No. 01-1157

In the Supreme Court of the United States

STEVEN MCCOY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a medical malpractice action brought under the Federal Tort Claims Act is barred when the administrative claim for damages resulting from amputation of a limb was filed more than two years after the date of the amputation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15-32) is reported at 264 F.3d 792. The opinion of the district court (Pet. App. 12-14) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2001. A petition for rehearing was denied on October 31, 2001 (Pet. App. 33). The petition for a writ of certiorari was filed on January 22, 2002, and docketed on February 7, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was convicted of drug conspiracy charges and incarcerated in various federal prisons from 1993 to April 16, 1999. In December 1994, he was bitten on the right leg by a spider and sought treatment at the prison infirmary. Following a worsening of petitioner's condition, doctors eventually diagnosed peripheral vascular disease and attempted an arterial bypass. When this attempt failed, petitioner's right leg was amputated on November 21, 1995, at the Osteopathic Medical Center of Texas. Pet. App. 16.

In June 1996, petitioner noticed lesions on the heel of his left foot. He again sought treatment and was transferred to several different medical facilities, at which he received treatment from several different doctors. A vascular bypass and other attempts to clear the artery failed. He developed gangrene in the left foot, which was amputated on January 23, 1997, by doctors at the United States Medical Center for federal prisoners in Springfield, Missouri. Subsequently, he had additional medical treatment to close the wound caused by this second amputation, to attempt skin grafts, for a stump revision, and for a bone resection. Pet. App. 16.

2. On September 19, 1996, while his left leg was being treated, petitioner filed an administrative claim seeking damages for the amputation of his right leg. R. 34. He claimed that if proper first aid had been administered, the condition could have been arrested without the subsequent loss of the right leg. *Ibid.* The administrative complaint was denied on January 16, 1997. R. 35-36.

3. On July 17, 1997, petitioner filed a lawsuit in the United States District Court for the Eastern District of

Pennsylvania. He sought damages for the amputation of both his right and left legs, and further alleged that he suffered damages "by the inexcusable delays of starting to treat him, and before and between each amputation." R. 69-70. The case was dismissed in November 1998. Pet. App. 3.

4. On February 1, 1999, petitioner filed a new administrative claim with the Bureau of Prisons. Pet. App. 17. In this second claim, he sought damages for the amputation of his left leg and "pain and suffering as a result of that amputation and prior thereto as a result of the failure of physicians and others to adequately treat his left foot wound." *Id.* at 2. The claim was denied on February 11, 1999 (R. 57), on the ground that it had not been filed within two years after the accrual of the injury as required by 28 U.S.C. 2401(b).

5. Petitioner then brought this action, based on the February 1, 1999, administrative claim, in the United States District Court for the Western District of Missouri. Pet. App. 17. The government moved for summary judgment on the basis of petitioner's failure to file his administrative claim within two years after his left leg had been amputated. *Id.* at 12, 17. In response, petitioner argued that the "continuing treatment" doctrine tolled the limitations period. *Id.* at 17. The district court ultimately entered summary judgment in favor of the United States, finding that petitioner's argument of ongoing treatment was irrelevant to the allegations made in his administrative claim. *Id.* at 13-14, 17.

The court of appeals affirmed. Pet. App. 20. The court agreed with the district court's determination that petitioner "knew of his doctors' breach of duty 'as soon as the leg was amputated'" in January 1997, so that the two-year statute of limitations had run before

the filing of petitioner's February 1999 administrative complaint. *Id.* at 19. Moreover, the court also concluded that the statute of limitations had not been tolled by the continuing treatment doctrine because "the date his leg was amputated was a date certain, and because there could be no continuing 'treatment' to correct the error resulting in the loss of his leg, he was therefore required to file his administrative claim within two years of the amputation." *Id.* at 18-19. It further concluded that the administrative claim failed, in any case, to encompass an allegation of continuing negligent treatment, *id.* at 19 & n.3 (district court's finding that petitioner's "administrative claim cannot be fairly read to encompass his failure to diagnose and treat claim" not clearly erroneous), a requirement for successfully later invoking the continuing treatment doctrine in court. *Ibid.*; see *id.* at 22 (McMillian, J., dissenting) ("The majority opinion concluded that [petitioner] did not raise an issue of continuing negligent treatment in his administrative claim and therefore could not rely on the continuing treatment doctrine later in court.").

