

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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TIM SHOOP, WARDEN, )  
                                ) Petitioner, )  
                                ) v. ) No. 21-511  
RAYMOND A. TWYFORD, III, )  
                                ) Respondent. )  
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Pages: 1 through 62  
Place: Washington, D.C.  
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3 TIM SHOOP, WARDEN, )

4 Petitioner, )

5 v. ) No. 21-511

6 RAYMOND A. TWYFORD, III, )

7 Respondent. )

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10 Washington, D.C.

11 Tuesday, April 26, 2022

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13 The above-entitled matter came on for  
14 oral argument before the Supreme Court of the  
15 United States at 11:50 a.m.

16

17 APPEARANCES:

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19 Ohio; on behalf of the Petitioner.

20 NICOLE F. REAVES, Assistant to the Solicitor General,  
21 Department of Justice, Washington, D.C.; for the  
22 United States, as amicus curiae, supporting  
23 neither party.

24 DAVID A. O'NEIL, ESQUIRE, Washington, D.C.; on behalf  
25 of the Respondent.

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P R O C E E D I N G S

(11:50 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 21-511, Shoop versus Twyford.

General Flowers.

ORAL ARGUMENT OF BENJAMIN M. FLOWERS

ON BEHALF OF THE PETITIONER

MR. FLOWERS: Thank you, Mr. Chief Justice, and may it please the Court:

Justice Jackson long ago warned against giving the convict population of the country new and unprecedented opportunities to litigate until they serve their sentences or make the best of increased opportunities to escape.

The Sixth Circuit here blessed precisely the sort of opportunity he warned of. It held that when a federal statute prohibits ordering a prisoner's transportation with a writ of habeas corpus, courts may instead order transportation under the All Writs Act.

But courts have no such power. Every All Writs order must be agreeable to the usages and principles of law, meaning the traditional

1 writs as altered by statute. Transportation  
2 orders must be agreeable to habeas law because  
3 habeas writs were the only traditional writs  
4 used for ordering the transportation of  
5 prisoners. So, when a federal habeas statute  
6 prohibits ordering transportation with a writ of  
7 habeas corpus in a particular situation, courts  
8 may not evade that prohibition by issuing a  
9 transportation order under the All Writs Act.

10 But the order here was improper for a  
11 second reason regardless. Every All Writs Act  
12 order must be necessary or appropriate in aid of  
13 the issuing court's jurisdiction. The order  
14 here doesn't qualify because it evades the rules  
15 governing discovery in habeas cases and  
16 facilitates the development of evidence that no  
17 habeas court can even consider.

18 All that leaves only the question  
19 whether the circuit had jurisdiction in this  
20 case, and it did. The warden satisfied all  
21 three elements of the collateral order doctrine.  
22 First, the order here is conclusive. Second,  
23 the question whether the All Writs Act empowers  
24 a federal court to interfere with the  
25 sovereign's management of its own prisons is

1 both important and separate from the merits.  
2 And, finally, the state cannot -- states cannot  
3 meaningfully protect themselves from  
4 transportation orders unless they're allowed to  
5 appeal immediately.

6           Regardless, the warden moved in the  
7 alternative for mandamus relief. If the Court  
8 thinks the collateral order doctrine doesn't  
9 apply, it should remand with instructions to  
10 issue a writ of mandamus correcting the district  
11 court's egregiously wrong and dangerous  
12 decision.

13           I welcome your questions.

14           JUSTICE THOMAS: Just one question,  
15 General. Why should we consider this  
16 transportation order a writ of habeas corpus?

17           MR. FLOWERS: Well, I -- I think there  
18 are actually two answers to that. One is you  
19 may not because, under the All Writs Act, they  
20 need to find a -- some traditional writ to which  
21 this is analogous. We candidly don't think  
22 there is one, but the best they can possibly do  
23 in finding an analogue is a habeas writ.

24           JUSTICE THOMAS: So what do you think  
25 it is?

1                   MR. FLOWERS: We don't -- we think  
2                   it's not analogous to any historical writ. It's  
3                   an ad hoc writ that the court had no authority  
4                   --

5                   JUSTICE THOMAS: No, I mean, how would  
6                   you -- I'm sorry, how would you characterize it  
7                   for the purpose of deciding this case?

8                   MR. FLOWERS: We would say that  
9                   because the closest analogue, albeit a bad one,  
10                  is habeas law, the order here was a writ in the  
11                  nature of habeas corpus and therefore had to be  
12                  consistent with statutes like 2241(c).

13                  And it was not consistent with that  
14                  because, as Judge Easterbrook explained in his  
15                  opinion for the Court in Ivey in the Seventh  
16                  Circuit, 2241(c) prohibits writs of habeas  
17                  corpus except in very -- I'm sorry.

18                  JUSTICE THOMAS: No.

19                  MR. FLOWERS: Except in specified  
20                  situations, and (c)(5) is the only one dealing  
21                  with transportation. It deals with writs of  
22                  habeas corpus ad testificandum and ad  
23                  prosequendum. This is neither of those and  
24                  therefore falls outside (c)(5) and is  
25                  impermissible.

1 JUSTICE THOMAS: Thank you.

2 MR. FLOWERS: We --

3 JUSTICE SOTOMAYOR: Counsel, I don't  
4 want to leave the collateral -- whether this is  
5 a appealable collateral order. It is conclusive  
6 under Mohawk, but we'd said there that the  
7 collateral appeal -- appealable orders are a  
8 narrow and selective class. They have to be  
9 final. They can't be reviewed on appeal.

10 But, if the district court ultimately  
11 grants Respondent's habeas petition, you can  
12 challenge the medical transport order and any  
13 evidence that it produces on appeal. If you  
14 succeed, that evidence could -- will be excluded  
15 from consideration.

16 That is exactly what we held in  
17 Mohawk, in a situation where the privilege could  
18 be violated by to your turning over materials  
19 even under seal, because the privilege is not to  
20 turn them over to anybody, whether under seal or  
21 not.

22 The third -- and I think this is your  
23 important point -- is that somehow you have some  
24 greater interest that this is an important  
25 question separate from the merits because state



1 sovereignty is at issue. You're expending money  
2 in transporting this prisoner.

3 But I understand that you're  
4 transporting him to a hospital that's regularly  
5 used by the prison to treat prisoners. You  
6 could put him on a bus that's going to that  
7 prison with other prisoners, so there's no extra  
8 money in the transport. The inmate's test is  
9 going to be paid by defense counsel, not by the  
10 state.

11 But, more importantly, there are all  
12 sorts of discovery orders that require  
13 expenditure by the state, including deposing  
14 your experts -- you have to pay for those  
15 experts to be deposed -- including sometimes  
16 doing searches of your own records and  
17 organizing them. That accounts for vast  
18 expenditures. How -- and we don't let any of  
19 those orders be reviewable.

20 So I don't know how this fits into the  
21 Mohawk exception.

22 MR. FLOWERS: Let me try to take that  
23 in three steps.

24 The first thing I want to emphasize --  
25 I'll start sort of in reverse order. With the

1 separate from the merits prong, if this Court  
2 determines that the inquiry is not separate from  
3 the merits, then it has announced a standard,  
4 and at that point, it can -- it can also  
5 issue -- reach the issue under a mandamus  
6 framework. But I'll put that aside for the  
7 moment.

8 JUSTICE SOTOMAYOR: That is an  
9 interesting question because it is tied up with  
10 the merits. If -- if the court has power, the  
11 question is what limits, if any, are in that  
12 power, correct?

13 MR. FLOWERS: So it's not --

14 JUSTICE SOTOMAYOR: So that's a merits  
15 question.

16 MR. FLOWERS: No, because, if we're  
17 correct, under the All Writs Act, courts have no  
18 authority to issue transportation orders under  
19 --

20 JUSTICE SOTOMAYOR: But it does -- but  
21 the merits still have to be addressed one way or  
22 another?

23 MR. FLOWERS: No, we don't think so --

24 JUSTICE SOTOMAYOR: So it's not  
25 separate from the merits.

1 MR. FLOWERS: Respectfully, Your  
2 Honor, no, you'll never reach the merits of the  
3 underlying claims because the only question  
4 would be whether the court had the power under  
5 the All Writs Act to do this, and the answer  
6 will always be no. It's -- I do want to  
7 emphasize every single circuit to have ever  
8 considered this has -- has said the collateral  
9 order doctrine applies.

