

1 IN THE SUPREME COURT OF THE UNITED STATES

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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.

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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: Oh. 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 -- whether this is a
5 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 turning over materials even under
19 seal, because the privilege is not to turn them
20 over to anybody, whether under seal or not.

21 The third -- and I think this is your
22 important point -- is that somehow you have some
23 greater interest that this is an important
24 question separate from the merits because state
25 sovereignty is at issue. You're expending money

1 in transporting this prisoner.

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

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

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

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

23 The first thing I want to -- I'll
24 start sort of in reverse order with the separate
25 from the merits prong. If this Court determines

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

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

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

12 JUSTICE SOTOMAYOR: So that's a merits
13 question.

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

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

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

22 JUSTICE SOTOMAYOR: So it's not
23 separate from the merits.

24 MR. FLOWERS: Respectfully, Your
25 Honor, no, you'll never reach the merits of the

1 underlying claims because the only question
2 would be whether the court had the power under
3 the All Writs Act to do this, and the answer
4 will always be no. It's -- I do want to
5 emphasize every single circuit to have ever
6 considered this has -- has said the collateral
7 order doctrine applies.

8 With respect to the injury, we're not
9 worried about --

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

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

20 I do want to, more importantly,
21 though, get to your point about monetary harms.
22 Our risks -- the harms we're concerned with have
23 nothing to do with money. We're worried about
24 public safety and interference with the
25 sovereign management of the prisons.

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

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

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

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

25 The exact opposite is true of

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

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

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

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

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

24 What makes this different is the harm
25 we're sustaining has nothing to do with this

1 case. The harm we're -- we're worried about is
2 not the harm we sustained from this evidence --

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

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

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

22 If there are no questions on that, I
23 can briefly reach the -- the questions the Court
24 granted certiorari to address. We do think the
25 closest analogue here is habeas, and that's why,

1 because this is inconsistent with habeas law,
2 the writ can't issue. And if the Court agrees
3 with that, that's all you need to say to reverse
4 the Sixth Circuit.

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

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

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

20 What's more is that even if the
21 discovery rules provided the relevant usages and
22 principles, the order here isn't agreeable to
23 those usages and principles. The reason for
24 that is that Habeas Rule 6(a) provides the
25 exclusive means for -- exclusive means for

1 obtaining discovery in habeas. And it requires
2 a good cause showing that Twyford has not met
3 and has never argued he can make and, indeed,
4 has affirmatively waived any intent to seek
5 relief under.

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

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

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

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

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

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

21 And then, finally, I took you to also
22 to be asking and I take the SG to make the point
23 that in some cases, if a federal prisoner brings
24 a 1983 suit, they may wish to have discovery and
25 that discovery may entail a physical

1 examination.

2 So here's my answer to that. Rule
3 35(a) of the Federal Civil -- Federal Rules of
4 Civil Procedure at least arguably would permit
5 that plaintiff to seek that relief. The stat --
6 courts have gone both ways on the question. I
7 don't think the Court needs to decide that here,
8 but it's at least possible that Federal Rule of
9 Civil Procedure 35 will allow that.

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

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

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

25 I don't think this Court wants to

1 bless a situation in which district courts are
2 resolving that on an ad hoc basis, oftentimes,
3 frankly, giving short shrift to the safety
4 interests that the states -- that states -- the
5 states have.

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

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

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

23 CHIEF JUSTICE ROBERTS: Well, but, I
24 mean, we have a lot of cases that talk about the
25 broad and flexible office of the great writ

1 and -- under the All Writs Act, and it seems
2 like that's a very confining construction.

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

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

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

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

25 So, in Hayman, it was a 2255 case;

1 2255 does anticipate transportation orders. And
2 the Court said that as long as you have the All
3 Writs Act you can issue a writ in the nature of
4 habeas corpus. That, by the way, shows --
5 proves our point that these writs are in the
6 nature of habeas corpus.

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

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

19 Years later, in Carbo, this Court
20 clarified that that was not the case and that
21 2241(a) has no bearing on writs issued under
22 (c)(5). So Hayman comes out the same way, and
23 Price came out differently under an old statute
24 that it failed to consider. So I don't think
25 this is contrary to any of those.

