No. 21-511

In the
Supreme Court of the United States

TIM SHOOP, Warden, *Petitioner,*

vs.

RAYMOND TWYFORD, *Respondent.*

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

BRIEF OF AMICI CURIAE STATE OF UTAH AND 20 OTHER STATES IN SUPPORT OF PETITIONER

SEAN D. REYES
Utah Attorney General
MELISSA HOLYOAK
Utah Solicitor General
Counsel of Record
THOMAS B. BRUNKER
Deputy Solicitor General,
Criminal Appeals
AARON G. MURPHY
Assistant Solicitor General
350 N. State Street, Suite 230
P.O. Box 142320
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: melissaholyoak@agutah.gov

Counsel for *Amici Curiae*

QUESTIONS PRESENTED

1. 28 U.S.C. § 2241(c) allows federal courts to issue a writ of habeas corpus ordering the transportation of a state prisoner *only* when necessary to bring the inmate into court to testify or for trial. It forbids courts from using the writ of habeas corpus to order a state prisoner's transportation for any other reason. May federal courts evade this prohibition by using the All Writs Act to order the transportation of state prisoners for reasons not enumerated in § 2241(c)?

2. Before a court grants an order allowing a habeas petitioner to develop new evidence, must it determine whether the evidence could aid the petitioner in proving his entitlement to habeas relief, and whether the evidence may permissibly be considered by a habeas court?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

Federal Rules

Other Authorities

INTEREST OF AMICI CURIAE

Amici states have a sacrosanct duty to protect their citizens from dangerous criminals who have been convicted and sentenced under presumptively valid state criminal laws and procedures. Law enforcement officers and citizens risk injury or death during prisoner escapes, almost all of which occur when prisoners are transported outside of secure prison environments. Most dangerous of all are transports to medical facilities because they are unsecure, filled with unsuspecting members of the public, often require unshackling of prisoners during treatment, and are unwittingly stocked with weapons like scalpels and scissors. Prisoners should only be transported when there is a legitimate necessity. Transportation for evidentiary frolics without any limiting principles of relevance or admissibility should not be permitted. Even one death for such a transport is too many.

Amici also have an abiding interest in the proper construction and application of the standard for habeas corpus relief prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), because that standard preserves the proper balance of state and federal interests served by principles of comity. To that end, AEDPA review of state merits decisions "is limited to the record that was before the

state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Typical cases take a decade or more to reach federal habeas. And they often spend a decade or more there. Adding further delay—at great risk to public safety—to gather evidence that cannot be used in the proceeding because a federal court refuses to properly apply *Pinholster* before ordering transport for evidence gathering is unsupportable.

Federal habeas review of state court decisions does not exist to facilitate federally sponsored fishing expeditions. This Court should reverse.

SUMMARY OF ARGUMENT

The rule the Sixth Circuit fashioned poses unnecessary risks to the public caused by transporting prisoners for no valid reason. The risk of death is so high that the Court should reverse to avoid any loss of life or serious injury. The rule also conflicts with the limits on habeas review set out in the AEDPA, and this Court's precedent.

Twyford says that his trial counsel was ineffective in developing his penalty phase mitigation case. The Ohio state courts denied that claim on its merits. Therefore, federal habeas review is limited to (1) the record before the State court when it resolved this question against him, and (2) the narrow question of whether that decision contradicted or unreasonably applied this Court's ineffective-assistance jurisprudence. To state the obvious, the first prohibits the

federal courts from considering any new evidence. The second is so narrow that new evidence could inform the decision in only the rarest of cases. And in ineffective-assistance claims, the core issue is whether counsel's choice was reasonable on its own, not compared to an alternative choice. So evidence supporting the alternative choice is irrelevant if the one counsel made was reasonable.