10 With respect to the injury, we're not  
11 worried about --

12 JUSTICE SOTOMAYOR: In Mohawk, many  
13 have said privilege was, so we can't go by what  
14 their practice is; we have to go by what Mohawk  
15 said, correct?

16 MR. FLOWERS: I understand, though  
17 Osborn, which was the last case in 2007 to  
18 recognize when the collateral order doctrine  
19 applies -- a case in which it applies, did say  
20 that the fact that the circuits were unanimous  
21 was significant.

22 I do want to, more importantly,  
23 though, get to your point about monetary harms.  
24 Our -- the harms we're concerned with have  
25 nothing to do with money. We're worried about

1 public safety and interference with the  
2 sovereign management of the prisons.

3 In that context, the Court has said,  
4 for example, in United States v. Nixon, that  
5 even in a -- in a situation where the  
6 President's subpoenaed to turn over documents,  
7 which is basically discovery, the -- it could be  
8 immediately appealed because of the interference  
9 with the operations of another branch.

10 Separate sovereigns are entitled to --  
11 JUSTICE SOTOMAYOR: But discovery  
12 orders of all kind pose that risk.

13 MR. FLOWERS: And so that brings me to  
14 the second point I wanted to reach, which is how  
15 we distinguish Mohawk, and I'm -- I'm happy for  
16 the opportunity to do so.

17 What -- what the Court stressed in  
18 Mohawk is that most attorney-client rulings are  
19 mundane questions, there's usually no error, and  
20 they can be corrected later on appeal because  
21 usually the harm in the disclosure of  
22 attorney-client privilege, the Court said, is  
23 confined to the case at bar. It leads to  
24 evidence that shouldn't have been admitted. It  
25 causes the other side to have insight into

1 litigation strategy and so forth.

2 The exact opposite is true of  
3 transportation orders. Every single time we're  
4 subject to this order, we suffer harm that is  
5 unrelated to the case, namely, the harm from  
6 having to expose the public to this danger. So  
7 that distinguishes that.

8 I believe you also alluded to the  
9 importance of the issue, and sovereignty is what  
10 makes that different. Again, I'd point you to  
11 United States v. Nixon, for example, which said  
12 that we're not --

13 JUSTICE SOTOMAYOR: You -- you still  
14 haven't addressed my question. How are all of  
15 those issues different in any normal discovery  
16 situation?

17 MR. FLOWERS: Because, in a normal  
18 discovery situation, the harm the party suffers  
19 can be cured on appeal.

20 So, for example, if -- if  
21 attorney-client privilege is breached and  
22 information is given to one side that they can  
23 then use as evidence against them at trial, that  
24 can result in reversal. Most discovery orders  
25 are even easier than that.

1                   What makes this different is the harm  
2 we're sustaining has nothing to do with this  
3 case. The harm we're -- we're worried about is  
4 not the harm we sustained from this evidence --

5                   JUSTICE SOTOMAYOR: So could they do  
6 a -- a writ if the defense paid for the  
7 transportation and the security?

8                   MR. FLOWERS: No, because, again, the  
9 writ has nothing to do with payment. The --  
10 the -- or the injury has nothing to do with  
11 payment. The injury we're suffering is the  
12 sovereign interference with our -- our safe  
13 operation of our prisons that we cannot remedy  
14 on appeal, plus -- plus the threat to public  
15 safety. Once we transport him, we have  
16 sustained all of those harms. There's no  
17 unringing that bell after the fact.

18                   That's what makes this case different  
19 than discovery -- typical discovery orders.  
20 It's what makes it more like the Nixon case or  
21 if you want to look at the various immunity  
22 cases where the harm of actually going to trial  
23 is fully sustained once you reach trial.

24                   If there are no questions on that, I  
25 can briefly reach the -- the questions the Court

1 granted certiorari to address. We do think the  
2 closest analogue here is habeas, and that's why,  
3 because this is inconsistent with habeas law,  
4 the writ can't issue. And if the Court agrees  
5 with that, that's all you need to say to reverse  
6 the Sixth Circuit.

7 Now there's been this late push to  
8 analogize two discovery rules saying that this  
9 is like certain rules that exist in the -- in  
10 the Federal Rules of Civil or Criminal  
11 Procedure.

12 There are two problems with that. The  
13 first is that the discovery rules that they draw  
14 analogies to are not actually traditional writs.  
15 And you need to find some traditional writ to  
16 which this is analogous.

17 Botsford, this Court's decision in  
18 Botsford makes absolutely crystal-clear that  
19 courts have no sort of freestanding common law  
20 authority to invent new discovery methods. So  
21 there was no traditional writ that allowed that.

22 What's more is that even if the  
23 discovery rules provided the relevant usages and  
24 principles, the order here isn't agreeable to  
25 those usages and principles. The reason for

1 that is that Habeas Rule 6(a) provides the  
2 exclusive means for -- exclusive means for  
3 obtaining discovery in habeas. And it requires  
4 a good cause showing that Twyford has not met  
5 and has never argued he can make and, indeed,  
6 has affirmatively waived any intent to seek  
7 relief under.

8 For that reason, this is permitting  
9 review that the habeas rules affirmatively  
10 disclose. That makes it like the Carlisle case,  
11 it makes it like the Syngenta case, and it makes  
12 it like the Pennsylvania Bureau of Corrections  
13 case in which this Court said that when -- when  
14 there's a statute that governs a particular  
15 issue, parties may not evade that using the All  
16 Writs Act.

17 JUSTICE SOTOMAYOR: Are you taking the  
18 position that the SG was wrong in all the  
19 examples it gave of transport orders, for  
20 example, in a 1983 claim involving excessive  
21 force where prisoners ordered into a different  
22 medical facility -- to a medical facility for  
23 examination or a danger posed in a prison that's  
24 been proven, there's been a threat of a guard  
25 going to hire someone to kill him and there's an



1 order to transport him to another prison?

2 All of those, you say, are wrong.

3 MR. FLOWERS: I don't think they're  
4 wrong. I think those orders would not be issued  
5 under the All Writs Act and, indeed, could not  
6 be. So let me try to take them in the order you  
7 mentioned them.

8 If the person has proved a violation,  
9 say, of the Eighth Amendment, that we're not  
10 providing medical care or may be exposing them  
11 to a danger, then they can seek -- they can  
12 bring an Ex Parte Young action, seek relief.

13 If the Court issues an injunction, the  
14 Court has never suggested that the inherent  
15 authority to enjoin a legal action stems from  
16 the All Writs Act. So that's off the table.

17 The second would be that even if they  
18 for some reason can't bring that suit, if we are  
19 doing something that violates their  
20 constitutional rights, they can bring a mandamus  
21 suit to compel us to do something to vindicate  
22 their rights.

23 And then, finally, I took you to also  
24 to be asking and I take the SG to make the point  
25 that in some cases, if a federal prisoner brings

1 a 1983 suit, they may wish to have discovery and  
2 that discovery may entail a physical  
3 examination.

4 So here's my answer to that. Rule  
5 35(a) of the Federal Civil -- Federal Rules of  
6 Civil Procedure at least arguably would permit  
7 that plaintiff to seek that relief. The courts  
8 have gone both ways on the question. I don't  
9 think the Court needs to decide that here, but  
10 it's at least possible that Federal Rule of  
11 Civil Procedure 35 will allow that.

12 If it does not allow that, this Court  
13 can, of course, amend Federal Rule 35 to permit  
14 it. And that's -- if the answer is not provided  
15 by Federal Rule 35, that's the way to address  
16 the question.