The dissent noted that the majority's opinion rested on the factual finding made by the district court that the administrative claim did not include an allegation of continuing treatment or continuing negligence. See Pet. App. 22. Judge McMillian disagreed with these factual conclusions and so went on to address the application of the continuing treatment doctrine. Judge McMillian argued that, even "[a]ssuming that our circuit requires that any corrective treatment must be negligent, that factor has been met in the present case because, as noted above, [petitioner] alleged that the entire course of diagnosis and treatment of his peripheral vascular disease, or Buerger's disease, in-

cluding the amputation and post-amputation treatment[,] was negligent." *Id.* at 27.

ARGUMENT

Petitioner contends (Pet. 16) that the Court should grant certiorari to resolve a conflict among the circuits over the prerequisites to proper invocation of the "continuing treatment doctrine." This case represents an inapt vehicle for resolving any conflict for three reasons. First, the court of appeals made clear that its decision was justified on an independent, fact-specific ground. Second, on the facts of this case, petitioner would lose under any standard articulated in the courts of appeals. Third, it is unclear, in any event, that a ripe circuit conflict even exists.

1. Although petitioner had additional medical procedures performed after the January 23, 1997, amputation of his left leg, his administrative claim specifically requested damages for the loss of that leg and the "pain and suffering as a result of that amputation *and prior thereto*." Pet. App. 2 (emphasis added). Section 2675 of Title 28 requires a litigant to state all of his claims in his administrative claim. See, *e.g.*, *Deloria* v. *Veterans Admin.*, 927 F.2d 1009, 1011 (7th Cir. 1991); *Provancial* v. *United States*, 454 F.2d 72, 74-75 (8th Cir. 1972). Thus, while petitioner later argued in his district court complaint that negligent treatment of his vascular disease *after* the date of this amputation was part of his case, the district court and court of appeals properly disregarded these allegations because it found that these allegations of continuing negligent treatment had not been included in petitioner's administrative claim. Pet. App. 13, 19.

The finding by both courts below that the claim alleged an injury based only on treatment up to the left-

leg amputation is factual in nature and, absent extraordinary circumstances, therefore will not be disturbed by this Court. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985); *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). This finding independently supports the court of appeals' disposition of this case. Accordingly, the decision below is correct and does not implicate the alleged circuit conflict to which the court's alternative holding alludes.

2. An FTCA claim for medical malpractice accrues when the plaintiff becomes aware of the existence of his injury and discovers, or in reasonable diligence should have discovered, the acts constituting the cause of his injury, even though he is unaware that he may have received substandard care. *United States* v. *Kubrick*, 444 U.S. 111, 120-122 (1979). A gloss on the general *Kubrick* rule—the so-called continuing treatment doctrine—has been articulated by some courts of appeals. Under this doctrine, the two-year limitations period is tolled, *under certain circumstances*, during the period when plaintiff remains in the "continuing care of the negligent actor for the same injury out of which the FTCA cause of action arose." *Ulrich* v. *Veterans Admin. Hosp.*, 853 F.2d 1078, 1080 (2d Cir. 1988) (citing *Wehrman* v. *United States*, 830 F.2d 1480, 1485-1486 (8th Cir. 1987); *Otto* v. *NIH*, 815 F.2d 985, 988 (4th Cir. 1987)). The courts of appeals have, in several cases, analyzed whether particular factual circumstances present a proper context for application of the doctrine. Whether tolling is appropriate is a fact-specific inquiry determined on a case-by-case basis. See, *e.g.*, *id.* at 1080-1081.

Essentially, petitioner's claim in this case is that, despite his failure to allege in his administrative claim an injury based on post-amputation medical treatment, the courts below erred in determining that post-amputation treatment did not implicate the continuing treatment doctrine. In particular, petitioner contends (Pet. 16, 20) that the court of appeals' decision not to apply the continuing treatment doctrine in this case conflicts with the Second and Fourth Circuits' decisions in *Ulrich* and *Otto*. That contention is incorrect.

