No. 02-787

In the Supreme Court of the United States

MICHAEL D. PERNA, PETITIONER

v.

UNITED STATES, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the applicable two-year statute of limitations, 28 U.S.C. 2401(b), bars petitioner's claim under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*

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OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1-4) is not published in the *Federal Reporter*, but is reprinted at 36 Fed. Appx. 61. The opinion of the district court (Pet. App. 7-18) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5-6) was entered on June 5, 2002. A petition for rehearing was denied on August 26, 2002 (Pet. App. 21-22). The petition for a writ of certiorari was filed on November 21, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner filed this damages action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.* The United States District Court for the District of New Jersey granted summary judgment for the United States, and the court of appeals affirmed. See Pet. App. 1-4, 11-16.

1. The applicable limitations provision of the FTCA, 28 U.S.C. 2401(b), provides in pertinent part that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." In *United States* v. *Kubrick*, 444 U.S. 111 (1979), this Court interpreted Section 2401(b) in the context of a medical malpractice suit against a veterans' hospital. The plaintiff alleged that his hearing loss was caused by the hospital's negligent administration of an antibiotic. The court of appeals believed that accrual of the plaintiff's FTCA claim depended on when the plaintiff "knew or could reasonably be expected to know that in the eyes of the law, the [antibiotic] treatment constituted medical malpractice." *Id.* at 118. This Court rejected the court of appeals' view. In so doing, the Court noted "that the general rule under the [FTCA] has been that a tort claim accrues at the time of the plaintiff's injury," although knowledge of the cause of injury also may be required for the two-year period to run in medical malpractice cases. *Id.* at 120.

2. Petitioner alleges that in 1993 and 1994, respondent Ronald Previti committed torts—including assault, battery, false imprisonment, and extortion—against him while acting as a confidential informant for the Federal Bureau of Investigation (FBI). Pet. App. 2. Petitioner claims that the FBI failed to prevent

Previti from committing those torts and "provide[d] Previti with a badge of authority upon which to perpetrate crime[s] against [petitioner]." *Id.* at 8 (quoting Pet. Compl. ¶ 17).

In October 1995, petitioner filed an administrative complaint against Previti with the United States Department of Labor's Office of Organized Crime and Racketeering. Pet. App. 9. The Department terminated its investigation when petitioner refused to cooperate. *Ibid.*

Petitioner alleges that he did not know of Previti's role as an FBI informant until June 29, 1999, when he learned about it through a newspaper article. Pet. App. 10; Pet. 4 & n.2. Petitioner states that he filed a notice of his FTCA claim with the FBI on October 20, 1999.[1] Pet. 4. In September 2000, petitioner filed his federal court complaint containing the FTCA claim. See generally 28 U.S.C. 2401(b) (tort claim against United States must be brought within six months of agency's final denial of claim).[2]

3. The district court determined that petitioner failed to present his FTCA claim to the FBI within two years of the date on which the claim accrued, and therefore granted summary judgment for the United States. Pet. App. 11-16. The district court explained that un-

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[1] Because the record before the district court indicated only that petitioner filed his administrative claim in 1999, the district court assumed (in petitioner's favor) that the claim was filed on January 1, 1999. See Pet. App. 11 n.2.

[2] Petitioner also asserted claims against Previti, individual federal agents, the New Jersey Division of State Police, and individual state police officers. See Pet. App. 8. The district court dismissed all those claims. See *id.* at 17-18. The petition, however, addresses only petitioner's FTCA claim against the United States. See Pet. i, 4, 7-12.

der the Third Circuit's decision in *Zeleznik* v. *United States*, 770 F.2d 20 (1985), cert. denied, 475 U.S. 1108 (1986), an FTCA claim "accrues when the injured party learns of the injury and its immediate cause." Pet. App. 13 (quoting *Zeleznik*, 770 F.2d at 23). As the district court further explained, *Zeleznik*'s "injury and immediate cause" rule applies even if a reasonable investigation, commenced at the time when the injury and its immediate cause became known, would not have revealed the government's involvement in the alleged tort. *Id.* at 13-14, 16; see *Zeleznik*, 770 F.2d at 23-24.

