No. 21-511

In the Supreme Court of the United States

TIM SHOOP, WARDEN, PETITIONER

v.

RAYMOND TWYFORD, RESPONDENT

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the district court exceeded its authority by granting Respondent's motion for a transport order for a neurological evaluation in connection with his habeas petition.

Whether the district court erred by exercising its discretion in granting Respondent's motion for a transport order for a neurological evaluation where it had not yet been able to determine the admissibility of the results.

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INTRODUCTION

Petitioner asks this Court to review a decision arising from its interlocutory appeal of an order directing that Respondent be transported to a secure medical facility for neurological testing. This Court should deny certiorari.

As a child and young adult, Respondent was physically abused and raped, and he attempted suicide multiple times. At age 13, Respondent attempted suicide for the first time, shooting himself in the head, destroying his right eye, and lodging more than 20 pieces of the bullet in his brain, where they remain today.

In 1993, Respondent was convicted of murdering his stepdaughter's rapist. At trial, Respondent did not seriously contest the charges and ultimately was convicted of all counts and sentenced to death. In 2003, Respondent filed a habeas petition in federal court, asserting among other things that trial counsel was constitutionally ineffective for failing to investigate and develop evidence of the severe neurological impairment that resulted from his sustained physical abuse, drug use, and failed suicide attempt.

In support of his ineffective assistance claim, Respondent developed evidence of this neurological impairment. Respondent was evaluated by neurologist Dr. Douglas Scharre of The Ohio State University Medical Center ("OSU"). Following Dr. Scharre's recommendation that he undergo further neurological testing, Respondent sought an order from the district court directing his transport to OSU. The district court issued the transport order based on its conclusion that, in light of Dr. Scharre's assessment, further neurological imaging would aid counsel's investigation and help the court assess the constitutionality of Respondent's conviction and sentence. The district court rejected Petitioner's argument that it lacked jurisdiction to order Petitioner to transport Respondent, concluding that the court's habeas corpus jurisdiction and the All Writs Act allowed it

to order Respondent's transport for neurological testing, which "may aid [it] in the exercise of its congressionally mandated habeas review." Pet. App. 30a. The district court also rejected Petitioner's argument that Respondent's request for a transport order was precluded by *Cullen v. Pinholster*, 563 U.S. 170 (2011), observing that Respondent explained he is seeking "material encased within his own body," not discovery to be disclosed by the State, Pet. App. 32a. The district court cautioned, however, that it could not "make a determination [at that time] as to whether or to what extent it would be precluded by *Cullen v. Pinholster* from considering any evidence." Pet. App. 32a. Petitioner filed an interlocutory appeal, and the Sixth Circuit affirmed.

The Sixth Circuit's application of well-settled law to the unique facts presented here does not warrant this Court's intervention. First, the decision below is correct. The district court's careful opinion is consistent with applicable federal law and the rules governing adjudication of habeas petitions. Second, the decision below does not create (or deepen) any circuit split. None of the Petition's cases reached a different outcome on similar facts, and the Petition's failure to cite to *any* factually analogous case undermines its argument that this case presents an important, recurring issue or otherwise warrants certiorari. Third, this case presents a poor vehicle for this Court's review. It arrives before this Court on interlocutory appeal of a transport order and it presents highly atypical facts; the transport order was granted because the district court reasonably concluded that neurological testing at a secure medical facility was warranted because of the bullet fragments that have been lodged in Respondent's brain since 1975. *See* Pet. App. 32a ("The fact that [Respondent] has multiple bullet fragments that remain lodged in his brain weighs in favor of this Court issuing an Order to Transport.").

The Petition should be denied.

STATEMENT OF FACTS AND CASE

Respondent was born in 1962 in Youngstown, Ohio. He moved to Nevada with his father after his parents divorced while he was an infant and moved back to Ohio in 1968 to live with his mother and stepfather. Respondent's father died shortly after, and his stepfather abused alcohol and beat him, his younger brother, and his mother. Respondent's mother had a nervous breakdown when he was eight; his stepfather blamed him and sent him to live with an aunt and uncle, who introduced Respondent to drugs and alcohol. Pet. App. 193a.