17 The matter of when prisoners should be  
18 moved from one place to another and the threat  
19 to public safety that it poses makes this an  
20 incredibly important policy question.

21 It's the sort of question that should  
22 be answered in either a legislative process by  
23 Congress or a quasi-legislative process like  
24 this Court's Rules Enabling Act process that  
25 would allow all the relevant stakeholders to

1 bring forth all the relevant concerns.

2 I don't think this Court wants to  
3 bless a situation in which district courts are  
4 resolving that on an ad hoc basis, oftentimes,  
5 frankly, giving short shrift to the safety  
6 interests that the states -- that states -- that  
7 states have.

8 CHIEF JUSTICE ROBERTS: So are you  
9 saying putting aside your Rule 35 point that the  
10 only reason you can transport a prisoner is to  
11 testify or for trial?

12 MR. FLOWERS: Well, I -- I wouldn't go  
13 quite that far. What I would say is that  
14 insofar as -- that's the only thing you can do  
15 under the All Writs Act. There may be a  
16 particular statute that applies in a specific  
17 situation that allows transportation. There may  
18 be a federal rule that allows transportation.

19 But, if there is none and if you  
20 resort to the All Writs Act, then you need to  
21 consider that the transportation is agreeable to  
22 the usages and principles of law. And if it's  
23 inconsistent with 2241(c), it is not, and,  
24 therefore --

25 CHIEF JUSTICE ROBERTS: Well, but, I

1 mean, we have a lot of cases that talk about the  
2 broad and flexible office of the great writ  
3 and -- under the All Writs Act, and it seems  
4 like that's a very confining construction.

5 MR. FLOWERS: I think what we say is  
6 consistent with all those precedents, so I'll --  
7 I'll try to take them in order.

8 One is Price, where the Court ordered  
9 a petitioner to be transported to argue his --  
10 his appeal pro se. And that was before 2241(c)  
11 was enacted. There was a predecessor statute  
12 that was strikingly similar. The key point,  
13 though, is that Price never considered that  
14 statute. I don't know if it wasn't raised or  
15 what the reason was, but it simply never  
16 addressed the problem.

17 So stare decisis absolutely requires  
18 that you respect the holding of Price. It does  
19 not require extending Price's holding to a new  
20 context when doing so would require rejecting an  
21 argument that case never considered.

22 The next case I think is Hayman.  
23 Hayman comes out exactly the same way under our  
24 theory, though the reasoning would be slightly  
25 different in light of subsequent legal

1 developments.

2           So, in Hayman, it was a 2255 case;  
3 2255 does anticipate transportation orders. And  
4 the Court said that as long as you have the All  
5 Writs Act you can issue a writ in the nature of  
6 habeas corpus. That, by the way, shows --  
7 proves our point that these writs are in the  
8 nature of habeas corpus.

9           But it -- it issued what was  
10 effectively a writ of habeas corpus ad  
11 testificandum. You might ask why didn't it just  
12 do it under (c)(5). That's the way the case  
13 would come out today. The Court wouldn't need  
14 the All Writs Act.

15           The reason it didn't invoke (c)(5) is  
16 because, at the time, courts had assumed and  
17 Hayman, in fact, assumed that a different  
18 statute, 2241(a), prohibited courts from  
19 invoking 2241(c) except with respect to  
20 prisoners located within their jurisdiction.

21           Years later, in Carbo, this Court  
22 clarified that that was not the case and that  
23 2241(a) has no bearing on writs issued under  
24 (c)(5). So Hayman comes out the same way and  
25 Price came out differently under an old statute

1 that it failed to consider. So I don't think  
2 this is contrary to any of those.

3 And I do want to stress that allowing  
4 it under the All Writs Act would be inconsistent  
5 with the cases this Court's announced in the  
6 years since New York Telephone that have  
7 attempted to rein in, shall we say, overly  
8 expansive readings of the Act. So, in Syngenta,  
9 in Carlisle, and to some extent Pennsylvania  
10 Bureau of Corrections, the Court has made  
11 absolutely crystal-clear that when there's a  
12 statute or a rule that governs a situation, you  
13 cannot use the All Writs Act to evade that.

14 This, if it's anything, is a writ of  
15 habeas corpus. They need to be agreeable to  
16 that. It's not, and for that reason, it's  
17 improper.

18 If there are no further questions, I'm  
19 happy to reserve the rest of my time.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 Ms. Reaves.

23 ORAL ARGUMENT OF NICOLE F. REAVES  
24 FOR THE UNITED STATES, AS AMICUS CURIAE,  
25 SUPPORTING NEITHER PARTY

1 MS. REAVES: Mr. Chief Justice, and  
2 may it please the Court:

3 In certain rare circumstances, a  
4 federal court may order a state prisoner  
5 transported under the All Writs Act. Such an  
6 order can be agreeable to the usages and  
7 principles of law because it is analogous to  
8 numerous discovery provisions and consistent  
9 with the Court's long-standing use of the Act to  
10 assist litigants in conducting factual  
11 inquiries.

12 And a transport order may be necessary  
13 or appropriate in a Section 2254 case if a  
14 prisoner shows good cause for the order and  
15 demonstrates that equitable considerations  
16 support his transport request. The Court took  
17 this sort of authority for granted in Rees, and  
18 it should not now foreclose courts from issuing  
19 transport orders under the All Writs Act.

20 This Court has repeatedly rejected the  
21 warden's proposition that an order may be issued  
22 under the Act only if there's a common law  
23 analogue. And the warden's sweeping assertion  
24 that Section 2241(c) governs all prisoner  
25 transport relies on an atextual reading of that

1 provision and a misunderstanding of habeas  
2 corpus.

3 I'd welcome the Court's questions.

4 JUSTICE THOMAS: If we don't have a  
5 common law analogue, how do we determine whether  
6 or not the writ is agreeable to the usages and  
7 principles of law?

8 MS. REAVES: So a couple of points on  
9 that, Justice Thomas.

10 First of all, I think I'd urge the  
11 Court in this particular case to take the sort  
12 of approach that it took in Harris, where, when  
13 in a similar situation, when determining whether  
14 a 2254 -- 2255, excuse me, petitioner could  
15 engage in discovery, and there weren't any  
16 applicable discovery provisions to 2255 at that  
17 point in time, the Court looked to the Federal  
18 Rules of Civil Procedure.

19 And I think that that is consistent  
20 with this Court's general approach in this sort  
21 of situation. It's -- the Court's been fairly  
22 limited when it finds something blocked by  
23 existing statutory law and has only done so in a  
24 couple of situations that I'd be happy to  
25 elaborate on.



1 JUSTICE THOMAS: Actually, what I'd  
2 like you to elaborate on just a bit, your -- the  
3 jurisdictional question.

4 MS. REAVES: So the United States does  
5 agree that the warden has jurisdiction here. I  
6 think that the order, the transport order,  
7 conclusively determines the disputed question of  
8 whether there will be transport. It resolves an  
9 issue completely separate from the merits.

10 It's separate because it's almost an  
11 evidentiary consideration under the good cause  
12 standard as to whether this particular order  
13 should issue. And it's important because the  
14 state does have interests like the President had  
15 in Nixon in running its prisons, imposing  
16 lawful -- presumptively lawful sentences without  
17 undue federal influence -- interference, and  
18 avoiding the risks inherent in prisoner  
19 transport.

20 JUSTICE THOMAS: So how would you  
21 distinguish this, though, from any other  
22 discovery order?

23 MS. REAVES: So the harm in a  
24 discovery order -- with a discovery order can be  
25 remedied on -- at the final judgment because

1 whether the evidence did or didn't come in can  
2 be fixed by a new trial.

3 Here, the harm that the warden is  
4 complaining about is just inherent in transport.  
5 It's nothing related to this evidence coming in  
6 or staying out. And that particular harm can't  
7 be remedied on appeal from a final judgment  
8 here.