Nevertheless, the Sixth Circuit's rule requires transporting high-risk prisoners to develop evidence without first determining whether the federal courts may consider that evidence at all, or whether it will be relevant to any habeas claim. That rule poses an unnecessary risk to the public. Even when necessary, taking inmates outside of prison has resulted in deaths and serious injury as they try to or do escape, and sometimes while on escape. There is no reason to heighten that risk to facilitate a non-essential field trip under the guise of developing evidence that a federal court ultimately cannot consider or will not advance a habeas claim.

Further, permitting unnecessary evidentiary development runs afoul of the AEDPA's proscription against unnecessary delay and this Court's precedent implementing that proscription. It also undermines the finality of state criminal judgments and invades state sovereignty. Capital petitioners like Twyford have every incentive to delay the outcome of their habeas cases. Allowing unnecessary evidentiary

development serves only as another tool for delay, undermining the AEDPA and this Court's precedent furthering its objectives.

ARGUMENT

The Court should reverse to protect (1) the public from death and serious injury that may result when prisoners attempt to escape during unnecessary transport, and (2) the AEDPA's provisions and this Court's precedent that eliminate dilatory habeas litigation.

One of AEDPA's bedrock purposes is to "reduce delays in the execution of state and federal criminal sentences, particularly in capital cases." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003). Its provisions codify this Court's longstanding view that state collateral review is the "main event" and not merely a "tryout" for the later federal habeas case. *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

Indeed, this Court has always guarded the "delicate balance" of federalism by limiting the scope of federal habeas "intrusion into state criminal adjudications." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). Federal habeas review "disturbs the State's significant interest in repose for concluded litigation . . . and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (citation omitted).

When a state court adjudicates a federal constitutional claim on its merits, two critical limitations restrict federal habeas intrusion on state sovereignty. First, the universe of information the federal court can consider is necessarily "limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Second, a federal court may grant federal habeas relief only when the state court contradicted or unreasonably applied this Court's precedent. *Id.* at 182.

These principles are "part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Richter*, 562 U.S. at 103. And because state courts are the principal forum for adjudicating constitutional claims, habeas review is "backward-looking" and "focuses on what a state court knew and did." *Pinholster*, 563 U.S. at 182.

Further, where, as here, the claim at issue is a counsel ineffectiveness claim, federal review is "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). The federal court must first do the "highly deferential" *Strickland* analysis of counsel's performance. *Pinholster*, 563 U.S. at 190. Then it must view that analysis "through the deferential lens of § 2254(d)." *Id.* And again, at no point may the federal

court consider anything outside of the state court record. *Id*. at 185.

But the Sixth Circuit jumped over these limiting principles and ordered Ohio to transport Twyford—a high-risk, death-sentenced inmate with every incentive to escape no matter the cost and with every incentive to delay his case—from a secure prison to a medical facility. And to what end? To develop evidence that the court *cannot* consider and is not likely to be relevant even if it could.

As illustrated below, transporting inmates even when it is required is risky and may result in serious injury or death to innocent bystanders. Federal courts should never risk citizens' safety by transporting inmates for no good reason. The loss of even one life under a rule like the Sixth Circuit's is intolerable. The Court should reverse.

And delaying a case to develop evidence that is inadmissible and irrelevant contravenes both the AEDPA and this Court's precedent barring unnecessary delay in federal habeas litigation. The Court should reverse the Sixth Circuit's expansive opinion and re-raise the guardrails that prevent delay and keep federal habeas review in its narrow lane.

A. The Court should reverse before anyone is killed or seriously injured during prisoner transport in furtherance of futile evidentiary development.

Prisoner transport is high risk and inherently dangerous.[1] "[T]housands of juvenile and adult inmates are moved daily" by state and local law enforcement.[2] And while detailed "escape data from prisons and jails are not currently being systematically collected,"[3] it has been documented that from 1981 to 2001 prison escapes dropped dramatically due to better prison design.[4] Consequently, by 2001, corrections experts were of the opinion that "[t]he best opportunity for escape is when inmates are transported outside correctional facilities."[5]

The problem of transport-related escapes was serious enough that Congress enacted the Interstate

