Emphasis Added]

United States v. Lipar, 665 F. App'x 322, 323–24 (5th Cir. 2016)(Unpublished)

While the Fifth Circuit has noted in some cases the requirements of "citations to record evidence," they are uneven in applying this to FRCP 52. *Lipar,* involved the same trial judge as a recent published decision in *Pulse Network, L.L.C. v. Visa, Inc.*, 30 F.4th 480 (5th Cir. 2022). However, despite not once mentioning FRCP 52, the Fifth Circuit cited numerous reversals of the same trial judge, for the same reason as *Lay*—lack of citation support with which to examine the factual findings.

The Fifth Circuit, however, rather than specifically adopt and apply a consistent and strong FRCP 52(a) as precedent, especially on (A) (1) and (5) ("*Questioning the Evidentiary Support.* A party may later question the sufficiency of the evidence supporting the findings") — they piecemeal avoided the issue, by adopting a different and far more unusual remedy— reversal and reassignment of the judge in the case.

> "Finally, the district court's substantive rulings lend further support to Pulse's arguments for reassignment. For instance, after Visa moved to dismiss Pulse's case in 2015, the district court took nine months to issue a one-sentence order denying the motion. The order stated in full: "While the complaint is not compellingly lucid, Pulse Network, LLC, has alleged sufficient facts that probably adequately state a claim for relief." Two years later—despite the lack of meaningful discovery—Visa was allowed to move for summary judgment on both the merits and antitrust standing. The court then waited another ten months to resolve the motion. *Its order consisted in—to borrow from a previous case involving the same judge that was also reassigned on remand—"a [seven]-page opinion with few citations to either record evidence or relevant legal authority ... consist[ing] almost entirely of conclusory statements*." *United States ex rel. Little v. Shell Expl. & Prod. Co.*, 602 F. App'x 959, 975 (5th Cir. 2015) [unpublished].[…]We REVERSE the summary judgment in part, REMAND the case for further proceedings consistent with this opinion, and DIRECT the Chief Judge of the Southern District of Texas to assign the case to a different district judge.") [Emphasis Added]

Pulse Network, L.L.C. v. Visa, Inc., 30 F.4th 480, 496–97 (5th Cir. 2022),

It is unclear why the Fifth Circuit has remained inconsistent in their FRCP 52(a) jurisprudence, which with *Lay*, supports the Fifth Circuit now insists *Ruiz* to be considered precedent, at the expense of three more recent appellate published cases, and at best, presently have no clear precedent. Other cases, though unpublished, have been reversed for the very same or at least similar arguments made by Petitioner Lay. There appears to at least be an "Intra-Circuit Split," but *Lay* supports an apparent full Circuit Split as well now between the Fifth, versus the Ninth and Tenth Circuits. Regardless, the Fifth Circuit's mixed decisions on the topic, should be of concern to this Court, because of this Court's ultimate supervisory role, over both Circuit and District Court judges.

II. AS RELATED TO QUESTION PRESENTED ONE, CERTIORARI IS ALSO DESIRABLE AND IN THE PUBLIC INTEREST ON FEDERAL CIRCUIT COURTS OF APPEAL, PROPERLY DISTINGUISHING AS *DICTA,* TWO SENTENCES FROM A FORTY-YEAR-OLD INAPPOSITE CASE NEVER CITED BEFORE, VERSUS FULLY SUPPORTED PRECEDENT.

Incorporating the points and authorities discussed *supra,* in the Introduction to Petition for Writ of Certiorari, the above case is well preserved and ideal vehicle for this Court's review. The understanding and appreciation of *dicta* versus precedent, has a long history tracing to Chief Justice John Marshall's discussion in *Cohens v. Virginia.*

> "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821)(C.J. Marshall)

The importance of this topic has been understood for over two centuries of Supreme Court jurisprudence, by distinguishing clear precedent from clear *dicta.*

> "Chief Justice Marshall provides an instrumental justification for the maxim that *dicta* need not be followed. *Dicta* are less carefully considered than holdings, and, therefore, less likely to be accurate statements of law. Thus, according to Marshall, accuracy is the primary virtue that the holding/dictum distinction serves."

Michael C. Dorf, *Dicta and Article III*, 142 U. Pa. L. Rev. 1997, 2000 (1994)

Thus, more recent opinions by this Court, have cemented a mostly rational understanding to separate what are intended holdings in appellate cases, versus random *dicta* statements or sentences. More generally, a holding yields precedential value when the adjudication is necessary to resolve a case. *See Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.") (citations omitted); *see also, Ramos v. Louisiana*, 140 S. Ct. 1390, 1404 (2020)(discussing *dicta,* and determining what is *ratio decidendi* of opinion); *see also, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1446 (2010)(Discussing the mischief created of "obscure *obiter dictum*," from an errant sentence of a 45-year old Supreme Court case.)

> "The failure to define the terms holding and dictum with any precision has serious consequences. It enables courts to avoid the normal requirements of *stare decisis*. In order to overrule an earlier decision, it is not enough that a court have a present disposition to resolve the question differently. Something more is required. The earlier decision must have been profoundly wrong from the outset, overtaken by intervening factual developments, or rendered anachronistic by changed legal doctrine, or some combination of

these factors must hold true."

Michael C. Dorf, *Dicta and Article III*, 142 U. Pa. L. Rev. 1997, 2004 (1994).

Almost never, does a case present as so clearly *dicta,* to establish a bright-line Rule by this Court. Certiorari is justified to establish, a two-sentence, out of context determination of an inapposite case, should not be newly enshrined as "precedent" by a Circuit Court of Appeals. The Fifth Circuit's determination, is particularly disturbing, and itself is dangerous precedent, when you add into the equation, it arises from a 40-year old case, which has never before had these two sentences used in any case, or apparently even argued or considered before, as "precedent."

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Supreme Court of the United States grant review of this matter. Alternatively, it is requested this Court consider the foregoing Petition as appropriate for this Court's consideration on Summary Reversal, based on the straightforward arguments presented in the claims for relief, which are examinable through a quick, yet careful review of Appendices A-D.

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