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

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

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

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Ms. Reaves.

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

24 MS. REAVES: Mr. Chief Justice, and
25 may it please the Court:

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

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

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

1 I'd welcome the Court's questions.

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

6 MS. REAVES: So a couple of points on
7 that, Justice Thomas.

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

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

24 JUSTICE THOMAS: Actually, what I'd
25 like you to elaborate on just a bit, your -- the

1 jurisdictional question.

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

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

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

21 MS. REAVES: So the harm in a
22 discovery order -- with a discovery order can be
23 remedied on -- at the final judgment because
24 whether the evidence did or didn't come in can
25 be fixed by a new trial.

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

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

14 MS. REAVES: So a couple of responses
15 to that.

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

24 JUSTICE SOTOMAYOR: No, that's a
25 transport order to it. That Rule 35 is a

1 transport order, permission to transport someone
2 for a medical exam.

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

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

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

15 JUSTICE BREYER: Well, I just want to
16 know what your response is.

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

23 JUSTICE BREYER: They're not? Okay.
24 So -- and we have now a new category of orders,
25 which category of discoveries -- orders -- by

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

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

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

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

23 MS. REAVES: So, Justice Breyer, let
24 me offer up a couple responses to that.

25 First of all, I think the category

1 here would be orders requiring a state warden to
2 transport a prisoner. That would be immediately
3 appealable.

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

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

20 JUSTICE BREYER: Okay. But, well, I
21 just did think of one. I mean, what -- what we
22 would like is we would like a -- a -- a person
23 of the defendant's choosing, if you wish,
24 happens to be the state, to go through the --
25 what do you call it, you know, where they put

1 the dead people -- we'd like them to look at
2 that.

3 MS. REAVES: At the morgue?

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

10 Okay? Are they included or not?

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

16 Going back to the component of your
17 question about whether there are other
18 situations in which there are asymmetrical
19 appeal rights, the Barnes Seventh Circuit
20 decision that Petitioner cited in their opening
21 brief gives several examples of other
22 asymmetrical appeal rights under the collateral
23 order doctrine that includes grants of qualified
24 immunity, particularly partial grants of
25 qualified immunity. It includes bonds in civil

1 cases. The denial of a bond is immediately
2 appealable; the grant is not.

3 And in addition to that, there are
4 certain First Amendment pretrial orders that are
5 generally seen as immediately appealable if
6 they're granted but not if they're denied.

7 So --

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

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

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

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

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

2 MS. REAVES: -- of federal civil
3 procedure and federal criminal procedure.

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

7 MS. REAVES: Again --

8 JUSTICE SOTOMAYOR: It's in the
9 same -- the exact same issue.

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

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

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

21 MS. REAVES: So, again, courts don't
22 generally view that as a transport order. It's
23 never been applied to require a warden to
24 transport a prisoner. To the extent it's
25 required, you know, an individual parent, for

1 example, to produce their child for physical
2 examination, that doesn't raise --

3 JUSTICE SOTOMAYOR: So you're --

4 MS. REAVES: -- the same sort of
5 state --

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

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

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

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

19 JUSTICE SOTOMAYOR: Okay.

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

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

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

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

17 And you've got one of them,
18 transportation, and the reason you have
19 transportation, I take it, from the other side
20 is because is danger involved. Okay. I have
21 only been here for a few minutes, and it seems
22 to me I've thought of a few which also involve
23 danger, like the Tiger Man, okay, or death row
24 inmates. And I bet imaginative counsel there
25 can think of a few more.

1 So you want to stick to the only
2 orders that are appealable immediately
3 collaterally are transportation orders and
4 nothing else that provides danger or what?

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

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

12 Deposition orders, assuming --

13 JUSTICE KAGAN: I mean, aren't there
14 --

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

23 JUSTICE KAGAN: Ms. Reaves, I'm just
24 curious, how many transports of prisoners are
25 there daily in the prison system?