---

[1] *See, e.g.,* J. Skelly Wright & Abraham D. Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 Yale L.J. 895, 981 (1966) and Megan A. Ferstenfeld-Torres, *Who Are We to Name? The Applicability of the "Immediate-Custodian-as-Respondent" Rule to Alien Habeas Claims under 28 U.S.C. § 2241*, 17 Geo. Immigr. L.J. 431, 463 (2003) (acknowledging the danger involved in transporting prisoners); and Jaden P. Rhea, Note, *Highway to Hell: The Privatized Prison Transportation Industry and the Long Road to Reform*, 120 W. Va. L. Rev. 203, 213 (2017) (describing how "there are inherent risks in transporting dangerous criminals, and guards are very hesitant about trusting the prisoners they are transporting.").

Transportation of Dangerous Criminals Act of 2000 to regulate the interstate transport of violent criminals by private transportation companies and "enhance public safety." 34 U.S.C. § 60101 (West 2021). The regulations implementing that act "enforce the conclusion that interstate prisoner transportation is an inherently dangerous activity." *Paull v. Park Cty.*, 218 P.3d 1198, 1203 (Mont. 2009).

The many variables involved in transportation exacerbate the danger by creating opportunities for unpredictability in an unsecure setting: traffic, vehicle breakdowns, the need for fuel and food stops, bathroom breaks, and road or weather conditions. As a result, corrections publications and experts speak of prisoner transports in the starkest terms: "Every transport is a risky venture . . . because the possibility

---

[2] Carlos Jackson & Sharon Johnson Rion, *Inmate Transportation: Safety Is the Priority*, 63 Corrections Today 110, 114 (July 2001).

[3] Bryce Elling Peterson, Adam Fera & Jeff Mellow, *Escapes from Correctional Custody: A New Examination of an Old Phenomenon*, 96 Prison J. 511, 518 (2016) (explaining that the "CID [Correctional Institutions Division] is the only available database on escape incidents from both prisons and jails across the United States. [. . .] the CID only includes data from 2009." *Id.*

[4] Max Kutner, *Recent Prisoner Escapes Have One Common Factor: Hospital Visits*, Newsweek (Apr. 5, 2015, 10:17 AM), https://www.newsweek.com/recent-prisoner-escapes-have-one-common-factor-hospital-visits-319692.

[5] Jackson & Rion, *supra* note 2, at 113.

that the inmate may seize an opportunity to escape is ever-present."[6]

Most prisoner transports are from prison to prison, or prison to courthouse and back again. The termini for these trips are facilities designed to contain dangerous criminals. But even these routine transports are dangerous.[7]

---

[6] Christian Mason, Tod W. Burke & Stephen S. Owen, *On the Road Again: The Dangers of Transporting Ailing Inmates*, 75 Corrections Today 77 (Nov./Dec. 2013); *see also* Eileen O'Gorman, *Inmate Escapes Transport Van on Way to Kane County Jail*, Patch (July 27, 2021, 3:45 PM), https://patch.com/illinois/stcharles-il/authorities-search-escaped-inmate-charged-felonies (Illinois inmate slipped from handcuffs and ran from transport van as it was stalled in traffic.); *Latest: No Answers from Transport Company in Prisoner Escape*, AP News (Feb. 4, 2019), https://apnews.com/article/08062c67a2554d7d8eb07821be926b68 (a shackled, double-murder suspect escaped out a window during a food stop at a McDonald's drive-thru); *Prisoner Who Escaped Transport While Vehicle Was in Gary Drive-Thru Arrested*, WGN Web Desk (Dec. 30, 2020, 9:26 AM), https://wgntv.com/news/prisoner-who-escaped-transport-while-vehicle-was-in-gary-drive-thru-arrested/ (shackled murder suspect escaped during another stop at a McDonald's drive-thru, causing a two-week manhunt by the U.S. Marshals Service and five other police departments).