9 JUSTICE SOTOMAYOR: Counsel, but  
10 that's true of a Federal Rule 35 order. If  
11 someone's mental health is at issue and the  
12 court orders under Rule -- Federal Rule 35 a  
13 transport, that medical evidence can or cannot  
14 come in, but it may or may not be dispositive of  
15 the outcome of the case?

16 MS. REAVES: So a couple of responses  
17 to that.

18 First of all, when it comes to the  
19 collateral order doctrine, it's true that lower  
20 courts have generally held that Rule 35 orders  
21 are not immediately appealable, but that's  
22 because a Rule 35 order is focused on requiring  
23 an individual to be subjected to an examination  
24 and the resulting evidence. There isn't usually  
25 a transport component.

1 JUSTICE SOTOMAYOR: No, that's a  
2 transport order to it. That Rule 35 is a  
3 transport order, permission to transport someone  
4 for a medical exam.

5 MS. REAVES: I don't think courts have  
6 ever interpreted it. We were unable to find an  
7 example of a lower court using Rule 35 in a  
8 situation like this, where a prisoner seeks  
9 transport for an examination.

10 JUSTICE BREYER: So what do you --  
11 suppose the order, same question, same order,  
12 but it was denied. Can the prisoner appeal it?  
13 I mean, they -- can the -- you know, the person  
14 who wanted the order, can he appeal?

15 MS. REAVES: So I don't think you need  
16 to reach that question in this case.

17 JUSTICE BREYER: Well, I just want to  
18 know what your response is.

19 MS. REAVES: But, yes, lower courts  
20 have unanimously found -- just as they've  
21 unanimously found that orders like this are  
22 immediately appealable, they've found that  
23 orders denying transport are not immediately  
24 appealable. And --

25 JUSTICE BREYER: They're not? Okay.

1 So -- and we have now a new category of orders,  
2 which category of discoveries -- orders -- by  
3 the way, discovery costs money. And so even if  
4 a defendant is -- doesn't end up making much  
5 difference to the case, it's going to cost him  
6 money. So he'd like it now to save that money,  
7 just as the state would like it now to save the  
8 evils that they say this order is going to  
9 provide.

10 So I'm still back to the original  
11 question that Justice Thomas asked. There is a  
12 category of orders such that if you grant them  
13 the defendant can appeal. Often the state.  
14 But, if you deny them, there is no appeal.

15 Now are there other things like that?  
16 Is that a big category, a little category? And,  
17 by the way, there are other methods of  
18 appealing. You have 1292(b), not perfect, but  
19 it's there. And you also have mandamus.

20 So I'd like to know rather  
21 specifically what this category is that you're  
22 giving appellate rights to, collateral appellate  
23 rights, where one side can do it but not the  
24 other.

25 MS. REAVES: So, Justice Breyer, let

1 me offer a couple responses to that.

2 First of all, I think the category  
3 here would be orders requiring a state warden to  
4 transport a prisoner. That would be immediately  
5 appealable.

6 JUSTICE BREYER: But not -- not a  
7 state -- not -- not a state order, not a  
8 discovery order which requests that the  
9 Secretary -- the state's Secretary of the  
10 Treasury go through records and provide the  
11 records that the person -- you know, we can  
12 think of dozens of things like that. So I don't  
13 know if you can limit it just to transport  
14 orders?

15 MS. REAVES: So I think -- I think a  
16 court can limit it pretty easily to transport  
17 orders, and lower courts have had no problem  
18 doing that, and that's because the state and the  
19 warden have to incur a norm -- normal discovery  
20 costs and burdens. That's not something that  
21 creates the basis for an immediate appeal, but  
22 the point --

23 JUSTICE BREYER: Okay. By the way, I  
24 just did think of one. I mean, what -- what we  
25 would like is we would like a -- a -- a person

1 of the defendant's choosing, if you wish,  
2 happens to be the state, to go through the --  
3 what do you call it, you know, where they put  
4 the dead people -- we'd like them to look at  
5 that.

6 MS. REAVES: At the morgue?

7 JUSTICE BREYER: Yeah, the morgue. We  
8 want them to go through the morgue because there  
9 happens to be stuff in there that will help us  
10 win this. And the state says: You can't go  
11 into the, morgue. My God, I mean, you know,  
12 that's sovereignty and a lot of things.

13 Okay? Are they included or not?

14 MS. REAVES: I don't think so. And,  
15 again, that's because one of the interests --  
16 the state has a number of interests here, but  
17 one of them is the risks inherent in transport  
18 itself.

19 Going back to the component of your  
20 question about whether there are other  
21 situations in which there are asymmetrical  
22 appeal rights, the Barnes Seventh Circuit  
23 decision that Petitioner cited in their opening  
24 brief gives several examples of other  
25 asymmetrical appeal rights under the collateral

1 order doctrine that includes grants of qualified  
2 immunity, particularly partial grants of  
3 qualified immunity. It includes bonds in civil  
4 cases. The denial of a bond is immediately  
5 appealable; the grant is not.

6 And in addition to that, there are  
7 certain First Amendment pretrial orders that are  
8 generally seen as immediately appealable if  
9 they're granted but not if they're denied.  
10 So --

11 JUSTICE SOTOMAYOR: Counsel, you had  
12 answered my earlier question I asked about  
13 Federal Rule of Civil Procedure 35, and you said  
14 that's not immediately appealable.

15 But it says, and it's the court where  
16 the action is pending may order a party whose  
17 mental or physical condition, including blood  
18 group, is in controversy to submit to a medical  
19 exam. The court has the same authority to order  
20 a party to produce for examination a person who  
21 is in its custody or under its control.

22 So, if you start by telling me that  
23 the All Writs Act, we should look at the federal  
24 rules to guide us on what is permissible or  
25 within the usages of law, doesn't that tell me?

1 MS. REAVES: I think that Rule 35 is a  
2 good analogue, along with other rules --

3 JUSTICE SOTOMAYOR: So why, if it's --

4 MS. REAVES: -- of federal civil  
5 procedure and federal criminal procedure.

6 JUSTICE SOTOMAYOR: -- if this is not  
7 subject to collateral attack, why would this  
8 order be?

9 MS. REAVES: Again --

10 JUSTICE SOTOMAYOR: It's in the  
11 same -- the exact same issue.

12 MS. REAVES: So I disagree that it's  
13 the exact same issue. I think orders requiring  
14 a warden to transport a prisoner raise --

15 JUSTICE SOTOMAYOR: But the court has  
16 the authority -- I'm reading it -- to order a  
17 party to produce for examination a person who is  
18 in its custody or under its legal control.

19 That's a transportation order in my  
20 mind. And the rest of it, take my word for it,  
21 just requires that the notice of the motion tell  
22 you where, when, and by whom.

23 MS. REAVES: So, again, courts don't  
24 generally view that as a transport order. It's  
25 never been applied to require a warden to



1 transport a prisoner. To the extent it's  
2 required, you know, an individual parent, for  
3 example, to produce their child for physical  
4 examination, that doesn't raise --

5 JUSTICE SOTOMAYOR: So you're --

6 MS. REAVES: -- the same sort of  
7 state --

8 JUSTICE SOTOMAYOR: -- you're -- on  
9 behalf of the United States, you're saying that  
10 under Rule 35, any order issued under Rule 35 to  
11 a warden would be collaterally reviewable?

12 MS. REAVES: If it ordered transport,  
13 I think that it would, and that's consistent  
14 with --

15 JUSTICE SOTOMAYOR: How about if it's  
16 just an order of go here and be examined?

17 MS. REAVES: If it's an order, an  
18 examination that could occur in the prison, I  
19 don't think that would be a transport order. It  
20 wouldn't be immediately appealable.

21 JUSTICE BREYER: Oh, well, by the way,  
22 that order happens to ask the state to produce  
23 John the Tiger Man, who is the most dangerous  
24 prisoner they have ever discovered because here,  
25 by the way, their complaint is, one, there is

1 danger, and, two, it costs money.