In 1975, Respondent attempted suicide by shooting himself in the head. He was just 13 years old. He survived, but lost his right eye, and more than 20 bullet fragments remain in Respondent's brain today. As a teenager, Respondent spent time in juvenile detention facilities and prison. Respondent was raped in prison and attempted suicide several more times. After being released from prison in 1992, Respondent's wife and stepdaughter refused to live with him.

On September 24, 1993, Respondent was arrested by the Windham Police Department in connection with their investigation of the murder of Richard Franks. Respondent informed the officers that after he learned that Franks had raped his girlfriend's child, Pet. App. 196a, he and another individual drove Franks to a remote location for a purported hunting trip, shot Franks in the back with a rifle, and disposed of the body. Pet. App. 47a–48a.

On October 8, 1992, Respondent was charged in a five-count indictment. Count One alleged aggravated murder with prior calculation and design. Count Two alleged aggravated murder with prior calculation and aggravated murder in the course of aggravated robbery. Count Three alleged kidnapping, Count Four alleged aggravated robbery, and Count Five alleged possession of a weapon while under disability.

On March 23, 1993, Respondent proceeded to trial. He pled not guilty but did not seriously contest the charges. On March 26, 1993, after two hours of deliberation, Respondent was convicted of all counts. After the penalty phase of Respondent's trial, the jury deliberated for two hours and returned a unanimous recommendation of death. Pet. App. 56a. On April 7, 1993, Respondent was sentenced to death. State courts affirmed Respondent's convictions and sentence on direct appeal, and in state post-conviction proceedings.

In 2003, Respondent filed a federal habeas corpus petition, challenging his 1993 conviction and capital sentence for aggravated murder. Pet. App. 2a–3a. Among other claims, Respondent's habeas petition asserted that his trial counsel was constitutionally ineffective because counsel failed to investigate and introduce evidence of Respondent's family history, mental health issues, and the impact of a failed suicide attempt during his capital trial. Pet. App. 4a. This evidence would have affected the jury's assessment of both Respondent's competency to stand trial, and the voluntariness of his statements to law enforcement, and is thus essential to the assessment of his ineffective assistance claims. Pet. App. 16a.

Of particular importance is evidence of Respondent's neurological problems stemming from his childhood physical abuse, alcohol and drug use, and self-inflicted gunshot wound from his failed suicide attempt. Pet. App. 30a. The suicide attempt and consistent drug use have caused severe neurological damage and significantly impacted his cognitive ability and capacity to act rationally and exercise self-control.

In connection with these habeas proceedings, Respondent was evaluated by Dr. Douglas Scharre, a neurologist and the director of the Cognitive Neurology Division at OSU. Pet. App. 24a. Dr. Scharre suspected, based on his evaluation, that Respondent suffered from neurological defects resulting from childhood abuse, drug and alcohol use, and the gunshot wound to the head. Pet.

App. 30a. He noted that CT scans taken in 1996 revealed 20–30 metal fragments scattered through Respondent's skull, but that the scan did not provide a clear view of Respondent's frontal lobes or the rest of his brain. Pet. App. 30a. Because of this, an additional CT and PET scan was necessary to determine "how the brain is functioning and if there is evidence particularly of frontal lobe damage" that would impair Respondent's cognition or ability to think and act rationally. Pet. App. 31a.

Because the prison did not have the facilities necessary for such testing, Respondent moved the district court to order Petitioner, as Warden of Chillicothe Correctional Institution, to transport him to OSU. OSU is the official prison hospital, and has a secure medical facility that regularly serves inmates. *See* Ohio Department of Rehabilitation & Correction, *Bureau of Medical Services*, https://drc.ohio.gov/correctional-healthcare (last visited Dec. 5, 2021). Any Ohio inmate needing testing or other medical care is routinely transported from the prison to OSU. And, as the official prison hospital, OSU has the security and other infrastructure to accommodate any security concerns that Petitioner may have. This is the very facility to which Respondent will be transported for the necessary testing. Respondent has frequently been transported for medical care without incident.