[7] Matthew Impelli, *Georgia Inmate Escaped from Custody During Transport*, *Police Searching Ongoing*, Newsweek (Apr. 30, 2021, 1:53 PM), https://www.newsweek.com/georgia-inmate-escaped-custody-during-transport-police-search-ongoing-1587902 (Georgia murder suspect escaped during a stop at a gas station causing five schools to go on "soft lockdown"); Sam Newhouse, *Philly Prisons to Beef up Transport Security After*

For example, in 2017, Ricky Dubose and Donnie Rowe were on a Georgia transport bus with 31 other prisoners traveling between corrections facilities when they got out of the locked area, overpowered and brutally murdered the two officers onboard, and used the officers' guns to carjack an escape vehicle. They then led police on a 100-mph chase—firing shots at the pursuing officers and ending in a crash, where the two fled through a wooded area. They were finally captured by an armed homeowner who held the two at gunpoint until police arrived.[8]

In 2019, a married couple—both facing first-degree murder charges—escaped during transport to Arizona to stand trial. They complained of gastrointestinal issues and asked the van to pull over in remote Blanding, Utah. The couple overpowered the two security guards and escaped. With access to a cache of more than 100 firearms, they were added to

---

Attack on Guard, Metro Philadelphia (Jan. 4, 2017), https://philly.metro.us/philly-prisons-to-beef-up-transport-security-after-attack-on-guard/ (inmate "dropped" his bible exiting transport bus and severely injured officer who bent to retrieve it in an attempt to steal the bus).

[8] Emily Shapiro, *Escaped Georgia Inmates Captured in Tennessee, Officials Say,* ABC News (June 15, 2017, 9:15 PM), http://abcnews.go.com/US/escaped-georgia-inmates-captured-tennessee-officials/story?id=48055236.

the U.S. Marshal's Most Wanted List until they were finally captured after a two-week manhunt.[9]

Prisoners are opportunists who can take advantage of any chance to escape.[10] But transport to medical facilities is by far the most dangerous, for a variety of reasons. Hospitals are designed for entirely different purposes than prisons. They are not secure and do not have staff trained to deal with an inherently dangerous population.[11] As a result, coordination between hospital staff and correctional officers "can lead to misplacing inmates, unnecessary delays [. . .] and public safety risks" particularly because an "inmate could find himself or herself unguarded for a

---

[9] Emily S. Rueb, *Couple Charged with Murder and Who Escaped from Guards in Blanding Are Now on the Most Wanted List*, N.Y. Times (Sept. 10, 2019, 12:59 PM), https://www.sltrib.com/news/nation-world/2019/09/10/us-marshals-arizona/.

[10] *See* Gabriela Szymanowska, *Mississippi Inmate Who Escaped Custody on the Way to Mother's Funeral Caught 900 Miles Away*, Mississippi Clarion Ledger (Sept. 14, 2021, 1:03 PM), https://www.clarionledger.com/story/news/local/2021/09/14/ms-inmate-who-escaped-while-being-escorted-to-funeral-captured-900-miles-away/8334945002/ (Mississippi inmate serving a life sentence for kidnapping and sexual battery escaped while being escorted to a family member's funeral); *Kidd v. State*, No. 03-08-00208-CR, 2010 WL 391856, at *1 (Tex. App. Feb. 4, 2010) (prisoner escaped during transport to hospital after having claimed to have put razor blade in his penis).

[11] Kutner, *supra* note 4 (reporting on four different hospital escapes in Virginia, Louisiana, New Jersey, and West Virginia just in the previous two-week period).

few moments, providing the perfect opportunity to flee."[12]

Prisoners often must be unshackled for exams or procedures, compounding the risk of escape and injury or death to facilitate it. "[C]orrectional officers are often unfamiliar with medical facilities, medical procedures and treatment practices."[13] Plus, hospital rooms are filled with dangerous weapons—scalpels, scissors, syringes—and hospitals generally are filled with members of the public who have every right to expect a safe environment and generally are not even aware that a dangerous criminal might be right down the hall. This volatile mix is extremely dangerous. "Every time inmates must leave a secure facility for medical reasons, they pose a potential danger to the correctional officers, the health care professionals who will treat them and anyone else they may encounter."[14]

Even a partial list of horrific hospital-related escapes is long. In 1984, Utah prisoner Ronnie Lee Gardner attacked a guard at the University of Utah Hospital, forced the guard to remove his shackles at gunpoint, then shattered the guard's eye socket, broke his nose in 16 places, and ruptured four discs in the guard's back. *Gardner v. State*, 234 P.3d 1115,

---

[12] Mason et al., *supra* note 6, at 80.
[13] *Id.*
[14] *Id.* at 78.