Applying *Zeleznik*, the district court emphasized that petitioner "learned of his injury between 1993 and 1994 when the alleged assault, battery, false imprisonment, and extortion occurred and he knew at least one possible defendant, Previti, was responsible for his injuries." Pet. App. 14. Nonetheless, the court noted, petitioner "did not promptly file an action against Previti; instead he waited more than six years to assert such claims." *Ibid.*

The district court rejected petitioner's argument that his FTCA claim did not accrue until he actually discovered the government's alleged involvement in June 1999. Pet. App. 11-12, 14. The court reiterated that "the critical facts about causation and who inflicted [petitioner's] injury was [sic] known to him in 1994." *Id.* at 16. The court added that "equitable considerations do not warrant the tolling of the statute of limitations" in this case because petitioner "has not presented any evidence that United States-Defendants in any way obstructed his efforts to sue Previti, seek protection from Previti's violent acts, or discover his status as a confidential informant for the FBI." *Ibid.*

4. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. 1-4. The court of ap-

peals stated that under its decision in *Zeleznik* "[t]he statute of limitations begins to run on the first date that the injured party possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress." *Id.* at 3 (quoting *Zeleznik*, 770 F.2d at 23). The court concluded that the statute of limitations therefore bars petitioner's claim "[b]ecause the record clearly establishes that the action was filed more than two years after the accrual of [petitioner's] injuries." *Id.* at 4.

ARGUMENT

The court of appeals correctly determined that petitioner's claim under the Federal Tort Claims Act accrued no later than 1994, when Previti's alleged torts were complete. At that point, petitioner knew that he was injured, knew that Previti caused his injury, and was on notice of the need to investigate the surrounding circumstances. The court of appeals' unpublished decision does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

1. Under the FTCA, a tort claim against the United States is time-barred "unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. 2401(b). That two-year limitation, like other statutes of limitations, "represent[s] a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) (internal quotation marks and citation omitted).

In *Kubrick* the government conceded, and the Court assumed, that accrual of FTCA claims in the medical malpractice context is governed by a "discovery rule" under which "the 2-year period d[oes] not begin to run until the plaintiff has discovered both his injury and its cause." 444 U.S. at 120; see *id.* at 120-121. But this Court never has endorsed application of the discovery rule in FTCA cases outside the medical malpractice context. To the contrary, the Court recently rejected the view that "a generally applied discovery rule" is implicit in federal statutes of limitations. *TRW Inc.* v. *Andrews*, 122 S. Ct. 441, 447 (2001).

2. In this case, the court of appeals applied the discovery rule in an FTCA action outside the medical malpractice area. As the court of appeals concluded, however, petitioner's FTCA claim was untimely even under that plaintiff-friendly approach.

Petitioner argues (Pet. 12) that his FTCA claim did not accrue until he knew (or in the exercise of reasonable diligence should have known) that Previti was an FBI informant. See Pet. 10-12. Yet under the discovery rule "discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000). Sometimes, discovery of the injury's cause also may be required to "start[] the clock," see *id.* at 555-556 (quoting *Kubrick*, 444 U.S. at 122), but discovery of the cause of an injury "does not mean knowing who is responsible for it. The 'cause' is known when the immediate physical cause of the injury is discovered." *Dyniewicz* v. *United States*, 742 F.2d 484, 486 (9th Cir. 1984) (per Kennedy, J.).