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

3 JUSTICE KAGAN: Some of your amici say
4 thousands a day.

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

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

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

25 And so I think all of those things

1 together makes this case look more like Nixon
2 from an interest perspective. And I'd also
3 point out if we're -- how --

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

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

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

25 MS. REAVES: So I don't think that

1 whether something's immediately appealable
2 suggests that any of those prior orders were
3 invalid, and -- and we aren't taking the
4 position that -- obviously, the United States is
5 taking the position that orders like that can be
6 permissible under the All Writs Act.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Anything further? Justice Kavanaugh?

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

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

21 And maybe also tell me what should
22 inform that policy judgment if we're making it.
23 Is it just the benefits, fairness in individual
24 cases outweigh the costs, even though you don't
25 think that they do in this particular case?

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

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

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

21 And I think that the Court should look
22 at analogous cases again like Harris. You know,
23 the Court there, discovery rules at that point
24 in time didn't apply to 2255 cases, but the
25 Court said that it could still engage in

1 gap-filling in that particular situation.

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

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

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Anybody have
16 anything on this side? No?

17 Thank you, counsel.

18 Mr. O'Neil.

19 ORAL ARGUMENT OF DAVID A. O'NEIL

20 ON BEHALF OF THE RESPONDENT

21 MR. O'NEIL: Mr. Chief Justice, and
22 may it please the Court:

23 The order that the state has spent the
24 last three years litigating simply requires the
25 warden to move an inmate between two secure

1 prison buildings, from the detention center to
2 the official prison hospital, so that the inmate
3 can undergo a medical test.

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

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

19 For three-quarters of a century, this
20 Court has approved of the use of the All Writs
21 Act in habeas cases and specifically for the
22 purpose of ordering prisoners transported. To
23 adopt Petitioner's categorical argument, this
24 Court would have to repudiate at least three of
25 its own decisions, cast serious doubt on federal

1 court authority in a wide range of other
2 contexts, and change the basic approach that has
3 characterized the All Writs Act for the last 200
4 years.

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

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

20 I welcome the Court's questions.

21 JUSTICE THOMAS: Do you know whether
22 you're going to use whatever it is you find from
23 the scan in a habeas proceeding?

24 MR. O'NEIL: Justice Thomas, I'm happy
25 to explain how this evidence would be useful to

1 us, but if you'll indulge me, I'd like to come
2 back after that to explain why that's not the
3 question either that this Court needs to answer
4 at this stage or that we -- we were required to
5 answer below, but I will -- I will address the
6 question.

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

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

25 The second way is, if this evidence

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

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

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

21 But, Justice Thomas, I don't think
22 those are the questions that this Court needs to
23 resolve to get to -- to resolve the question of
24 whether the district court had the authority to
25 issue this order and whether it appropriately

1 exercised its discretion to do so.

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

13 That is conceptually no different from
14 what is happening here.

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

21 I mean, if he has no idea whether or
22 not he has a claim, it seems as though he could
23 meet with virtually anyone. Yes, an expert
24 would be important. The doctor might be
25 important. But he might say, I need to meet

1 with a mentalist or someone to help me recover
2 my memory.

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

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

9 JUSTICE THOMAS: And I don't know how
10 you limit that.

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

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

22 The only reason that this order is
23 necessary is because the state is not permitting
24 Mr. Twyford access to those services. It's
25 necessary because he cannot -- he cannot engage

1 in the kind of testing that the doctors here
2 have recommended in the hospital. So the only
3 way that he can do it is to be transferred
4 outside the facility to another prison facility.

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

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

22 MR. O'NEIL: We just don't -- we don't
23 know the answer to that yet because the test has
24 not come back. We think that if -- if the Court
25 is going to take this almost like a motion to

1 dismiss and evaluate whether he would be able to
2 show -- whether he'd be able to title -- be
3 entitled to relief, then it has to assume that
4 the test shows the severe harm.

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

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

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

18 The Court is not writing on a clean
19 slate here. There is a broad spectrum of types
20 of factual development that take place in the
21 district court. At one end is the inquiry that
22 happens in cases like Pinholster and Schriro v.
23 Landrigan and 2254, where the petitioner --
24 where the inmate is seeking to introduce known
25 facts in evidence.