The district court granted the motion, finding first that it had jurisdiction to issue the transportation order under the All Writs Act because such imaging "may aid this Court in the exercise of its congressionally mandated habeas review." Pet. App. 30a. The district court found that an order requiring transport for medical testing is warranted and necessary because the results of the testing would aid the court "in its existing habeas corpus jurisdiction to assess the constitutionality of [Respondent's] incarceration." Pet. App. 32a. The district court reserved a decision on the question whether and to what extent any evidence that was produced as a result of the testing could be

considered under *Cullen v. Pinholster.* Pet. App. 32a. In light of the ongoing COVID-19 pandemic and the Petitioner's appeal, the court stayed transportation order. Pet. App. 36a.

Petitioner filed an interlocutory appeal and the Sixth Circuit affirmed, finding that it had jurisdiction to review the district court's order under the collateral-order doctrine, Pet. App. 7a–8a, and that the district court had authority to issue the transport order under the All Writs Act because the order did "not conflict with habeas statutes or the common law and [is] consistent with congressional intent to provide counsel for capital defendants," Pet. App. 12a. The Sixth Circuit also held that rules limiting discovery in federal habeas proceedings did not limit the district court's authority to issue the transport order because the order did not compel discovery; it did not compel disclosure of any information from the state or from a third party. Pet. App. 15a. Rather, the transport order allowed Respondent to access information that was in his own body. Indeed, "[b]ut for his incarceration, [Respondent] would not need *any* state involvement in obtaining his own neurological imaging." Pet. App. 15a. And, the transport order was "necessary or appropriate to aid the district court in its adjudication of [Respondent's] habeas petition." Pet. App. 15a. The Court of Appeals also declined to decide the question whether evidence from the neurological tests would be admissible, noting that the "district court is best suited in the first instance to untangle the knotty *Pinholster* evidentiary issues in [this] case." Pet. App. 17a.

Judge Batchelder dissented, asserting that the district court should not have issued the transport order before determining whether the results of the scan would be admissible under *Pinholster* and would entitle Respondent to habeas relief. Pet. App. 20a–22a.

REASONS FOR DENYING THE WRIT

This Court need not review an interlocutory decision applying settled law to particular facts that do not regularly arise.

Certiorari should be denied for three specific reasons. First, the decision below is correct. The district court's transport order is consistent with 28 U.S.C. §§ 2241 and 2254, and 28 U.S.C. § 1651, and this Court's decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011). No part of any federal law, the Rules Governing Section 2254 Cases, or this Court's precedents prohibits the relief requested. Second, no split warrants this Court's review. On the first question presented, only the decision below involved a transport request filed by a habeas petitioner. Two of the Petition's cited cases involved a transport request filed by a § 1983 plaintiff, and the third involved a transport request filed by an inmate who had not filed a habeas petition. And the most recent of these three decisions was decided more than 25 years ago, in January 1995. On the second question presented, neither the decision below nor any of the Petition's cited cases acknowledge a split. Nor could they: there is no tension between any of the cited cases. Third, this case would be a poor vehicle to address either of the questions presented because Petitioner seeks review of an interlocutory appeal arising from idiosyncratic facts that do not frequently arise.

A. The Decision Below Is Correct.

The Sixth Circuit correctly concluded that the district court had jurisdiction to enter the transport order. District courts have jurisdiction to resolve habeas petitions by federal and state inmates though under 28 U.S.C. § 2241(c)(5), the "writ of habeas corpus shall not extend to a prisoner unless . . . [i]t is necessary to bring him into court to testify or for trial." However, the basis of the district court's jurisdiction in Respondent's habeas case is 28 U.S.C. § 2241(c)(1) and 28 U.S.C. § 2254(a), not § 2241(c)(5). Respondent initiated the legal proceedings by giving notice

of his intention to file a § 2254 habeas petition and seeking the appointment of counsel under 21 U.S.C. § 848(q). Pet. App. 75a. These filings vested the district court with jurisdiction over the parties and issues. *See McFarland v. Scott*, 512 U.S. 849 (1994). Under 28 U.S.C. § 1651(a), federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The district court's transport order is consistent with these provisions.