Therefore, "[t]he well-established rule is that once a prospective plaintiff learns of his injury, he is on notice that there may have been an invasion of his legal rights and that he should investigate whether another may be

liable to him." *Gould* v. *United States Dep't of Health & Human Servs.*, 905 F.2d 738, 744 (4th Cir. 1990), cert. denied, 498 U.S. 1025 (1991); accord *Garza* v. *United States Bur. of Prisons*, 284 F.3d 930, 935 (8th Cir. 2002); *Zeleznik* v. *United States*, 770 F.2d 20, 22-23 (3d Cir. 1985), cert. denied, 475 U.S. 1108 (1986); *Richman* v. *United States*, 709 F.2d 122, 123-124 (1st Cir. 1983) ("[I]f a pedestrian were struck by a negligent driver, the statute would run in favor of his undisclosed employer, and the barkeeper who allowed him to drink too much, even if the pedestrian were ignorant of their existence."); *Steele* v. *United States*, 599 F.2d 823, 828-829 (7th Cir. 1979). Consistent with that settled principle, the court of appeals held in this case that petitioner's claim accrued "on the first date that [he] possesse[d] sufficient critical facts to put him on notice that a wrong [was] committed and that he need investigate to determine whether he is entitled to redress." Pet. App. 3 (quoting *Zeleznik*, 770 F.2d at 23).

3. a. Petitioner contends (Pet. 8-12) that the court of appeals' decision conflicts with a line of decisions in which courts, including the Third Circuit itself, have held that a cause of action under the FTCA does not accrue at the time of injury if the plaintiff was "blamelessly unaware" (*Diaz* v. *United States*, 165 F.3d 1337, 1339 (11th Cir. 1999)) of the government's alleged role in the injury. The cases on which petitioner relies involved plaintiffs who reasonably did not know at the time of their injury of *any cause* that might, after diligent investigation, give rise to a potential tort claim. In contrast, petitioner knew by 1994 the "critical facts" that "put him on notice that a wrong [was] committed and that he need investigate to determine whether he is entitled to redress." Pet. App. 3 (quoting *Zeleznik*, 770 F.2d at 23). See *Dyniewicz*, 742 F.2d at 486 ("With

knowledge of the fact of injury and its cause * * * [t]he burden is then on plaintiff to ascertain the existence and source of fault within the statutory period.") (citation omitted); cf. *Kubrick*, 444 U.S. at 122-123 (FTCA action accrues despite plaintiff's unawareness that his known injury is legally actionable). Thus, whether or not the line of cases on which petitioner relies correctly applies the FTCA's limitations rule, it is inapposite.

Drazan v. *United States*, 762 F.2d 56 (7th Cir. 1985), for example, is a medical malpractice case in which the plaintiff's husband was treated for tuberculosis at a Veterans Administration hospital. During the husband's treatment, a radiology report showed a possible tumor. The report suggested a follow-up examination, but that examination was not conducted. A year later, the husband was diagnosed with lung cancer, which proved fatal. See *id.* at 57. The Seventh Circuit held that the plaintiff's wrongful death claim under the FTCA did not accrue when she learned of the physical injury that caused her husband's death (*i.e.*, lung cancer). Rather, the claim accrued when the plaintiff became aware (or in the exercise of reasonable diligence should have become aware) that her husband may have suffered doctor-caused harm. *Id.* at 58-59. It was in that context of two potential causes, only one of which was possibly tortious, that the *Drazan* court stated that "[w]hen there are two causes of an injury, and only one is the government, the knowledge that is required to set the statute of limitations running is knowledge of the government cause, not just of the other cause." *Id.* at 59.

The decision below therefore does not conflict with the Seventh Circuit's failure-to-diagnose analysis in *Drazan*. Indeed, as petitioner acknowledges (Pet. 9),

the Third Circuit recently followed *Drazan* in a case involving an alleged failure to diagnose and treat a medical condition. See *Hughes* v. *United States*, 263 F.3d 272, 277 (3d Cir. 2001). The decision below is consistent with *Hughes*, but even if it were not, any tension between this unpublished decision and the earlier published decision of the Third Circuit would not provide a basis for this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

The Eleventh Circuit's decision in *Diaz*, *supra*, also involved a wrongful death claim arising from the government's alleged failure to provide medical treatment to the plaintiff's husband. See 165 F.3d at 1338-1339. The immediate cause of the husband's death—suicide—did not suggest the possibility of tortious conduct by any party and the court, following *Drazan* in the specific context of a wrongful death action, therefore concluded that the plaintiff was not under a duty to investigate the identity of possible tortfeasors at that time. *Id.* at 1340-1341.