2 Well, they'll pay the money. So it  
3 isn't going to cost them money. So they're left  
4 with danger. And, by the way, depositions of  
5 death row inmates may, in fact, cost a lot of  
6 money. But you are saying that ordering a  
7 deposition of a death row inmate is not  
8 appealable or do you say it is appealable?

9 MS. REAVES: So I don't think the  
10 Court would need to reach that. I think that if  
11 the --

12 JUSTICE BREYER: The problem that I'm  
13 having, you do need to reach it, because I'm  
14 trying to figure out what the category is of --  
15 of the orders that the state can appeal, the  
16 discovery orders that the state can appeal  
17 collaterally, but the prisoner cannot.

18 And you've got one of them,  
19 transportation. And the reason you have  
20 transportation, I take it, from the other side  
21 is because it is danger involved. Okay. I have  
22 only been here for a few minutes, and it seems  
23 to me I've thought of a few, which also involve  
24 danger.

25 Like the Tiger Man, okay, or death row

1 inmates. And I bet imaginative counsel there  
2 can think of a few more. So do you want to  
3 stick to the only orders that are appealable  
4 immediately collaterally are transportation  
5 orders and nothing else that provides danger or  
6 what?

7 MS. REAVES: I think one way to think  
8 about this would be is the category of orders,  
9 as the Court suggested in Mohawk, always going  
10 to raise this type of issue.

11 Here this type -- category of orders  
12 because of the nature of transport are always  
13 going to raise the risks issue.

14 Deposition orders, assuming --

15 JUSTICE KAGAN: I mean, aren't there  
16 --

17 MS. REAVES: -- the deposition is  
18 happening at the prison, that's not always going  
19 to raise categorical issues the same way that  
20 transport is. And I think for that reason, that  
21 might be a situation in which mandamus or a  
22 certified appeal is more appropriate and you  
23 don't need the collateral order doctrine to come  
24 in as to the entire category of orders.

25 JUSTICE KAGAN: Ms. Reaves, I'm just

1       curious, how many transports of prisoners are  
2       there daily in the prison system?

3               MS. REAVES: I don't have a number for  
4       that, but I think we --

5               JUSTICE KAGAN: Some of your amici say  
6       thousands a day.

7               MS. REAVES: I -- I wouldn't contest  
8       that but I would say that most of those are not  
9       pursuant to a Court order. Most of those are  
10      just occurring in the normal course of prison  
11      administration and -- and aren't occurring in a  
12      situation like this.

13              JUSTICE KAGAN: I take the point, but  
14      it -- it does suggest that, you know, not every  
15      transport of a prisoner is going to raise  
16      security concerns of the kind that you're  
17      talking about, but that's going to be, you know,  
18      maybe the unusual case if prisons, they know how  
19      to do this, they do it thousands of times a day?

20              MS. REAVES: So I don't think it's  
21      just the security concerns here. It's also the  
22      component of a -- that's definitely part of it,  
23      but the additional components include the fact  
24      that a federal court is interfering with a  
25      state's prison administration in this kind of

1 enormous way.

2           And so I think all of those things  
3 together makes this case look more like Nixon  
4 from an interest perspective. And I'd also  
5 point out about how --

6           JUSTICE KAGAN: So that's any court  
7 order that a state can say you're interfering  
8 with my sovereignty, that now becomes  
9 immediately appealable?

10           MS. REAVES: No, it's all the  
11 components that I just discussed. And I think  
12 as far as your question goes about how often  
13 this arises, the fact that this hasn't arisen  
14 either direction since Mohawk until this  
15 particular case shows how infrequently these  
16 sorts of orders are litigated and why the Court  
17 shouldn't be concerned about extending the  
18 collateral order doctrine.

19           JUSTICE SOTOMAYOR: Well, once we say  
20 that there's no power ever under any  
21 circumstance, then all of the orders that we've  
22 issued in the past in Rees, ordering the  
23 transport of a prisoner to come argue before us,  
24 ordering another habeas prisoner to be examined,  
25 those were ultra vires by us, but we're stopping

1 other courts from doing the same thing, correct?

2 MS. REAVES: So I don't think that  
3 whether something is immediately appealable  
4 suggests any of those prior orders were invalid,  
5 and -- and we aren't taking the position that --  
6 obviously, the United States is taking the  
7 position that orders like that can be  
8 permissible under the All Writs Act.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel. Anything further?

11 Justice Kavanaugh?

12 JUSTICE KAVANAUGH: I just wanted to  
13 follow up, Ms. Reaves, on Justice Thomas's first  
14 question. So if there's no common law analog  
15 and no specific statutory authorization, in the  
16 end, it seems to be a policy judgment of sorts,  
17 how much we think we should analogize to other  
18 rules or what have you as you point out.

19 If it is in the end a policy judgment,  
20 the other side says leave it to Congress or the  
21 rules committees given the public safety issues  
22 involved and just wanted you to respond to that.

23 And maybe also tell me what should  
24 inform that policy judgment if we're making it.  
25 Is it just the benefits, fairness, and

1 individual cases outweigh the costs, even though  
2 you don't think that they do in this particular  
3 case?

4 MS. REAVES: So I think it's important  
5 to start from the fact that the All Writs Act is  
6 always fulfilling a gap-filling role and it  
7 always comes into play when a statute doesn't  
8 directly cover a situation, but there is some  
9 type of analog.

10 And obviously here we think that the  
11 appropriate analogs to look at are these federal  
12 rules we've identified. They don't directly  
13 cover but they do come in through Rule 6 in  
14 appropriate situations and that's what the Court  
15 should be looking at.

16 As far as what the Court -- whether  
17 the Court should feel uncomfortable here in this  
18 particular case because of policy  
19 considerations, I think that that isn't quite  
20 the role for the Court to play here. I think  
21 the Court has to ask, is there a gap that we can  
22 fill and whether the -- the -- the components of  
23 the All Writs Act are, in fact, met here.

24 And I think that the Court should look  
25 at analogous cases again like Harris. You know,

1 the Court there, discovery rules at that point  
2 in time didn't apply to 2255 cases but the Court  
3 said that it could still engage in gap-filling  
4 in that particular situation.

5 And if you're worried about the  
6 transport component here and the dangers, you  
7 know, as we explain in our brief, we do think  
8 that part of the necessary or appropriate  
9 consideration courts should take into account  
10 are dangers related to that.

11 And if the Court wants to say  
12 something along those lines here, that courts  
13 need to take that into account before issuing  
14 one of these transport orders under the All  
15 Writs Act, that they can do that. And -- and  
16 this Court could do that to make that clear.

17 JUSTICE KAVANAUGH: Thank you.

18 CHIEF JUSTICE ROBERTS: Anybody have  
19 anything on this side? No?

20 Thank you, counsel.

21 Mr. O'Neil.

22 ORAL ARGUMENT OF DAVID A. O'NEIL

23 ON BEHALF OF THE RESPONDENT

24 MR. O'NEIL: Mr. Chief Justice and may  
25 it please the Court:



1           The order that the state has spent the  
2 last three years litigating simply requires the  
3 warden to move an inmate between two secure  
4 prison buildings, from the detention center to  
5 the official prison hospital, so that the inmate  
6 can undergo a medical test.

7           That kind of movement happens  
8 thousands of times a day around the country  
9 every day of the week. There is no appellate  
10 jurisdiction over an interlocutory order  
11 involving such a routine event, particularly one  
12 that merely removes an obstacle to counsel's  
13 investigation of the case.

14           To allow the appeal to proceed now  
15 would require a dramatic expansion of the Cohen  
16 doctrine despite this Court's consistent efforts  
17 to narrow it. If this Court does create a new  
18 Cohen category, it should affirm. There is no  
19 basis for Petitioner's novel rule that the All  
20 Writs Act can never be used as an authority for  
21 a prisoner transportation order.

22           For three-quarters of a century, this  
23 Court has approved of the use of the All Writs  
24 Act in habeas cases and specifically for the  
25 purpose of ordering prisoners transported. To

1 adopt Petitioner's categorical argument, this  
2 Court would have to repudiate at least three of  
3 its own decisions, cast serious doubt on federal  
4 court authority on a wide range of other  
5 contexts, and change the basic approach that has  
6 characterized the All Writs Act for the last 200  
7 years.