1119 (Utah 2010). The guard underwent "emergency surgery where physicians rebuilt the guard's eye socket from one of his ribs, placed a rod through his face to anchor his cheekbones apart, and wired the bones in his face together." *Id.* But he still suffered permanent damage, including loss of sight in his eye. *Id.* Gardner then hijacked a motorcycle at gunpoint and forced the rider to take him to an apartment building where he took the man's clothes and wallet, beat him with the gun, and rode off on the motorcycle. *Id.* And while on the run, Gardner murdered a bartender by shooting him in the face, then robbing him of less than $100.[15]

In 1989, a Rikers Island prisoner escaped from a Brooklyn hospital by pulling an I.V. from his arm and climbing out a second-story window and down a 25-foot wall. Three miles from the hospital, he hid in an apartment building. Barefoot and wearing a blood-spattered hospital gown, he attacked a woman as she entered her apartment, forced her inside, raped her,

---

[15] Amy Donaldson, *Crime and Punishment for Ronnie Lee Gardner*, Deseret News (June 12, 2010, 9:03 PM), https://www.deseret.com/2010/6/12/20120992/crime-and-punishment-for-ronnie-lee-gardner#a-photo-illustration-shows-the-young-ronnie-lee-gardner-and-his-victims-michael-burdell-left-melvyn-otterstrom-and-george-nick-kirk.

and left the woman and a male occupant tied up before fleeing in stolen clothing.[16]

In 1995, an Arkansas inmate at a medical facility disarmed the officer guarding him then shot and killed the officer. *Shepherd v. Washington Cty.*, 962 S.W.2d 779, 780 (Ark. 1998). He then fled the facility and took a woman hostage in the parking lot. *Id.* When the woman's husband intervened to try to save her, the inmate murdered the husband by shooting him in front of his wife, then stole the couple's truck. *Id.* Fleeing from police in the truck, the inmate eventually crashed and then committed suicide with the officer's gun. *Id.*

In 1997, Tennessee prisoner Kennath Henderson obtained a smuggled .380 caliber pistol from his girlfriend before being transported to a dentist's office. *State v. Henderson*, 24 S.W.3d 307, 310 (Tenn. 2000). While the transport officer waited in the lobby, Henderson pulled the pistol on the dentist and his assistant. *Id.* As the dentist and Henderson struggled for the gun, the dentist called out, and the deputy rushed in. Henderson shot the deputy, grazing his neck and causing him to fall backward against the door. *Id.* The fall knocked the deputy unconscious, and he fell to the

---

[16] Craig Wolff, *Inmate Escapes from Hospital; Rapes Woman*, N.Y. Times (Nov. 3, 1989), https://www.nytimes.com/1989/11/03/nyregion/inmate-escapes-from-hospital-rapes-woman.html?searchResultPosition=2.

floor, face-down. Henderson took the deputy's gun, along with the dentist's money, credit cards, and truck keys. *Id.* He ordered the dentist and the assistant to leave the building with him, but before they left, he returned to the deputy—still unconscious on the floor—and murdered him with a shot to the back of the head at point-blank range. *Id.* Outside, the dentist and the assistant were able to escape back into the office and lock the door. *Id.* Henderson fled in the dentist's truck but was apprehended a short time later. *Id.* at 311.