Because district courts have jurisdiction to resolve habeas petitions by inmates in state custody, *see* 28 U.S.C. § 2254, they may "transport a habeas petitioner for medical imaging in aid of its habeas jurisdiction." Pet. App. 12a. This exercise of jurisdiction does not flow directly from 28 U.S.C. § 2241(c)(5), which limits "when the district court may issue the writ of habeas corpus itself," but which does not forbid "ancillary orders needed to aid in adjudicating a petitioner's habeas petition." Pet. App. 14a. Rather, the exercise of jurisdiction flows from § 2241(c)(1), which provides federal court jurisdiction over the underlying habeas petition itself. Transport orders, such as the one here, "instead fill the gaps left by federal habeas statutes by ensuring that states cannot prevent federal habeas petitioners from presenting their cases to the district court." Pet. App. 14a.

Nor does the transport order run afoul of Rule 6 of the Rules Governing Discovery in Section 2254 Cases, which permits, upon a finding of "good cause," a judge to "authorize a party to conduct discovery." "Rules limiting habeas discovery have no bearing on the transport order because Twyford's request for transportation to OSU for neurological imaging is not a request for discovery." Pet. App. 15a. Discovery is the "[c]ompulsory disclosure, at a party's request, of information that relates to the litigation." *Discovery*, Black's Law Dictionary (11th ed. 2019). "The transport order does not fall within Black's definition of discovery, because [Respondent] is seeking neurological imaging of his own brain, not information from the other party. But for his

incarceration, [Respondent] and his attorneys would not need any state involvement in obtaining his own neurological imaging." Pet. App. 15a.

Further, the district court's transport order here is consistent with Congress's intent to provide "enhanced rights of representation" for defendants and petitioners in capital cases, including "more money for investigative and expert services." *Martel v. Clair,* 565 U.S. 648, 659 (2012) (citing 18 U.S.C. § 3599(f)). Congress did so "in light of what it calls 'the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.'" *Id.* (quoting 18 U.S.C. § 3599(d)). The enactment of Section 3599 "reflects a determination that quality legal representation is necessary" in capital proceedings to ensure "fundamental fairness in the imposition of the death penalty." *McFarland v. Scott,* 512 U.S. 849, 855, 859 (1994). Congress knew that such legal representation would, in many cases, require "investigative, expert, or other services," and thus provided for defense counsel's ability to obtain funding for such services where "reasonably necessary for the representation." 18 U.S.C. § 3599(f). Just as "Congress's provision of a right to counsel" "reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings," the fact that the same statute provides for "'the defendant's attorneys to obtain such services' from the court," *McFarland,* 512 U.S. at 855 (internal citation omitted), reflects Congress's determination that appropriate legal representation in some cases may require such services. This Court can "safely assume that [Congress] did not intend for the express requirement of counsel to be defeated," *id.* at 856, by interposing a restrictive rule that would deny services "reasonably necessary for the representation of the defendant." 18 U.S.C. § 3599(f).

The history of Section 3599(f) confirms Congress's objectives. When Congress initially enacted this provision, there was concern that identifying counsel willing and able to represent death-row prisoners in federal habeas proceedings was becoming increasingly difficult. *See* 134

Cong. Rec. H7285 (daily ed. Sep. 8, 1988) (Statement of Rep. Conyers). When the provision was amended as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress was aware of the fact that funding for specialized services to support investigation was needed at the habeas stage. *See, e.g.*, 141 Cong. Rec. S7819 (daily ed. June 7, 1995) (Statement of Sen. Biden) ("[T]he defendant needs the same tools available to him or her that a wealthy defendant would need or the prosecutor needs. . . . Do not be misled by the notion that the trial is over, therefore, there is no other factfinding to go on, you do not need an investigator."); *id.* at S7816-17 (Statement of Sen. Feingold) (describing "instances of States not providing sufficient resources to assigned defense counsel for proper investigation of a case" and the "significant disadvantage" at which such inadequate resources puts capital defendants "[c]ompared to the resources available to an aggressive prosecutor").

