No. 01-1815

In the Supreme Court of the United States

NELLE B. BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner's claim for medical malpractice under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, was barred by the statute of limitations because he knew of his injury and its cause as early as 1951.

2. Whether the court of appeals correctly found that petitioner failed to present any evidence of mental incapacity to support her effort to toll the statute of limitations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unpublished, but it is available at 28 Fed. Appx. 198. The opinion of the district court (Pet. App. 6a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2002. A petition for rehearing was denied on March 12, 2002. The petition for a writ of certiorari was filed on June 10, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner's husband, George Brown, injured his back in 1945 while on active duty in the United States

Navy. Pet. App. 1a, 7a. In 1947, he was awarded disability compensation by the Department of Veterans Affairs for that injury. *Id.* at 7a. In January 1950, Mr. Brown underwent a myelogram for treatment of a herniated disc. *Ibid.* Iodized poppy seed oil (Lipiodol) was used as a contrast medium for the procedure. *Ibid.* The Lipiodol was not removed at the completion of the myelogram. *Id.* at 2a. Mr. Brown was hospitalized in August and September 1951, complaining of pain in his head, neck, back, and legs. *Id.* at 2a, 7a. He was diagnosed as having meningeal adhesions resulting from Lipiodol in his ventricular system. *Id.* at 7a. Despite that formal diagnosis, Mr. Brown's doctors did not believe that the Lipiodol could cause the described pain, and Mr. Brown was advised to seek psychiatric assistance. *Id.* at 2a. Thereafter, he was treated by a psychiatric physician because of his deteriorating physical and mental condition. *Id.* at 7a.

In November 1951, Mr. Brown gave a detailed history of his back pathology to the Veterans Administration (VA) Rating Board. Pet. App. 7a. He asserted that the Lipiodol had not been properly extracted and had scattered throughout his body, causing continuous, severe headaches. *Ibid.* The rating board assigned a 90% disability rating for: "(1) 'post-operative ruptured interve[r]tebral disc with chronic sciatic neuritis'; and (2) 'meningitis, chronic, due to retained iodized oil in the ventri[c]ular system and anxiety reaction, chronic, severe.'" *Id.* at 2a. In 1955, the rating board awarded Mr. Brown 100% disability for catatonic schizophrenia, but found that he was mentally competent. *Ibid.*

In 1958, the treating psychiatrist wrote to the VA Regional Office noting that, in their original meeting, Mr. Brown had complained of "intense feelings in the top of his head which he attributed to an arachnoiditis,

the result of a myelogram some time before." Pet. App. 2a, 8a. He eventually became bedridden, and he remained in that condition until his death in 1996. *Ibid.* The post-mortem examination revealed that his pain and neurological disturbances were likely the result of arachnoiditis induced by the administration of Lipiodol. *Id.* at 3a.

2. In November 1998, petitioner filed an administrative claim with the Department of Veterans Affairs for the severe pain that she claimed Mr. Brown endured because of the administration of the Lipiodol. Pet. App. 3a. After that claim was denied, petitioner filed the instant action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, alleging medical malpractice and loss of consortium. Pet. App. 6a. The district court granted the government's motion for summary judgment on the ground that petitioner's claim was time-barred because an administrative claim should have been filed within two years after it had accrued. *Id.* at 6a, 8a-9a. Specifically, the court determined that the claim had accrued "as early as 1951 and no later than 1958." *Id.* at 10a.

The court of appeals affirmed in an unpublished, per curiam opinion. It held that petitioner's medical malpractice claim accrued when Mr. Brown knew or should have known of his injury and its cause. Pet. App. 4a. Viewing the facts most favorably to Mr. Brown, it found that he knew in November 1951 that his injury (i.e., severe headaches) was caused by the oil remaining in his body. *Id.* at 3a, 4a. The court of appeals also rejected petitioner's argument that the statute of limitations should be tolled because of Mr. Brown's mental incapacity. It stressed the "complete lack of evidence showing that Brown was unable to understand

his injuries and their cause during the relevant time period"—that is, from 1951 to 1953. *Id.* at 5a.