In 2006, William Morva was awaiting trial on burglary and robbery charges when he faked an injury to his leg and arm and got transported to a hospital. *Morva v. Commonwealth*, 683 S.E.2d 553, 557 (Va. 2009). Once there, his "injured" arm was unsecured. During a bathroom break, Morva tore a metal toilet paper holder from the wall and, when his guard entered the bathroom to check on him, Morva attacked the officer, beat him unconscious, and stole his gun. *Id.* While fleeing, Morva confronted an unarmed hospital security guard who put his hands out to his side in an act of surrender, but Morva shot the guard in the face at point blank range, killing him, and fled. During the ensuing manhunt, Morva shot another police officer in the back of the head, killing him. *Id.*

In 2007, Utah prisoner Curtis Allgier was changing back into his clothes after undergoing an MRI when he disarmed his guard, shot him twice, and

killed him. *State v. Allgier*, 416 P.3d 546, 548 (Utah 2017). Allgier fled the hospital, carjacked a vehicle with the officer's gun, and sped away. *Id.* In pursuit, officers attempted to stop the car with a spike strip, but Allgier was able to swerve around it, nearly running over a police officer. *Id.* He then drove to a restaurant and ordered everyone inside to get on the ground. He held the gun to a restaurant employee's head and pulled the trigger. The gun fired, but miraculously missed. Undeterred, Allgier began beating the employee with the butt of the gun. And when a customer attempted to help the employee, Allgier "grabbed a knife and sliced the customer's neck." *Id.*

The list of hospital escape carnage goes on and on. EMTs have been attacked in ambulances on the way to hospitals.[17] Nurses were held hostage during one multi-hour standoff after an inmate disarmed a corrections officer and terrorized patients with his gun.[18] Still in other incidents, officers were disarmed

---

[17] *Inmate Escapes During Transport*, The Review (Oct. 2, 2019), https://www.reviewonline.com/news/local-news/2019/10/inmate-escapes-during-transport/ (Ohio inmate assaulted an EMT and jumped from the moving ambulance).

[18] *Armed Inmate Shot and Killed After Taking Nurse Hostage at Ill. Hospital, Authorities Say*, CBS News (May 14, 2017, 1:44 AM), https://www.cbsnews.com/news/armed-inmate-shot-and-killed-after-taking-nurse-hostage-at-delnor-hospital-authorities-say/.

resulting in exchanges of gunfire inside hospitals filled with innocent bystanders.[19]

The motivation to escape can be so high that prisoners will take risks that appear totally irrational to others, including hurling themselves from moving vehicles.[20] And prisoners like Twyford—on death row for a heinous murder and dismemberment—are the most dangerous prisoners of all. They already have a proven willingness to kill to achieve their goals and—facing a death sentence—have inverted incentives where fear for their own lives means little compared to even a small possibility of escape and freedom, however brief.

---

[19] Anahad O'Connor, *Inmate Escapes from Hospital*, N.Y. Times (Jan. 3, 2008), https://www.nytimes.com/2008/01/03/us/01cnd-escape.html?searchResultPosition=1.

[20] *See Oneida County Jail Inmate Arraigned on Escape Charge*, Oneida Observer-Dispatch (Jan. 31, 2020), (inmate jumps out transport van window between the courthouse and jail); Stefania Okolie, *Man Wanted by US Marshals Seen Kicking Vehicle Panel, Wiggle Out, and Fall from Moving Vehicle*, ABC 13 Eyewitness News (Oct. 2, 2021), https://abc13.com/prisoner-escape-video-pedro-castillo-hernandez-houston-sexual-assault-mexican-national-escapes/11069864/ (inmate escapes from transport van by kicking out a panel and jumping from the moving vehicle); *See* Kara Berg, *Sheriff: Inmate Died by Suicide*, Lansing St. J. (Jan. 12, 2020), https://lansingstatejournal.newspapers.com/image/627785106 (prisoner jumps from transport van on the freeway and later dies from the resulting injuries).

Prisoners have a right to appear in court and to reasonable medical care. But, as shown, even transports to further constitutionally protected rights include myriad risks to public safety.