"National standards on defense services have consistently recognized that quality representation cannot be rendered unless assigned counsel [has] access to adequate supporting services." ABA Death Penalty Guideline 4.1, cmt. at 955 (internal quotation marks omitted). The need for these services "is particularly acute in death penalty cases." *Id.* And these services may be particularly important at the post-conviction stage. *See id.* Guideline 4.1, cmt. at 955. Investigators are often "indispensable to discovering and developing the facts that must be unearthed . . . in post-conviction proceedings," both because they have specialized expertise that counsel lacks, and because counsel often simply has other duties to discharge. *Id.* at 954. Likewise, mitigation specialists "possess clinical and information-gathering skills and training that most lawyers simply do not have," and the time and ability to gather and incorporate what may be critical information for the defense case. *Id.* at 959; *see also* ABA Death Penalty Guideline 10.1 (capital habeas representation "requires enormous amounts of time, energy, and knowledge," and counsel ordinarily cannot

be expected to shoulder that burden alone). Additionally, "[t]he circumstances of a particular case will often require specialized research and expert consultation." *Id.* Guideline 10.7, cmt. at 1026.

In particular, given the prevalence of mental impairments and severely traumatic backgrounds among those convicted of capital crimes, "mental health experts are essential to defending capital cases." *Id.* Guideline 4.1, cmt. at 956. "Evidence concerning the defendant's mental status is relevant to numerous issues that arise at various junctures during [capital] proceedings," and "the defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase." *Id.; see, e.g., Porter v. McCollum,* 558 U.S. 30, 40 (2009) (reversing denial of habeas relief where counsel failed to investigate and present evidence related to, *inter alia*, defendant's "mental health or mental impairment"). Empirical research confirms that mental health evidence, if competently documented and presented, frequently "is considered by jurors to be highly mitigating." John H. Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation,* 36 Hofstra L. Rev. 1035, 1039 (2008). Thus, where mental health is at issue, "a psychologist or other mental health expert may well be a needed member of the defense team" or at least a mental health evaluation may be needed. ABA Death Penalty Guideline 10.4, cmt. at 1004; *see also id.* Guideline 4.1, cmt. at 956 ("Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process.").

The Sixth Circuit's transport order does not contravene this Court's decision in *Cullen v. Pinholster*. In *Pinholster*, this Court held that "review under 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits," and that "a federal habeas petitioner must overcome the limitation of 2254(d)(1) on the record that was before the state court." 563 U.S. at 185.

Pinholster's prohibition applies only to claims "adjudicated on the merits in State court proceedings," *id.* at 186, not to newly-raised or newly-discovered claims or to issues of cause and prejudice or other procedural issues. Similarly, *Pinholster* allows a federal court to hold an evidentiary hearing to remedy an error that had been found on the record before the state court, *Harris v. Haeberlin*, 752 F.3d 1054, 1058 (6th Cir. 2014), or where the state court did not address the question presented, *Toliver v. Pollard*, 688 F.3d 683 (7th Cir. 2012).

At no point in the proceedings below did the district court consider any evidence *Pinholster* forbids it from considering, and the district court expressly acknowledged that *Pinholster* may limit Respondent's use of any evidence obtained in connection with Dr. Scharre's evaluation. Pet. App. 32a Indeed, the district court was clear that the unique posture of this case—"that [Respondent] has multiple bullet fragments that remain lodged inside his brain"— meant it could not "at this stage of the proceedings . . . make a determination as to" the applicability of *Pinholster*. *Id*.

B. Certiorari Is Unwarranted Because the Petition Does Not Present a Developed Split That Merits This Court's Review.

Petitioner contends that the Third, Seventh, and Ninth Circuits would have concluded that the district court lacked authority to issue Respondent's transport order, *see* Pet. 18, but that mischaracterizes the state of the law. None of the cited cases involved an analogous request for a transport order; it is not at all clear that those courts would reach a different result from the decision below on the facts presented here.

Two of Petitioner's cited cases involved a request for a transport order filed by a § 1983 plaintiff, not a habeas petitioner. In *Ivey v. Harney*, the Seventh Circuit considered a § 1983 plaintiff's request for a transport order. The plaintiff sued his former jailers, alleging that the deficient medical care provided after his injury while incarcerated violated the Eighth and Fourteenth Amendments. 47 F.3d 181 (7th Cir. 1995). The plaintiff's lawyer moved for an order requiring the

