

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2022

Tiffany Lay; Robert Lay, *Petitioners*

v.

United States of America, *Respondent*.

*Application for Extension of Time to File Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit*

To the Honorable Samuel A. Alito Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Court of Appeals for the Fifth Circuit:

Pursuant to Rule 13.5 of the Rule of this Court and 28 U.S.C. § 2101(c), Petitioners Tiffany and Robert Lay respectfully request for a 30-day extension of time to file their petition for certiorari to this Court to and including November 20, 2022.

1. Under this Court's Rule 13 (1), Certiorari "is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment." As an opinion affirming the trial court was issued by the Fifth Circuit, with a timely "Petition for Panel Rehearing" filed in

this case involving the United States as a party (under FRAP 40(a)(1)) and ultimately denied by the Fifth Circuit, Supreme Court Rule 13(5), applies to this case. That Rule provides “[t]he time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate...” This makes the effective final judgment date of the Court of Appeals for the Fifth Circuit on July 22, 2022 and Petitioner's time to file a petition for certiorari in this Court expires on October 20, 2022. This application is being filed more than 10 days before that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

2. This case arises from the United States District Court for the Southern District of Mississippi, Northern Division. This was a Federal Tort Claims Act (FTCA) medical malpractice case, involving serious permanent injuries to the Petitioner Tiffany Lay (with her husband as a party due to loss of consortium damages), in a four-day non-jury trial. As argued to the trial judge Kristi H. Johnson, with multiple expert witnesses in support in the approximately 4000-page Record on Appeal, the Veteran’s Hospital failed to properly take any actions to properly diagnose and treat “red flag” symptoms

of *cauda equina*, until days later, when it was too late. This included readily available “gold standard” medical treatments such as the MRI machine at the Veteran’s Hospital, or a simple non-invasive sonogram, which would have taken a few minutes time, which would have diagnosed the *cauda equina*, and allowed for emergency surgery which would have avoided Ms. Lay becoming permanently disabled.

3. At the end of the fourth day of trial on April 22, 2021, Judge Kristi Johnson, requested both parties provide Proposed Supplemental Findings of Facts, which after the transcripts of the proceedings were accomplished, were filed by Petitioners Lay and Respondent United States. Respondent United States’ Supplemental Proposed Findings of Fact and Conclusions of Law, was 23 pages length. (ROA.3950-3972). Petitioner’s Supplemental Proposed Findings of Fact and Conclusions of Law, was 37 pages long, with 118 Proposed Findings of Fact, most with numerous citations for each Proposed Finding, totaling hundreds of direct citations to the Record via transcripts, medical records, and exhibits.¹ No closing statements,

¹ See Attached “D” (ROA.3973-4008).

or any closing arguments either at the trial itself, or subsequently, were held in the matter by Judge Johnson.

4. In a written FTCA decision issued on August 11, 2021, Judge Johnson ruled in favor of the Defendant/Respondent United States in denying all relief, and closing the case. *See* Attached “A.” Of note, and in apparent violation of FRCP 52, within the 21-Page Memorandum Opinion and Order, not only are there a lack of specific understandable factual findings given, there does not exist a single citation given by Judge Johnson to the over 4000-page Record on Appeal, including the medical records, exhibits, and 4 days of transcripts with expert witness testimony, to ascertain the specific bases and “evidentiary support” for any and all conceivable factual findings in the matter. *Id.*
5. A timely appeal to the Fifth Circuit Court of Appeals was then accomplished by Petitioner, under FRAP 3 and FRAP 4(a)(1)(B) (60 Days in cases with United States as a party) on October 8, 2021.
6. Subsequently, Briefing was done by Petitioner in the Fifth Circuit, concentrating on the argued FRCP 52 error, as violating numerous aspects of the Rule, (including a Question of First Impression of the trial judge not giving any “Evidentiary Support” under FRCP 52

(a)(5)), as well as existing Fifth Circuit precedents of *Eni US Operating Co., Inc. v. Transocean Offshore Deepwater Drilling, Inc.*, 919 F.3d 931 (5th Cir. 2019), *S.S. Silberblatt, Inc. v. United States*, 353 F.2d 545 (5th Cir. 1965), and *Chandler v. City of Dallas*, 958 F.2d 85 (5th Cir. 1992) which already favorably address Petitioner’s arguments of FRCP 52(a), as reversible error.