Kronisch v. *United States*, 150 F.3d 112 (2d Cir. 1998), is similarly distinguishable. The plaintiff in *Kronisch* brought an FTCA claim in 1981, alleging that in 1952 an operative of the Central Intelligence Agency administered hallucinogenic drugs to him without his knowledge or consent, causing permanent injuries. *Id.* at 119-120. The Second Circuit held that the claim accrued during the late 1970s, rather than in 1952. *Id.* at 121-123. But like *Drazan* and *Diaz*, *Kronisch* was a case in which the plaintiff did not have reason to suspect at the time of the alleged injury that the injury might have arisen from any tortious conduct. See *id.* at 121.

b. Petitioner also suggests (Pet. 9-11) a conflict between the decision below and the Eighth Circuit's decision in *Garza*, *supra*, but the holding in *Garza* is entirely consistent with the Third Circuit's decision in this case. In *Garza*, a federal convict murdered his wife after escaping from a private halfway house. The representative of the wife's estate brought an FTCA claim, alleging that a federal employee negligently failed to notify law enforcement agencies or the wife that the convict had escaped. 284 F.3d at 933. The FTCA claim was presented more than two years after the wife's murder. The plaintiff, however, argued that the claim did not accrue until he discovered that the person responsible for the failure to warn was a federal employee, rather than an employee of the halfway house. *Id.* at 936.

The Eighth Circuit held that the plaintiff's FTCA claim was time-barred. *Garza*, 284 F.3d at 936-938. It noted that "the statute of limitations under the FTCA 'does not wait until a plaintiff is aware that an alleged tort-feasor is a federal employee,'" *id.* at 935 (quoting *Gould*, 905 F.2d at 745), and that "[w]here the government or its agents have not misled or deceived a plaintiff, or otherwise hidden the legal identity of alleged tortfeasors as federal employees, the cause of action still accrues *when the existence of an injury and its cause are known*." *Ibid.* (emphasis added); accord *Diminnie* v. *United States*, 728 F.2d 301, 305 (6th Cir.), cert. denied, 469 U.S. 842 (1984) (accrual of FTCA claim can be deferred because of lack of knowledge of identity of tortfeasor only when "the United States itself played a wrongful role in concealing the culprit's identity"). Applying those principles, the Eighth Circuit explained that "from the time [the murdered wife's] body was discovered, inquiry was in order into the tragically obvious

questions of whether she had been notified of [the convict's] escape, whether anyone was responsible to make such notification and, if so, whom." *Garza*, 284 F.3d at 936.

In this case, the district court determined that petitioner "learned of his injury between 1993 and 1994 when the alleged assault, battery, false imprisonment, and extortion occurred and he knew at least one possible defendant, Previti, was responsible for his injuries." Pet. App. 14. The district court further determined that petitioner "did not promptly file an action against Previti; instead he waited more than six years to assert such claims." *Ibid.* Petitioner likewise did not cooperate in the Department of Labor's investigation of his administrative complaint against Previti, causing the Department to dismiss the complaint. *Id.* at 9. And as the district court also concluded, petitioner "has not presented any evidence that United States-Defendants in any way obstructed his efforts to sue Previti, seek protection from Previti's violent acts, or discover his status as a confidential informant for the FBI." *Id.* at 16. On those facts the court of appeals correctly determined (*id.* at 3), consistent with *Garza*, that petitioner's tort claim accrued when petitioner knew of his injury from Previti's conduct, not when he discovered that the alleged defendant's actions might be traceable to the federal government. Therefore, it was irrelevant whether petitioner would have discovered Previti's status as an FBI informant if petitioner had undertaken a timely and diligent investigation. *Ibid.*

The decision below is correct and does not implicate any conflict in the circuits. Moreover, the unpublished decision could not contribute to a circuit split in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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