State to bring the inmate to Chicago for a medical exam. The district court issued the order, and the Seventh Circuit reversed. And in *Jones v. Lilly*, the Third Circuit also considered a § 1983 plaintiff's request for a transport order. 37 F.3d 964 (3d Cir. 1994). The plaintiff alleged prison officials acted with deliberate indifference by placing him in a housing unit in which he was sexually assaulted by his cellmates, and moved for an order requiring the State to allow an inmate paralegal at his facility to assist him at trial. *Id.* at 965. The district court issued an order, and the Third Circuit reversed. The Third Circuit explained that "[i]t is neither reasonable nor practical to use a writ historically associated with the fight for human freedom to provide a plaintiff, especially in a civil proceeding," with such an order. *Id.* at 969. It specifically contrasted the historical use of the writ of habeas corpus in circumstances "focus[ed] on illegal detention and confinement of persons and the correction of miscarriages of justice within their reach," from the § 1983 case before it, which "is not directly or indirectly related to the usages or principles of law of any of the writs of habeas corpus." *Id.* at 968.

Petitioner's third cited case involved an inmate on state death row, without a pending habeas petition, who filed an ex parte request for an order compelling the warden of his institution to transport him to the University of California at Irvine for a brain scan. *Jackson v. Vasquez*, 1 F.3d 885, 886 (9th Cir. 1993). The district court issued an order without giving the warden notice of the request, and the Ninth Circuit vacated. The Ninth Circuit concluded that 21 U.S.C. § 848(q), a funding statute, did not authorize a district court "to issue, upon a petitioner's ex parte request, a coercive order against a state official." *Id.* at 888. The Ninth Circuit also rejected the inmate's "suggestion" that the transportation order was warranted under the All Writs Act. *Id.* Critical to the Ninth Circuit's reasoning in *Jackson* was that the district court's order was issued without notice to the warden. The panel explained that it "need not decide whether, upon proper notice and motion

at a proper stage in the habeas corpus proceedings, the district court is empowered to issue an order requiring a state official to transport a prisoner for medical examinations that are necessary to the petitioner's case." *Id.* at 889.

None of these three decisions involved a pending habeas petitioner's request for a transport order, and there is no reason to believe that the Third, Seventh, or Ninth Circuits would have reached a different decision than the Sixth Circuit did below. Because none of the three decisions involved a case with a pending habeas petition, none involved a district court exercising its habeas jurisdiction under 28 U.S.C. § 2254. Indeed, the department ordered to transport the inmate in *Ivey* was not ever a party to the § 1983 action. *Ivey*, 47 F.3d at 185.

But even if these cases presented a conflict, this Court's review would not be warranted. The decisions of the Third, Seventh, and Ninth Circuits were all decided in 1995 or earlier. The absence of authorities from the last 25 years suggests that disputes about the appropriateness of transport orders do not frequently arise and undermines Petitioner's contention, *see* Pet. 19, that this Court's review is warranted. This is not an instance in which the issue has failed to reach the federal appellate courts. Indeed, Petitioner has not shown that this issue arises with any regularity even in Ohio. Instead, Petitioner argues that "for reasons [it] cannot explain, prisoners [in Ohio] seem to request neurological testing with unusual frequency," and cites to four decisions from the Northern and Southern Districts of Ohio in more than 11 years. Pet. 31. In three cases, the district court denied the inmate's request; in the fourth, the district court granted the request where the Warden did not contest "the appropriateness of the testing in question for state clemency proceedings or the qualifications of the proposed testers to provide useful results." *See Nields v. Bradshaw*, No. 1:03-cv-19, 2010 WL 148076 (S.D. Ohio Jan. 11, 2010). The Sixth Circuit's approach

correctly leaves fact-specific determinations about the appropriateness of a transport order to district courts, which have demonstrated they are capable of determining when such an order is warranted.

Petitioner also contends that the Sixth Circuit, in conflict with the Ninth and Tenth Circuits, does not require district courts to consider whether the evidence a petitioner seeks to develop would be admissible before issuing an order facilitating evidentiary development. But Petitioner again exaggerates the conflict in the lower courts. None of Petitioner's cases acknowledge a conflict on this question, involved an interlocutory appeal of a collateral order, or centered on an inmate's request for a medical examination to reveal information contained within the inmate's own body. Here too, it is not clear that those courts would reach a different result from the decision below on the facts presented in this case.