First, despite petitioner's contrary allegation (Pet. 16-17, 20), the Eighth Circuit's rule—that the continuing treatment doctrine does not apply to a claim made by a patient who fails to allege that some part of his continuing treatment was negligent—is not clearly in conflict with the Fourth Circuit's decision in *Otto* v. *NIH*, 815 F.2d 985 (1987).[1] The Fourth Circuit has subsequently indicated that *Otto* stands only for the proposition that a patient cannot reasonably be expected to have learned of his "injury" when a physician has assured him that the evident ill effects of a medical procedure will be temporary. See *Kerstetter* v. *United States*, 57 F.3d 362, 366 (4th Cir. 1995). Thus, the *Otto* rule apparently applies only in cases where the post-injury treatment *is* negligent in a particular manner, *i.e.*, where there is specific misconduct wrongfully indicating the temporary nature of the negligent injury. As such, it is consistent with the Eighth Circuit's requirement, challenged here, that the continuing treatment

[1] The court of appeals did state that its rule was inconsistent with the Second and Fourth Circuit's articulation of the doctrine. Pet. App. 19-20. However, the court of appeals apparently did not consider the Fourth Circuit's subsequent clarification of *Otto* in its *Kerstetter* decision.

must involve some negligence in order for tolling to be appropriate.

Moreover, although it appears that the rule announced in the case below is in some tension with the rule announced by the Second Circuit in *Ulrich*, petitioner is wrong to assert (Pet. 16-18, 20) that any possible conflict between these decisions is implicated here. The outcome of this case would be identical under the Second Circuit's analysis in *Ulrich*.

Ulrich explains that whether tolling is proper is determined on a case-by-case basis by evaluating whether certain factors make it unreasonable to expect plaintiff to file a claim during the period of continuing care. That is, tolling is proper only if it would either be (1) unreasonable "to expect a patient who is in the continuing care of a doctor to discover that the doctor's acts may be the cause of his injuries" or (2) unreasonable to have required the plaintiff "to interrupt [his doctor's] corrective treatment in order to commence legal proceedings." 853 F.2d at 1080, 1081. Utilizing this test, tolling would not have been proper here.

First, it was not unreasonable to expect the plaintiff to have discovered his injury despite the fact that he remained in the care of the same doctor for follow-up treatment after the amputation. The district court found, and the court of appeals agreed, that petitioner in fact discovered his injury immediately. Pet. App. 13, 18. As the *Ulrich* court explained, the "unreasonable expectation of discovery" rationale ceases to be a persuasive reason for tolling where, for example, "the gravity of [the] injury was sufficient to alert [the patient] to the injury and its cause." *Ulrich*, 853 F.2d at 1081. Few injuries are as grave or as obvious as an amputation. Moreover, when, as here, a plaintiff does in fact discover the injury, it is unlikely that this

"reasonable failure to discover" rationale could ever be implicated; *Ulrich* concerned a case where the injury was not actually discovered by the plaintiff.

Second, it would not have been unreasonable to expect petitioner to interrupt his corrective treatment by instituting suit in this case. This rationale for tolling "permits a wronged patient to benefit from his physician's corrective efforts without the disruption of a malpractice action." *Otto*, 815 F.2d at 988. Here, petitioner could not receive corrective treatment for the amputation of his left leg, which was final at the moment it occurred. Furthermore, petitioner had already filed an administrative claim alleging malpractice regarding his right leg, demonstrating his willingness to interrupt any corrective treatment by challenging his health care providers.

Thus, petitioner is wrong to suggest (Pet. 16) that any differences among the courts of appeals' articulations of what constitutes a necessary prerequisite to invocation of the continuing treatment doctrine would be addressed in the context of this case. Under any standard articulated by the courts of appeals, petitioner's claim would not have been subject to tolling.

3. It is unclear, in any event, that the court of appeals' dicta acknowledging a circuit split is a proper reading of the Eighth Circuit's decision in *Wehrman* v. *United States*, *supra*. No circuit, including the Eighth, had previously recognized a conflict between *Wehrman* and any other court of appeals decision. Indeed, *Ulrich* cited *Wehrman*, see *Ulrich*, 853 F.2d at 1080, in support of the standard now being challenged as inconsistent. But even if the conflict were clear, it is brand-new and

has had no practical effect to date.[2] Thus, even if the alleged conflict might ultimately warrant resolution by this Court, the Court would be better served by waiting to see whether the alleged conflict manifests in actual divergent outcomes in factually similar contexts, rather than granting certiorari at this time. Moreover, because cases involving the continuing treatment doctrine arise infrequently, the particular conflict claimed here is unlikely to affect very many, if any, cases in the future.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] The only case where it could have had an effect was in this one, but, as discussed above, see pp. 8-9, *supra*, the outcome in this case was unaffected by the requirement that the continuing treatment had to be negligent.