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

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

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

23 JUSTICE SOTOMAYOR: Counsel, on that
24 issue, did you present to the court below? I
25 didn't see it in any of your briefing. I didn't

1 see it anywhere in the district court or circuit
2 court's opinion. I only saw it in the dissent
3 below, that you had to bear a burden of showing
4 at least that there's a plausible reason the
5 evidence could be -- would be admitted. So
6 where did you make that showing below?

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

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

18 MR. O'NEIL: Right.

19 JUSTICE SOTOMAYOR: Where did you make
20 that showing below?

21 MR. O'NEIL: We explained that, first,
22 Pinholster applies only to claims under
23 2254(d)(1). So, if the claim was not
24 adjudicated on the merits, Pinholster does not
25 apply.

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

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

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

20 So, typically, a prisoner would go to
21 a court seek -- seeking funding under 3599 for
22 an expert. The court would determine whether
23 reasonable counsel would regard that as having
24 likely utility and, if so, would issue the
25 order. At that point, the warden would

1 effectuate the order, and this -- there wouldn't
2 be this issue.

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

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

18 Is that enough?

19 MR. O'NEIL: Justice Alito, I think
20 that likely would not be enough. And I think
21 district courts, as you wrote in -- in Ayestas,
22 district courts have plenty of experience making
23 the kinds of determinations that the Ayestas
24 standard contemplates.

25 JUSTICE ALITO: They would probably

1 not be enough. We won't even -- okay.

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

9 So identify the claims that you're
10 thinking of. Explain what evidence you think
11 you may get from the testing. Explain how you
12 think you would be able to get that evidence
13 before the court in the habeas proceeding.

14 Why is that so -- why is that so
15 onerous?

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

22 What the state is arguing is for
23 something fundamentally different. It is saying
24 you have to show exactly how this evidence,
25 before you even know what it is, before the

1 investigation has been conducted, is going to
2 help you -- is going to win you relief on the
3 merits. And Ayestas considered that. Ayestas
4 did not adopt that standard.

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

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

17 JUSTICE ALITO: May I ask you a
18 question about your argument on jurisdiction?
19 From what you said this morning, it wasn't clear
20 to me whether your argument is that no transport
21 order -- that the -- the granting of a transport
22 order may never be appealable under the
23 collateral order doctrine or whether there's a
24 lack of appellate jurisdiction here only because
25 of the specific facts involved, it wasn't a long

1 trip, et cetera. Which is it?

2 MR. O'NEIL: This Court should not
3 create a new category of appealable orders for
4 transportation orders. So transportation orders
5 are not appealable as a class under the blunt
6 instrument of Cohen.

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

16 JUSTICE ALITO: So -- so, if we return
17 to -- to the Tiger Man, so suppose that the
18 order is to transport the Tiger Man from one
19 part -- you know, all the way across the country
20 for a period of treatment that's going to last
21 for 45 days and the district court says and he's
22 not to be shackled in a way that's going to make
23 him miserable during -- during this trip.

24 That's not -- you would say, well,
25 that's -- you can't appeal that?

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

5 JUSTICE ALITO: But so we -- you know,
6 for between that and -- and traveling across the
7 street, there are all sorts of gradations. Why
8 shouldn't it just be the rule that these are
9 appealable? What's the big deal about that?

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

16 JUSTICE ALITO: No, it's a question of
17 statutory interpretation. And we interpreted
18 1291 the way we did, and we practically never
19 undo our decisions on statutory interpretation,
20 and -- and, you know, it's not a final decision,
21 it doesn't necessarily mean the final order in
22 the case. That's not -- you know, that's not
23 a -- a necessary semantic interpretation of that
24 phrase. It could be exactly what Cohen says, a
25 final decision on a particular discrete matter.

1 So why this -- you know, why draw this
2 line?

3 MR. O'NEIL: Because it's inconsistent
4 with Mohawk. At a minimum, it would need to
5 satisfy -- if you're going to stick with Cohen,
6 it needs to satisfy the three Cohen factors.
7 Here, this one fails multiple.