8           Once this Court concludes that the All  
9 Writs Act permits prisoner transports in some  
10 circumstances, the only question left is whether  
11 the Act permits a transport in these  
12 circumstances. That is a classic issue for the  
13 district courts' discretion and the Sixth  
14 Circuit correctly held that there was no abuse  
15 of discretion here.

16           But if the Court adopts the standard  
17 fundamentally different from the one the Court's  
18 applied below, the only appropriate resolution  
19 would be to remand so that the district court,  
20 which has the competence and the familiarity to  
21 untangle fact-bound questions could address it  
22 in the first instance.

23           I welcome the Court's questions.

24           JUSTICE THOMAS: Do you know whether  
25 you're going to use whatever it is you find from

1 the scan in a habeas proceeding?

2 MR. O'NEIL: Justice Thomas, I'm happy  
3 to explain how this evidence would be useful to  
4 us, but if you'll indulge me, I'd like to come  
5 back after that to explain why that's not the  
6 question either that this Court needs to answer  
7 at this stage or that we -- we were required to  
8 answer below but I will -- I will address the  
9 question.

10 So there are at least four ways this  
11 evidence would be useful. First, we have an  
12 ineffective assistance at mitigation claim. The  
13 jury never heard any evidence about the effect  
14 of a point-blank gunshot wound on Mr. Twyford's  
15 cognition and therefore his culpability. They  
16 didn't hear anything about that because counsel  
17 never bothered to investigate it.

18 That was so even though one of the  
19 statutory mitigating factors under Ohio law was  
20 mental defect. And even though the jury  
21 instructions for the capital offense required  
22 the jury to find pre- -- prior calculation and  
23 design on the part of Mr. Twyford, even without  
24 that evidence in the record, the Ohio Supreme  
25 Court upheld the death penalty here by a single

1 vote. So that's the first way.

2           The second way is, if this evidence  
3 shows, as we expect that it will, that Mr.  
4 Twyford has a severe deficiency in his ability  
5 to plan ahead and to think ahead, that will  
6 support a new claim of ineffective assistance at  
7 the guilt phase. It would go to his ability to  
8 satisfy the -- the requirements of the jury  
9 instructions. It would go to his competence to  
10 stand trial, his -- the voluntariness of his  
11 confession.

12           Third, to the extent procedural  
13 default issues arise in the district court  
14 litigation, that's a federal law issue, and this  
15 information that would come from the test could  
16 inform that.

17           And, fourth, putting aside the issues  
18 of procedural default, if the evidence is -- is  
19 as significant as we expect that it will be, we  
20 would seek a stay under *Rhines v. Weber* to go  
21 back and develop the state court record and  
22 present those issues to the state court.

23           But, Justice Thomas, I don't think  
24 those are the questions that this Court needs to  
25 resolve to get to -- to resolve the question of

1 whether the district court had the authority to  
2 issue this order and whether it appropriately  
3 exercised its discretion to do so.

4           And in order to do that, I'd like  
5 to -- to posit a slight variation on this case.  
6 If the warden refused to move Mr. Twyford from  
7 his cell at this correctional institution to an  
8 examination room so that he could meet with his  
9 expert, I think there would be no question that  
10 the district court would have authority in those  
11 circumstances to tell the state that they have  
12 to not frustrate the district court's order and  
13 to allow the -- the inmate to go and meet with  
14 his expert.

15           I think that would be obvious. That  
16 is conceptually no different from what is  
17 happening here.

18           JUSTICE THOMAS: But I guess my point  
19 is I understand you will certainly state the  
20 facts and the examples in a way that are in --  
21 in your best interests, but you don't -- on the  
22 other end of that, you don't seem to have any  
23 limiting principle.

24           I mean, if he has no idea whether or  
25 not he has a claim, it seems as though he could

1 meet with virtually anyone. Yes, an expert  
2 would be important. The doctor might be  
3 important. But he might say I need to meet with  
4 a mentalist or someone to help me recover my  
5 memory.

6           There's all sorts of things. You  
7 don't -- there seems to not be a point to it, a  
8 particular issue that you are trying to -- that  
9 you have evidence and you're proving it. It's  
10 almost as though it's a fishing expedition.

11           MR. O'NEIL: It -- it is not --

12           JUSTICE THOMAS: And I don't know how  
13 you limit that.

14           MR. O'NEIL: Right. So let me explain  
15 the numerous limiting principles on the district  
16 court's authority here. This order is  
17 permissible only for a few reasons.

18           One, it is consistent with and  
19 agreeable to the usages and principles of a very  
20 specific law, 18 U.S.C. 3599, in which Congress  
21 said that capital death row inmates like Mr.  
22 Twyford shall be entitled to the services of  
23 expert investigative and counsel where  
24 reasonably necessary.

25           The only reason that this order is

1 necessary is because the state is not permitting  
2 Mr. Twyford access to those services. It's  
3 necessary because he cannot -- he cannot engage  
4 in the kind of testing that the doctors here  
5 have recommended in the hospital. So the only  
6 way that he can do it is to be transferred  
7 outside the facility to another prison facility.

8           And the fourth is we're not talking  
9 about a mentalist or any request of any -- you  
10 know, any kind that a prisoner can come up with  
11 for investigation. We are talking here about an  
12 indication from the Ohio State Director of  
13 Cognitive Neurology that the frontal lobe here  
14 likely has suffered damages and needs to be  
15 investigated. And it is based on the undeniable  
16 fact, which the state does not refute, that Mr.  
17 Twyford suffered a point-blank gunshot wound at  
18 the age of 13, leaving metal in his head.

19           JUSTICE THOMAS: But you're willing to  
20 say that this order is -- that you have this  
21 right -- that your -- your client has this right  
22 even if there's not -- you determine that there  
23 was no negative effect on his mental  
24 capabilities as a result of this?

25           MR. O'NEIL: We just don't -- we don't

1 know the answer to that yet because the test has  
2 not come back. We think that if -- if the Court  
3 is going to take this almost like a motion to  
4 dismiss and evaluate whether he would be able to  
5 show -- whether he'd be able to title -- be  
6 entitled to relief, then it has to assume that  
7 the test shows the severe harm.

8 And if that's the case, then we --

9 JUSTICE THOMAS: Well, it just seems a  
10 little inconsistent with how constrained we have  
11 been in the -- under -- under AEDPA, and it just  
12 seems that this is out -- this goes beyond what  
13 we've done in -- in Pinholster and some of the  
14 other cases.

15 MR. O'NEIL: So, Justice Thomas, let  
16 me explain why I actually think this is  
17 consistent with what this Court has done. The  
18 United States says you need to look here to an  
19 analogue to this kind of order in order to place  
20 it within the usages and principles of law.

21 The Court is not writing on a clean  
22 slate here. There is a broad spectrum of types  
23 of factual development that take place in the  
24 district court. At one end is the inquiry that  
25 happens in cases like Pinholster and Schiro v.



1 Landrigan and 2254, where the petitioner --  
2 where the inmate is seeking to introduce known  
3 facts in evidence.

4 We are at the opposite end of the  
5 spectrum. We are not at discovery. The state  
6 hasn't answered the petition. We are at the  
7 investigation stage. And this Court  
8 specifically addressed that stage in the -- in  
9 Ayestas. It specifically addressed it in the  
10 context of 18 U.S.C. 3599, in which Congress  
11 intended for capital -- death row inmates to  
12 have access to these investigative services.

13 And what it said there, despite Texas  
14 in that case advocating for Pinholster to play  
15 the gatekeeping role, this Court did not adopt  
16 that standard, it didn't even cite Pinholster  
17 and said -- instead, it said that the standard  
18 is whether a reasonable counsel would regard the  
19 services as having likely utility.

