(ORDER LIST: 570 U.S.)

THURSDAY, JUNE 27, 2013

APPEALS -- SUMMARY DISPOSITIONS

12-496 TEXAS V. UNITED STATES, ET AL.

The judgment is vacated, and the case is remanded to the United States District Court for the District of Columbia for further consideration in light of *Shelby County* v. *Holder*, 570 U.S. ___ (2013), and the suggestion of mootness of appellees Wendy Davis, et al.

12-1028 TEXAS V. HOLDER, ATT'Y GEN.

The judgment is vacated, and the case is remanded to the United States District Court for the District of Columbia for further consideration in light of *Shelby County* v. *Holder*, 570 U.S. ___ (2013).

CERTIORARI -- SUMMARY DISPOSITION

12-804 GROUNDS, ACTING WARDEN V. SESSOMS, TIO D.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Salinas* v. *Texas*, 570 U.S. ___ (2013).

ORDER IN PENDING CASE

12-7822 FERNANDEZ, WALTER V. CALIFORNIA

The motion of petitioner for appointment of counsel is granted. Gerald P. Peters, Esquire, of Thousand Oaks,

California, is appointed to serve as counsel for the petitioner in this case.

CERTIORARI GRANTED

12-794 WHITE, WARDEN V. WOODALL, ROBERT K.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted.

12-1094 CLINE, TERRY, ET AL. V. OK COALITION FOR REPRODUCTIVE

The petition for a writ of certiorari is granted. This Court, pursuant to the Revised Uniform Certification of Questions of Law Act, Okla. Stat., Tit. 20, §1601 *et seq.* (West 2002), respectfully certifies to the Supreme Court of Oklahoma the following question:

Whether H.B. No. 1970, Section 1, Chapter 216, O.S.L. 2011 prohibits: (1) the use of misoprostol to induce abortions, including the use of misoprostol in conjunction with mifepristone according to a protocol approved by the Food and Drug Administration; and (2) the use of methotrexate to treat ectopic pregnancies.

Further proceedings in this case are reserved pending receipt of a response from the Supreme Court of Oklahoma.

12-8561 PAROLINE, DOYLE R. V. UNITED STATES, ET AL.

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to the following question: What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. §2259.

CERTIORARI DENIED

12-23 BREWER, GOV. OF AZ, ET AL. V. DIAZ, JOSEPH R., ET AL.

12-63) WINDSOR, EDITH S. V. UNITED STATES, ET AL.
)
12-785) BIPARTISAN LEGAL ADVISORY GROUP V. WINDSOR, EDITH S., ET AL.

12-150 KWONG, CHUEN PIU V. UNITED STATES

12-765 HOMA, G. R. V. AMERICAN EXPRESS CO., ET AL.

12-6314 BORG, BRETT D. V. MINNESOTA

12-8664 REEDER, KEITH C. V. UNITED STATES

The petitions for writs of certiorari are denied.

12-13) BIPARTISAN LEGAL ADVISORY GROUP V. GILL, NANCY, ET AL.
)
12-15) DEPT. OF H&HS, ET AL. V. MASSACHUSETTS, ET AL.
)
12-97) MASSACHUSETTS V. DEPT. OF H&HS, ET AL.

The petitions for writs of certiorari are denied. Justice Kagan took no part in the consideration or decision of these petitions.

12-16 OPM, ET AL. V. GOLINSKI, KAREN

The petition for a writ of certiorari before judgment is denied. Justice Kagan took no part in the consideration or decision of this petition.

12-231) PEDERSEN, JOANNE, ET AL. V. OPM, ET AL.
)
12-302) OPM, ET AL. V. PEDERSEN, JOANNE, ET AL.

12-689 COALITION FOR PROT. OF MARRIAGE V. SEVCIK, BEVERLY, ET AL.

The petitions for writs of certiorari before judgment are denied.