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

15 Second, it's not effectively
16 unreviewable -- unreviewable for exactly the
17 reasons that Justice Sotomayor was elaborating
18 on. Anytime the state --

19 JUSTICE ALITO: Well, let me stop you
20 there. It is unreviewable because, if Tiger Man
21 escapes or kills somebody during his trip,
22 there's no way that's going to be remedied at
23 the end of the case, right?

24 MR. O'NEIL: So it is part of the
25 state's core function and competence to move

1 prisoners back and forth between these two
2 prison facilities. And a lot of the state's
3 argument -- essentially, the state's argument on
4 -- on jurisdiction ultimately rests on this
5 public safety argument.

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

14 The -- the state's brief and that of
15 its amici conjure these images of, you know,
16 inmates walking the halls of the Ohio State
17 Medical Center. This is a prison within the
18 hospital. It is operated by the Ohio Department
19 of Corrections. If any inmate has anything
20 other than the most routine medical care, they
21 are put on a transport van and they are sent
22 either to the Franklin Medical Center or to this
23 facility, and the -- the Ohio Department of
24 Corrections advertises that on its website.

25 And if -- I would like to -- to

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

9 Again, I think it's clear that the
10 district court would have gap-filling authority
11 under the All Writs Act to issue that order.
12 And if that is true, which it need -- has to be,
13 then several other things are true.

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

22 And the prisoner in order to get that
23 meeting would not need to show how the evidence
24 would ultimately be useful.

25 That is conceptually no different from

1 what we have here. Mr. Twyford is being asked
2 to move -- asked for the warden to move him from
3 one prison facility to another prison facility,
4 and the district court's authority does not
5 depend on whether it's an inter-facility
6 transfer, in other words, a transport by prison
7 van from one building to the other, versus an
8 intra-facility transport, meaning like on an
9 elevator from one floor to the other. Those are
10 equally true here.

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

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 MR. O'NEIL: Thank you.

16 CHIEF JUSTICE ROBERTS: Rebuttal,
17 General -- General Flowers.

18 REBUTTAL ARGUMENT OF BENJAMIN M. FLOWERS
19 ON BEHALF OF THE PETITIONER

20 MR. FLOWERS: Thank you, Your Honors.
21 I want to briefly make, if I can, three points.

22 The first is that in terms of the
23 difficulty of applying the collateral order
24 doctrine, appellate courts for decades have had
25 no trouble doing so to these -- to these cases,

1 in large part because most transportation orders
2 are never appealed. There's not actually a
3 problem. It's when the state is concerned with
4 interference with its affairs that it does
5 appeal.

6 To the extent the Court's worried
7 about that, though, it's free here to announce
8 the standards and remand for the Sixth Circuit
9 to consider the still-never-resolved mandamus
10 request through the application of the proper
11 standards.

12 Second, you must have a traditional
13 analogue in order to invoke the All Writs Act.
14 It is not a freestanding power to make up ad hoc
15 writs. The Court's been very clear about that.
16 And if you hold that there is such a power,
17 you'll be contradicting those and inventing a
18 rule with no limiting principle, as Justice
19 Thomas noted.

20 As best I can tell, Twyford believes
21 the All Writs Act allows courts to do anything
22 that may have some speculative benefit to
23 furthering the resolution of a case. The Court
24 has never adopted so free form a -- a version of
25 the All Writs Act, and it shouldn't do so here.

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

13 And that brings me finally to the
14 question about what's the big deal, prisoner
15 transportations happen with some regularity.
16 There is a world of difference between the state
17 deciding in its own exercise of its management
18 of its prisons that transportation is warranted
19 and can be done safely and a federal court
20 interfering with the operations of our
21 government and telling us when and how we can
22 move prisoners.

23 Under our rule, the All Writs Act does
24 not permit the courts to do that. Courts can do
25 so only when a rule or a statute specifically

1 permits them to do so, when Congress or this
2 Court have decided that the benefits outweigh
3 the risks. That is the rule the Court should
4 adopt in this case.

5 If there are no further questions, I
6 can sit down.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 MR. FLOWERS: Thank you, Your Honor.

10 CHIEF JUSTICE ROBERTS: The case is
11 submitted.

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

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