In *Runningeagle v. Ryan*, the Ninth Circuit affirmed denial of a state inmate's habeas petition raising a *Brady* claim, and request for an evidentiary hearing to determine what information a potential witness told prosecutors. 686 F.3d 758, 758 (9th Cir. 2012). In affirming denial of the *Brady* claim, the Ninth Circuit explained that "it cannot be known whether exculpatory or impeaching material exists, or whether it ever existed." *Id.* at 772. In affirming denial of the evidentiary hearing, the Ninth Circuit concluded that the state court's decision was not reviewable in federal court. *Id.*

In *Lafferty v. Benzon*, the Tenth Circuit denied an inmate's motion for a certificate of appealability on four claims asserted in his habeas petition. 933 F.3d 1237 (10th Cir. 2019). In denying a certificate of appealability on Benzon's ineffective assistance of counsel claim, the Tenth Circuit in a footnote denied a certificate of appealability regarding the district court's denial of his request "for discovery to depose his trial counsel and expansion of the record to add in a declaration

from his trial counsel." *Id.* at 1246 n.2. The Tenth Circuit agreed with the State that "there is no room for debate . . . that no newly developed evidence would be admissible in the habeas case." *Id.*

In this case, both the Sixth Circuit and the district court acknowledged *Pinholster* and—based on the unique facts presented—appropriately reserved a decision on the question whether and to what extent any evidence that was produced as a result of the testing would be admissible under *Pinholster.* Pet. App. 32a. As the Sixth Circuit explained, the "district court is best suited in the first instance to untangle the knotty *Pinholster* evidentiary issues in [this] case." Pet. App. 17a.

Moreover, the district court's decision to reserve judgment on the question whether information uncovered as a result of neurological testing was particularly appropriate given the complexity of this case, which plainly was not a factor in the cases decided by the Ninth and Tenth Circuits. It would be difficult, perhaps impossible, in these circumstances for the district court to have determined the admissibility of Dr. Scharre's neurological evaluation of Respondent without first considering the contents of that evaluation.

C. This Case Would Be a Poor Vehicle to Review the Question Presented.

Even if this Court were interested in further analyzing the questions presented, this case would be a poor vehicle for doing so.

First, the petition seeks review of an interlocutory appeal of a transport order, not a final judgment on the merits. As this Court has long noted, the interlocutory nature of a decision "alone furnishe[s] sufficient ground for the denial" of a petition for a writ of certiorari. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also Goldstein v. Cox*, 396 U.S. 471, 478 (1970) ("this Court above all others must limit its review of interlocutory orders."). Denial of the petition is consistent with this Court's ordinary practice of "await[ing] final judgment

in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of certiorari); *see also Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967); *Denver v. New York Trust Co.*, 229 U.S. 123, 133 (1913) ("The exceptional power to review, upon certiorari, . . . an appeal from an interlocutory order is intended to be and is sparingly exercised.") (addressing a circuit court of appeals ruling); *The Conqueror*, 166 U.S. 110, 113 (1897) ("certiorari . . . is ordinarily only issued, after a final decree"); *American Construction Co. v. Jacksonville, T & K. W. R. Co.*, 148 U.S. 372, 384 (1893); R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 4.18, pp. 224-226 (6th ed. 1986).

Second and related, the issues presented in the petition may not affect the outcome of the proceedings below. Respondent's habeas petition may be resolved in Petitioner's favor, or the district court may decide any information from the medical examination is inadmissible under *Pinholster*. Certiorari is thus unwarranted because the question presented may not be necessary to the resolution of this case.

Third, the decision below is highly fact-bound and is not illustrative of any problem regarding the adjudication of habeas petitions. Indeed, the district court order was based on Respondent's specific circumstances and the resulting recommendation from Dr. Scharre. As Dr. Scharre noted, Respondent's childhood was marked by physical abuse, alcohol and drug use, and a self-inflicted gunshot wound as a result of his adolescent suicide attempt. At least 20 metal fragments remain scattered in Respondent's head, impeding a clear view of his frontal lobes and other parts of his brain under standard review procedures. *See* Pet. App. 32a ("The fact that Petitioner has multiple bullet fragments that remain lodged in his brain weighs in favor of this Court issuing an Order to Transport."). For these reasons, the information that may be revealed by medical testing

of Respondent's own body is likely to be relevant to the district court's adjudication of Respondent's habeas petition, and unlike the evidence at issue in the Petitioner's cited cases.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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