SUPREME COURT OF THE UNITED STATES

ELRICK J. GALLOW, PETITIONER *v.* LYNN COOPER, WARDEN

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

No. 12–7516. Decided June 27, 2013

The petition for a writ of certiorari is denied.

Statement of JUSTICE BREYER, with whom JUSTICE SOTOMAYOR joins, respecting the denial of the petition for writ of certiorari.

Petitioner Elrick Gallow, like the petitioner in the recently decided case of *Trevino* v. *Thaler*, 569 U. S. ___ (2013), alleges that he received ineffective assistance of counsel both at his criminal trial and during his first state postconviction proceeding. Specifically, petitioner's trial counsel has admitted in an affidavit and testimony before the State's Disciplinary Board that "he was unable to effectively cross-examine the victim because he was suffering from panic attacks and, more importantly, is related to the victim. Because of this, [he] advised Gallow to plead guilty despite Gallow's reluctance to do so, and failed to inform both Gallow and the State that he had evidence to impeach the victim's testimony." 1 App. to Pet. for Cert. 3. In reliance on this conflicted advice, Gallow pleaded guilty midway through trial. His trial counsel was subsequently disbarred. When Gallow, represented by a different attorney, filed for state postconviction relief, his new attorney failed to bring forward "any admissible evidence" to support his claim of ineffective assistance of trial counsel. *Id.*, at 15. Namely, in state court Gallow's habeas counsel repeatedly neglected to subpoena the trial counsel, which led the state court to reject the counsel's affidavit on state evidentiary grounds. This meant that Gallow was left with a claim that had virtually no evidentiary support.

In my view, a petitioner like Gallow is in a situation indistinguishable from that of a petitioner like Trevino: Each of these two petitioners failed to obtain a hearing on the merits of his ineffective-assistance-of-trial-counsel claim because state habeas counsel neglected to "properly presen[t]" the petitioner's ineffective-assistance claim in state court. *Martinez* v. *Ryan*, 566 U. S. 1, ___ (2012) (slip op., at 2). A claim without any evidence to support it might as well be no claim at all. In such circumstances, where state habeas counsel deficiently neglects to bring forward "any admissible evidence" to support a substantial claim of ineffective assistance of trial counsel, there seems to me to be a strong argument that the state habeas counsel's ineffective assistance results in a procedural default of that claim. The ineffective assistance of state habeas counsel might provide cause to excuse the default of the claim, thereby allowing the federal habeas court to consider the full contours of Gallow's ineffective-assistance claim. For that reason, the Fifth Circuit should not necessarily have found that it could not consider the affidavit and testimony supporting Gallow's claim because of *Cullen* v. *Pinholster*, 563 U. S. ___ (2011).

Nonetheless, I recognize that no United States Court of Appeals has clearly adopted a position that might give Gallow relief. But I stress that the denial of certiorari here is not a reflection of the merits of Gallow's claims.

SUPREME COURT OF THE UNITED STATES

LINDA LANUS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ERIC K. LANUS *v.* UNITED STATES

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

No. 12–862. Decided June 27, 2013

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, dissenting from denial of certiorari.

Petitioner Linda Lanus asks the Court to revisit our decision in *Feres* v. *United States*, 340 U. S. 135 (1950), which interpreted the Federal Tort Claims Act (FTCA) to deny military personnel the ability to recover for injuries resulting from the negligence of federal employees. I would grant the petition to reconsider *Feres*' exclusion of claims by military personnel from the scope of the FTCA.

The FTCA is a sweeping waiver of sovereign immunity that, under specified circumstances, renders the Government liable for money damages for a variety of injuries caused by the negligence of Government employees. 28 U. S. C. §1346(b)(1). As written, the FTCA "renders the United States liable to *all* persons, including servicemen, injured by the negligence of Government employees." *United States* v. *Johnson*, 481 U. S. 681, 693 (1987) (SCALIA, J., dissenting). While the Act contains a number of exceptions to this broad waiver of immunity, "none generally precludes FTCA suits brought by servicemen." *Ibid.* Congress contemplated such an exception, *Feres*, *supra,* at 139, but codified language that is far more limited. See §2680(j) (excluding from waiver "[a]ny claim arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war*" (emphasis added)).