20 And that is much less demanding than  
21 the standard that the -- that the state is  
22 advocating here. Under Ayestas, the standard  
23 is, is the underlying claim plausible, is there  
24 a credible chance of overcoming procedural  
25 default? We satisfy --

1                   JUSTICE SOTOMAYOR: Counsel, on that  
2 issue, did you present to the court below? I  
3 didn't see it in any of your briefing. I didn't  
4 see it anywhere in the district court or circuit  
5 court's opinion. I only saw it in the dissent  
6 downstairs -- below, that you had to bear a  
7 burden of showing at least that there's a  
8 plausible reason the evidence could be -- would  
9 be admitted. So where did you make that showing  
10 below?

11                   MR. O'NEIL: We did make that showing  
12 under the standard that the district court  
13 imposed. And we -- we showed that there are  
14 numerous ways in which this evidence could be  
15 useful. Pinholster --

16                   JUSTICE SOTOMAYOR: No, that's  
17 different than whether it would be admissible,  
18 because that's what Justice Thomas was asking  
19 about, Cullen versus Pinholster, that there is  
20 an obligation on habeas to ensure that it's  
21 useful for some purpose.

22                   MR. O'NEIL: Right.

23                   JUSTICE SOTOMAYOR: Where did you make  
24 that showing below?

25                   MR. O'NEIL: We explained that, first,

1 Pinholster applies only to claims under  
2 2254(d)(1). So, if the claim was not  
3 adjudicated on the merits, Pinholster does not  
4 apply.

5 To the extent we are presenting a  
6 claim that was adjudicated on the merits, (d)(1)  
7 can be overcome. And we can show that the state  
8 court's adjudication on the merits was  
9 unreasonable. In addition, we can make these  
10 arguments as to procedural default.

11 There are numerous ways in which this  
12 evidence may be useful, again, depending on what  
13 it is, despite Pinholster. We simply don't know  
14 yet how those questions are going to be  
15 presented because we are at the investigation  
16 stage of this case.

17 This -- this request arises in the  
18 context of counsel's investigation, which  
19 usually would take place entirely out of sight  
20 of -- of a court. And I think understanding how  
21 this happens in the usual -- in the usual course  
22 explains also why this fills a gap and therefore  
23 is appropriate under the All Writs Act.

24 So, typically, a prisoner would go to  
25 a court seek -- seeking funding under 3599 for

1 an expert. The court would determine whether  
2 reasonable counsel would regard that as having  
3 likely utility and, if so, would issue the  
4 order. At that point, the warden would  
5 effectuate the order, and this -- there wouldn't  
6 be this issue.

7           Mr. Twyford is unusual in that he has  
8 funding of his own for this test. And so, when  
9 the state refused to allow him access to the  
10 services the expert said were necessary, the  
11 only recourse was to the All Writs Act, which  
12 could then fill that gap and effectuate  
13 Congress's intent that -- that this capital  
14 inmate have a -- an opportunity to access these  
15 services.

16           JUSTICE ALITO: What if the only thing  
17 counsel said was, we'd like this testing, we  
18 really don't know what claims we might bring,  
19 and we really don't know how the testing might  
20 assist any claims that we might bring, but we  
21 just want to see whether anything pops up?

22           Is that enough?

23           MR. O'NEIL: Justice Alito, I think  
24 that likely would not be enough. And I think  
25 district courts, as you wrote in -- in *Ayestas*,

1 district courts have plenty of experience making  
2 the kinds of determinations that the standard  
3 contemplates.

4 JUSTICE ALITO: They would probably  
5 not be enough. We won't even -- okay.

6 What's wrong with saying you have to  
7 make a connection with AEDPA? This is a  
8 habeas -- this is a habeas proceeding, and  
9 whatever you get, you're going to have to be  
10 able to get before the court that's going to  
11 decide the habeas petition. What's wrong with  
12 saying that?

13 So identify the claims that you're  
14 thinking of. Explain what evidence you think  
15 you may get from the testing. Explain how you  
16 think you would be able to get that evidence  
17 before the court in the habeas proceeding.

18 Why is that so -- why is that so  
19 onerous?

20 MR. O'NEIL: That -- the way you just  
21 described the standard is -- is not onerous if  
22 what is required is what's required in Ayestas,  
23 which is that the claims be plausible and that  
24 there be a credible chance of overcoming  
25 procedural defeat -- procedural default.

1           What the state is arguing is for  
2 something fundamentally different. It is saying  
3 you have to show exactly how this evidence,  
4 before you even know what it is, before the  
5 investigation has been conducted, is going to  
6 help you -- is going to win you relief on the  
7 merits. And Ayestas considered that. Ayestas  
8 did not adopt that standard.

9           But we accept a standard that requires  
10 us to show some connection to the claims that we  
11 have. In fact, we pointed to four claims below.  
12 The district court credited counsel's assertion  
13 that this investigation was necessary to  
14 investigate those claims.

15           And it noted that the showing was  
16 supported by objective and compelling facts, in  
17 particular, the referral from the Director of  
18 Cognitive Neurology and also the -- the  
19 undeniable fact of Mr. Twyford's point-blank  
20 gunshot injury.

21           JUSTICE ALITO: May I ask you a  
22 question about your argument on jurisdiction?  
23 From what you said this morning, it wasn't clear  
24 to me whether your argument is that no transport  
25 order -- that the -- the granting of a transport

1 order may never be appealable under the  
2 collateral order doctrine or whether there's a  
3 lack of appellate jurisdiction here only because  
4 of the specific facts involved, it wasn't a long  
5 trip, et cetera. Which is it?

6 MR. O'NEIL: This Court should not  
7 create a new category of appealable orders for  
8 transportation orders, so transportation orders  
9 are not appealable as a class under the blunt  
10 instrument of Cohen.

11 Where the warden believes that there  
12 is some egregious error by a district court, it  
13 can pursue mandamus. It can consider 1292(b)  
14 and seek a certification from the district  
15 court, or it can use the process that -- that  
16 the state has held up today as the right route  
17 and go to the Rules Enabling Act process and  
18 seek to create a category that way, which is  
19 what the Court in Mohawk said was the  
20 appropriate --

21 JUSTICE ALITO: So -- so, if we return  
22 to -- to the Tiger Man, so suppose that the  
23 order is to transport the Tiger Man from one  
24 part -- you know, all the way across the country  
25 for a period of treatment that's going to last

1 for 45 days and the district court says and he's  
2 not to be shackled in a way that's going to make  
3 him miserable during -- during this trip.

4 That's not -- you would say, well,  
5 that's -- you can't appeal that?

6 MR. O'NEIL: That's a great case for  
7 mandamus. And I think that, you know, any court  
8 would regard that as pretty egregious. But I  
9 would actually like to --

10 JUSTICE ALITO: So we -- you know, for  
11 between that and -- and traveling across the  
12 street, there are all sorts of gradations. Why  
13 shouldn't it just be the rule that these are  
14 appealable? What's the big deal about that?

15 MR. O'NEIL: Because it is  
16 inconsistent with Mohawk. I mean, Justice  
17 Thomas made a -- a -- an excellent argument in  
18 Mohawk that Cohen should stay right where it is  
19 given the availability of 1292(b) and mandamus  
20 and the Rules Enabling Act, but it --

21 JUSTICE ALITO: No, it's a question of  
22 statutory interpretation. And we interpreted  
23 1291 the way we did, and we practically never  
24 undo our decisions on statutory interpretation,  
25 and -- and, you know, it's not a final decision,



1 it doesn't necessarily mean the final order in  
2 the case. That's not -- you know, that's not  
3 a -- a necessary semantic interpretation of that  
4 phrase.

5 It could be exactly what Cohen says, a  
6 final decision on a particular discrete matter.  
7 So why this -- you know, why draw this line?

8 MR. O'NEIL: Because it's inconsistent  
9 with Mohawk. At a minimum, it would need to  
10 satisfy -- if you're going to stick with Cohen,  
11 it needs to satisfy the three Cohen factors.  
12 Here, this one fails multiple.