ARGUMENT

The unpublished decision of the court of appeals (Pet. App. 1a-5a) properly states the governing rule of law, correctly applies it to the relevant issues of fact, and does not conflict with any decision of this Court or any other court of appeals. Petitioner merely takes issue with the court's factual findings concerning Mr. Brown's knowledge of his injury's cause and his alleged mental incapacity. Review by this Court is therefore unwarranted.

1. Petitioner maintains that the limitations period did not begin to run until Mr. Brown's post-mortem examination in 1996. Until then, petitioner claims, the "true nature and extent of his injuries" were not and could not have been known. Pet. 9. In addition, petitioner asserts that without that evidence, Mr. Brown "could have proven neither causation nor damages." *Ibid.* That argument, however, is foreclosed by *United States* v. *Kubrick*, 444 U.S. 111 (1979).

Under *Kubrick*, a plaintiff's claim for medical malpractice accrues under the FTCA—and thus the limitations period begins to run—once he knows of the existence and cause of his injury. This is the law even if the plaintiff does not know that his injury was the result of negligence. 444 U.S. at 113, 118. The *Kubrick* Court was concerned not to "undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government." *Id.* at 123.

Mr. Brown clearly knew of his injury and its cause when he was hospitalized in 1951 for pain that he claimed began after his myelogram. He was diagnosed

as having meningeal adhesions caused by Lipiodol in his ventricular system. Pet. App. 2a. Then, in November 1951, he told the VA Rating Board that his headaches were caused by the myelogram dye that had not been removed from his body. The rating board, in turn, assigned him disability benefits based upon the Lipiodol retained in his body. *Ibid.* Finally, the treating psychiatrist noted in a 1958 letter to the VA Regional Office that Mr. Brown had attributed his headaches to the myelogram in their first meeting. *Ibid.*

Thus, petitioner incorrectly asserts (Pet. 8, 10) that this case involves a "creeping disease" such as asbestosis, "whose symptoms usually become evident * * * long after first exposure to the hazard which caused the disease." *McGowan* v. *University of Scranton*, 759 F.2d 287, 291 n.8 (3d Cir. 1985). On the contrary, Mr. Brown's immediately apparent symptoms were severe enough to cause his hospitalization in 1951. See Pet. App. 2a.

It is for this reason that petitioner errs in claiming (Pet. 10-11) that the decision below conflicts with *Toal* v. *United States*, 438 F.2d 222 (2d Cir. 1971). *Toal* did involve a plaintiff who was injured by a dye that was not removed following a myelogram, but that is where the factual similarities between *Toal* and this case end. Mr. Toal, unlike Mr. Brown, did not know for almost two years after his May 1962 myelogram that the retained dye caused his symptoms. He did not know because it was not until March 1964 that he went from experiencing "discomfort" to "extremely severe symptoms." *Id.* at 224-225. And as the court understood his March 1963 letter to the Veterans Administration, he initially believed that "the presence of pantopaque [dye] within the spinal column, the strain of the myelogram procedure and the pre-existing spinal injury made

him more vulnerable to suffering from the injuries he received" in a car accident shortly after the myelogram. *Id.* at 225. It is thus inaccurate for petitioner to claim that Mr. Toal "attributed his pain to the retained pantopaque." Pet. 11.[1]

In sum, the court of appeals in *Toal* had good reason to find no clear error in the trial court's determination that Mr. Toal did not know before March 1964 of the causal relationship between the dye retention and his symptoms. 438 F.2d at 224-225. And so as not to be misunderstood, the court stressed that its holding was "not to say that one who knows he has suffered damage from medical malpractice may postpone bringing an action until the full extent of that damage is ascertained." *Id.* at 225. In any event, *Toal* was decided before *Kubrick*, which now governs the application of limitations periods in FTCA malpractice cases. See *Kichline* v. *Consolidated Rail Corp.*, 800 F.2d 356, 358-359 (3d Cir. 1986) (recognizing that *Toal* was among the circuit court decisions affected by *Kubrick*). Therefore, no circuit split exists with respect to this issue. Moreover, because the decision below is unpublished, it could not create a split among the published authorities on this question.