Nevertheless, in *Feres*, the Court held that "the Government is not liable under the [FTCA] for injuries to

servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U. S., at 146. There is no support for this conclusion in the text of the statute, and it has the unfortunate consequence of depriving servicemen of any remedy when they are injured by the negligence of the Government or its employees. I tend to agree with Justice Scalia that "*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received." *Johnson*, *supra,* at 700 (internal quotation marks omitted). At a bare minimum, it should be reconsidered.

The instant petition asks the Court to do just that. I would grant this request. Private reliance interests on a decision that *precludes* tort recoveries by military personnel are nonexistent, and I see no other reason why the Court should hesitate to bring its interpretation of the FTCA in line with the plain meaning of the statute. I, therefore, respectfully dissent from the Court's decision to deny this petition.

SUPREME COURT OF THE UNITED STATES

No. 12–6355

RICARDO MARRERO, PETITIONER *v.*
UNITED STATES

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

[June 27, 2013]

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *Descamps* v. *United States*, 570 U.S. ___ (2013).

JUSTICE ALITO, with whom JUSTICE KENNEDY joins, dissenting

The Court's decision to grant, vacate, and remand shows that the Court's elaboration of its "modified categorical" approach has completely lost touch with reality.

In this case, the Court of Appeals for the Third Circuit held that petitioner qualifies as a career offender for purposes of the United States Sentencing Commission, Guidelines Manual §4B1.1 (Nov. 2012), based in part on a prior conviction under Pennsylvania law for simple assault, Pa. Stat. Ann., Tit. 18, §2701(a) (Purdon 2000), which applies to a defendant who "attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another." Based on what petitioner said when he pleaded guilty to this offense, the Court of Appeals concluded that petitioner had admitted—and had thus been convicted of—intentional or at least knowing conduct and not simply reckless conduct. See 677 F. 3d 155, 160–162 (2012). I see nothing lacking in the Court of Appeals' analysis.

The Pennsylvania statute is "divisible" because it contains alternative elements. See *Descamps* v. *United States*, *ante,* at 1–2, 6. Under this Court's precedents, the modified categorical approach applies to divisible statutes, see *ante,* at 6, 23, and courts applying that approach may consult the plea colloquy to "determin[e] which statutory phrase . . . covered a prior conviction," *Nijhawan* v. *Holder*, 557 U. S. 29, 41 (2009); see *Shepard* v. *United States*, 544 U. S. 13, 20 (2005).

When petitioner pleaded guilty, this is what was said:

> "'[Assistant District Attorney]: On . . . April 27, 2004, . . . [petitioner] grabbed Mrs. Marrero by the neck, attempting to drag her upstairs to the second floor. When she tried to make a phone call, he ripped the phone cord out of the wall as she was attempting to call 911.'"
>
> "'The Court: Do you admit those facts?'"
>
> "'The Defendant: Yes, Sir.'" 677 F. 3d, at 158 (quoting plea colloquy).

In sending this case back to the Third Circuit for a second look, this Court is apparently troubled by the possibility that petitioner was convicted merely for reckless conduct, and it is of course true that he did not say expressly that he intentionally or knowingly grabbed Mrs. Marrero by the neck or that he intentionally or knowingly attempted to drag her up a flight of stairs. The Court may be entertaining the possibility that what petitioner meant was that he grabbed what he believed to be some inanimate object with a neck—perhaps a mannequin named Mrs. Marrero—and attempted to drag that object up the steps. In that event, his conduct might have been merely reckless and not intentional or knowing.

The remand in this case is pointless. I would deny the petition and therefore dissent.