13 First, it's not separate from the  
14 merits. The whole argument and the theory of  
15 the dissent below was that before you can issue  
16 an order like this, you have to evaluate use and  
17 admissibility. These are the classic merits  
18 questions that are unsuitable for review under  
19 Cohen.

20 Second, it's not effectively  
21 unreviewable -- unreviewable for exactly the  
22 reasons that Justice Sotomayor was elaborating  
23 on. Anytime the state --

24 JUSTICE ALITO: Well, let me stop you  
25 there. It is unreviewable because, if Tiger Man

1 escapes or kills somebody during his trip,  
2 there's no way that's going to be remedied at  
3 the end of the case, right?

4 MR. O'NEIL: So it is part of the  
5 state's core function and competence to move  
6 prisoners back and forth between these two  
7 prison facilities. And a lot of the state's  
8 argument -- essentially, the state's argument on  
9 -- on jurisdiction ultimately rests on this  
10 public safety argument.

11 The state did not argue public safety  
12 in the district court, and had it done so, we  
13 would have introduced evidence that this  
14 particular inmate has been moved 16 times  
15 between these two facilities, that he is 60 and  
16 half blind, and, not surprisingly, there was no  
17 incident on those trips, that this facility is a  
18 prison.

19 The -- the state's brief and that of  
20 its amici conjure these images of, you know,  
21 inmates walking the halls of the Ohio State  
22 Medical Center. This is a prison within the  
23 hospital. It is operated by the Ohio Department  
24 of Corrections. If any inmate has anything  
25 other than the most routine medical care, they

1 are put on a transport van and they are sent  
2 either to the Franklin Medical Center or to this  
3 facility, and the -- the Ohio Department of  
4 Corrections advertises that on its website.

5           And it -- I would like to -- to  
6 explain why -- I think it goes to your question  
7 of why this is not immediately reviewable. To  
8 evaluate the situation, if this were slightly  
9 different, Mr. Twyford wants to go see his  
10 expert in an examination room at the Chillicothe  
11 Correctional Center where he lives, and the  
12 warden says, we are not moving you from your  
13 cell to go and do that.

14           Again, I think it's clear that the  
15 district court would have gap-filling authority  
16 under the All Writs Act to issue that order.  
17 And if that is true, which it need -- has to be,  
18 then several other things are true.

19           First of all, we wouldn't consider  
20 that a writ of habeas corpus. Second, it  
21 wouldn't be effectively unreviewable. It  
22 wouldn't be a collateral order under Cohen.  
23 Otherwise, anytime the -- anytime the warden  
24 refused to move someone within the prison, that  
25 would give rise to a mid-case appeal, and

1 that -- and that can't be right.

2 And the prisoner in order to get that  
3 meeting would not need to show how the evidence  
4 would ultimately be useful. That is  
5 conceptually no different from what we have  
6 here.

7 Mr. Twyford is being asked to move --  
8 asked for the warden to move him from one prison  
9 facility to another prison facility, and the  
10 district court's authority does not depend on  
11 whether it's an inter-facility transfer, in  
12 other words, a transport by prison van from one  
13 building to the other, versus an intra-facility  
14 transport, meaning like on an elevator from one  
15 floor to the other. Those are equally true  
16 here.

17 And if the Court has no further  
18 questions, I'm happy to rest on our briefs.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 MR. O'NEIL: Thank you.

22 CHIEF JUSTICE ROBERTS: Rebuttal,  
23 General O'Neil -- General Flowers.

24

25

1                   REBUTTAL ARGUMENT OF BENJAMIN M. FLOWERS  
2                                   ON BEHALF OF THE PETITIONER

3                   MR. FLOWERS: Thank you, Your Honors.

4                   I want to briefly make, if I can,  
5 three points.

6                   The first is that in terms of the  
7 difficulty of applying the collateral order  
8 doctrine, appellate courts for decades have had  
9 no trouble doing so to these -- to these cases,  
10 in large part because most transportation orders  
11 are never appealed. There's not actually a  
12 problem. It's when the state is concerned with  
13 interference with its affairs that it does  
14 appeal.

15                  To the extent the Court's worried  
16 about that, though, it's free here to announce  
17 the standards and remand for the Sixth Circuit  
18 to consider the still-never-resolved mandamus  
19 request through the application of the proper  
20 standards.

21                  Second, you must have a traditional  
22 analogue in order to invoke the All Writs Act.  
23 It is not a freestanding power to make up ad hoc  
24 writs. The Court's been very clear about that.  
25 And if you hold that there is such a power,

1 you'll be contradicting those and inventing a  
2 rule with no limiting principle, as Justice  
3 Thomas noted.

4           As best I can tell, Twyford believes  
5 the All Writs Act allows courts to do anything  
6 that may have some speculative benefit to  
7 furthering the resolution of a case. The Court  
8 has never adopted so free form a -- a version of  
9 the All Writs Act, and it shouldn't do so here.

10           That's especially true because, as  
11 this Court recognized last week in *Brown v.*  
12 *Davenport*, the history of habeas law shows that  
13 the tendency to interfere with the state's core  
14 sovereign power to punish crime, if -- if -- if  
15 the Court does not carefully police the  
16 boundaries of the doctrines that permit that,  
17 they tend to expand and expand and expand. And  
18 I can assure you from my experience in this  
19 field there will be a habeas bar eager to expand  
20 whatever door you leave ajar to make it as open  
21 as it can possibly be.

22           And that brings me finally to the  
23 question about what's the big deal, prisoner  
24 transportations happen with some regularity.  
25 There is a world of difference between the state

1 deciding in its own exercise of its management  
2 of its prisons that transportation is warranted  
3 and can be done safely and a federal court  
4 interfering with the operations of our  
5 government and telling us when and how we can  
6 move prisoners.

7 Under our rule, the All Writs Act does  
8 not permit the courts to do that. Courts can do  
9 so only when a rule or a statute specifically  
10 permits them to do so, when Congress or this  
11 Court have decided that the benefits outweigh  
12 the risks. That is the rule the Court should  
13 adopt in this case.

14 If there are no further questions, I  
15 can sit down.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 MR. FLOWERS: Thank you, Your Honor.

19 CHIEF JUSTICE ROBERTS: The case is  
20 submitted.

21 (Whereupon, at 12:49 p.m., the case  
22 was submitted.)

23  
24  
25





## Official - Subject to Final Review

<p><b>candidly</b> <sup>[1]</sup> 5:21  <b>cannot</b> <sup>[8]</sup> 5:2,2 13:12 21:12 25:12 33:16 45:25,25  <b>capabilities</b> <sup>[1]</sup> 46:21  <b>capital</b> <sup>[4]</sup> 42:19 45:18 48:8 51:10  <b>Carbo</b> <sup>[1]</sup> 20:20  <b>care</b> <sup>[2]</sup> 16:9 57:22  <b>carefully</b> <sup>[1]</sup> 61:8  <b>Carlisle</b> <sup>[2]</sup> 15:9 21:8  <b>Case</b> <sup>[40]</sup> 3:4 4:20 6:7 10:16,18 11:22 12:4 13:2,17,19 15:9,10,12 19:20,21 20:1,11,21 22:12 23:10 25:14 26:15 27:4 35:16 36:1,13 37:25 38:15 40:10 44:3 47:5 48:11 50:13 55:3,24 56:25 60:25 62:6,12,14  <b>cases</b> <sup>[13]</sup> 4:15 13:21 16:24 18:25 21:4 30:3 37:24 38:22,24 40:21 47:11,22 60:2  <b>cast</b> <sup>[1]</sup> 40:25  <b>categorical</b> <sup>[2]</sup> 34:17 40:23  <b>category</b> <sup>[14]</sup> 26:25 27:1,11,15,15,20 28:1 33:13 34:6,9,22 40:15 54:4,15  <b>cause</b> <sup>[3]</sup> 15:3 22:13 24:10  <b>causes</b> <sup>[1]</sup> 11:24  <b>cell</b> <sup>[2]</sup> 44:5 58:10  <b>center</b> <sup>[4]</sup> 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