2. According to petitioner (Pet. 4-8), the court of appeals also erred in finding no evidence for her claim that Mr. Brown's mental incapacity should have tolled the statute of limitations. She thus disputes only the

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[1] Petitioner misstates the facts of *Toal* in relating that "[t]he plaintiff had been in a car accident, and the myelogram was part of his treatment program." Pet. 11. The myelogram preceded the automobile collision. 438 F.2d at 223-224. Petitioner also errs in referring to a 1962 letter by Mr. Toal. He wrote the letter on March 29, 1963. *Id.* at 224.

fact finding on this issue, rendering review by this Court unnecessary. See Sup. Ct. R. 10.

Moreover, in this case the question of tolling is analytically indistinguishable from that of accrual. If, as petitioner alleges (Pet. 5), Mr. Brown was mentally incapable of knowing the cause of his injuries, the rule of *Kubrick* would not be satisfied. See 2 Lester Jayson & Robert Longstreth, *Handling Federal Tort Claims: Administrative and Judicial Remedies* § 14.05[1] (2001) (noting that concepts of tolling and accrual "merge" where "the government's action renders the claimant unaware of injury and cause"). In such a case, a court may refuse to apply a time bar either by invoking *Kubrick*, or by tolling the statute during the period of incapacity. Cf. *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998) (holding tolling unavailable in suit under Quiet Title Act, 28 U.S.C. 2409a, because statute "has already effectively allowed for equitable tolling" by providing that claim will not accrue until plaintiff "knew or should have known of the claim of the United States"). Because Mr. Brown knew of his injury and its cause in 1951 (Pet. App. 4a), it follows that he was not suffering from any incapacity that might warrant tolling.

Indeed, the records from 1951 show that Mr. Brown was "able to understand and seek disability benefits for the relationship between the myelogram and his pain." Pet. App. 5a. Further, the VA Rating Board determined in 1955 that Mr. Brown was mentally competent. *Id.* at 2a. Thus, the court of appeals properly held that tolling is impermissible where the injured party knows of his injury and its cause—and thus is sufficiently

competent—over four decades before the filing of an administrative claim.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] In view of these facts, the court of appeals properly found (Pet. App. 5a) no occasion to consider whether mental incapacity would allow tolling. It correctly stated the general rule that "mental incapacity does not permit the tolling of the FTCA statute of limitations. See, *e.g.*, *Casias* v. *United States*, 532 F.2d 1339, 1342 (10th Cir. 1976)." Pet. App. 4a-5a. It further noted, however, that "at least one court has held that tolling may be appropriate when the incompetence allegedly has been caused by the Government's negligence and limits the plaintiff's ability to understand his injury and its cause." *Ibid.*; see *Oslund* v. *United States*, 701 F. Supp. 710, 712 (D. Minn. 1988) (citing *Simmons* v. *United States*, 805 F.2d 1363 (9th Cir. 1986)). Indeed, though petitioner does not allege one, there may be a circuit split on this issue. See, *e.g.*, *Barren by Barren* v. *United States*, 839 F.2d 987, 992 (3d Cir.), cert. denied, 488 U.S. 827 (1988) (rejecting the notion that "a plaintiff's mental infirmity can extend the statute of limitations" where "the government's own negligence prevents a plaintiff from recognizing her injuries caused by that conduct"). But in any event, this case is not an appropriate vehicle for addressing any such conflict. Mr. Brown suffered no incapacity that prevented him from understanding his condition; on the contrary, he knew of his injury and its cause as early as 1951. Moreover, the unpublished decision in this case does not contribute to any preexisting split of authority on this issue.