7. It was in the Government’s Brief, for the first time the case of *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), *amended and vacated in part on other grounds*, 688 F.2d 266 (5th Cir. 1982) was not only cited, but argued at length by the Government in support as “precedent.” While that case does have a sentence or two in a paragraph that contends “citations are not required” it was in the context of a single paragraph of a decision which when printed on Westlaw, was 69-pages long. *Ruiz* was a completely inapposite case involving decades old prison overcrowding litigation in Texas jails, thereby creating Federal Constitutional concerns of due process and cruel and unusual punishment under the Eighth Amendment.
8. As detailed in Petitioner’s Reply Brief to the Fifth Circuit, not only was there no proper distinguishment given on the more recent Fifth Circuit precedent, but the sentence or two taken out of context by

the Government, was the definition of *dicta*, also known as *obiter dictum*. See, e.g. *Ramos v. Louisiana*, 206 L. Ed. 2d 583, 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.*, 559 U.S. 393, 414, 130 S. Ct. 1431, 1446, 176 L. Ed. 2d 311 (2010)(Discussing the mischief created of “obscure *obiter dictum*,” from an errant sentence of a 45-year old Supreme Court case.)

9. The Government was relying on a 40-year case, which itself had no citations in support for the sentence quoted. While the *Ruiz* case itself has been cited to scores of times related to prisoner overcrowding issues, if you check the “Headnotes,” *in the past 40 years, no Court in the United States, including the Fifth Circuit, had ever even cited in support, the one or two sentences of what by definition should be considered dicta, as if they were precedent, until the Fifth Circuit did so here in the Lay case.*
10. Yet, without any oral arguments, a 2-page unreported opinion was issued by the Fifth Circuit, affirming the trial Court in *Lay v. United States*, No. 21-60776, 2022 WL 1613004, (5th Cir. May 20, 2022), based entirely on the sentence or two wording in *Ruiz*, never

cited to before in the past 40 years. *See* Attached “B,” *Slip. Op.* at 2. A timely motion for Panel Rehearing was sought, which was denied on July 22, 2022. *See* Attached ‘C.’

11. Petitioners’ Lead Appellate Counsel Michael Wein is an attorney licensed in the State of Maryland, various Federal appellate courts, and a member of the Bar of this Court. Petitioners’ Counsel Corban Gunn, is an attorney licensed in the State of Mississippi, the Fifth Circuit Court of Appeals, and a member of the Bar of this Court. This case directly involves at least two important Federal Questions Presented, on the proper application of FRCP 52’s requirements for trial judges specifically findings of facts in bench trials with their evidentiary support, as well as the proper use and application of *dicta* in the Federal Circuit Courts of Appeal.

12. Petitioners Lay, have only recently been able to obtain agreement with private counsel herein to assist in seeking Certiorari with this Court on the appeal errors, which may including seeking “Summary Reversal” relief along with Certiorari. Counsels have also recently confirmed with a printing company for this Certiorari petition, to begin work in the matter, including the Appendix. Counsel Wein is also presently tasked with work on a different United States Supreme

Court certiorari petition due on October 13, 2022, in the case of *Howling v. State of Maryland*, 478 Md. 472 (2022) from the Maryland Court of Appeals. Particularly in light of the important questions presented by this case, it is important that additional time be provided to Counsel to properly frame and argue these complex matters to this Court.

Wherefore, Petitioners Tiffany and Robert Lay respectfully requests that an Order be entered extending his time to petition for Certiorari 30 days with this Court to and including November 20, 2022. ²

Respectfully Submitted,

/s/ Michael Wein
Michael Wein, Esquire

Law Offices of Michael A. Wein, LLC
7843 Belle Point Drive
Greenbelt, MD 20770
(301) 441-1151
Fax-(301) 441-8877
weinlaw@hotmail.com

/s/Corban Gunn
Corban Gunn, Esquire

² There is a medical procedure scheduled for Petitioner's counsel, that may justify an additional request for time to sought with this Court for 60-days, through December 19, 2022. At this time, Petitioner is only requesting a 30-day extension.

Corban Gunn, PLLC
175 Lameuse Street, Suite C
PO Box 1466
Biloxi, MS 39530
corban@corbangunn.com