Yet to these transports, the Sixth Circuit's rule adds transports that expose the public and law enforcement to the risk of death or serious injury even when it will do little or nothing to further any right the inmate enjoys. As stated, a federal habeas court cannot consider any evidence that the state courts did not have before them when they adjudicated his federal constitutional claims. The Sixth Circuit's rule requires transporting prisoners—with all the attendant risks—to develop that evidence anyway.

Likewise, as shown in the next point, under the AEDPA, a federal habeas court may grant relief on any claim the state courts adjudicated only if they contradicted or unreasonably applied the Court's precedent. Additional evidence—even if it could be considered—will rarely inform this very narrow legal inquiry.

The Sixth Circuit rule nevertheless requires prison transport to develop evidence that will almost always be inadmissible or irrelevant. The risk of deaths and injuries in furtherance of a right an inmate enjoys are bad enough. The risk of deaths and injuries for a pointless exercise is intolerable. At the very least, no such transport should be ordered until

a court has determined that the evidence is relevant and admissible.

Any death or injury in the service of pointless prisoner field trips is a death too many. The Court must stop this practice now before any occur.

B. *Pinholster* should perform a gatekeeping function for requests like Twyford's to prevent capital petitioners from causing endless delay in contravention of the AEDPA and this Court's precedent.

As this Court has recognized, "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death." *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). This hypothesis is born out empirically—capital petitioners have a well-established history of eleventh-hour filings intended solely to thwart imposition of a death sentence. *See e.g.*, *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133-34 (2019) (raising an as-applied challenge to the method of execution after years of managing "to secure delay through lawsuit after lawsuit"); *Gomez v. U.S. Dist. Ct.*, 503 U.S. 653, 653-54 (1992) (per curiam) (rejecting a successive petition masquerading as a last-minute § 1983 claim challenging method of execution); *Beaty v. Schriro*, 554 F.3d 780, 785 n.3 (9th Cir. 2009) (rejecting *Atkins* claim brought after six previous state petitions failed to raise it as "'needless piecemeal litigation . . . whose

only purpose is to vex, harass, or delay.'") (quoting *Sanders v. United States*, 373 U.S. 1, 18 (1963)).

As stated, the AEDPA took pains to curb dilatory litigation to fulfill its promise of an "effective death penalty." To that end, the relevant federal question here is whether the state court contradicted or unreasonably applied this Court's precedent when it held that Twyford's counsel reasonably chose to craft a mitigation case he could support with the facts available to him. Under *Pinholster*, the federal courts are restricted on that question to the record that was before the state court. 563 U.S. at 181.

By side-stepping a *Pinholster* analysis *before* permitting further evidence development, the Sixth Circuit has cleared a path for evidence gathering relating to § 2254(d)(1) claims that can serve no purpose other than delaying capital cases. This undermines the delicate balance of federalism and comity and is antithetical to the AEDPA's purpose and *Pinholster*'s restrictions. And it will open a floodgate of evidence-gathering requests in capital cases unbounded by any limiting principle. Indeed, these motions will become obligatory, brought in every capital case, late in the day, premised on only the thinnest reed of speculative plausibility. The exclusive tactical purpose will be delay and it will become malpractice for habeas attorneys not to bring such motions often (though never early).

And performing the *Pinholster* analysis *after* the evidence is developed defeats *Pinholster*'s purpose to avoid unnecessary delay. The delay spawned by developing the evidence is the victory; it makes no difference if the court ultimately concludes it can't or won't consider it.

Though the Sixth Circuit purported to adopt a limiting principle—that the new evidence "plausibly relates" to his claims—"plausible" sets no limitation at all. Permitting it will only encourage abusive evidence gathering in other cases.

The Sixth Circuit's "plausibly relates" standard is broader than even routine civil discovery, where evidence collection is the broadest.[21] To obtain civil discovery, a party must be able to demonstrate that the evidence sought is relevant, which requires that the evidence 1) "make a fact more or less probable than it would be without the evidence," and 2) "is of consequence in determining the action." Fed. R. Evid. 401. "Whether a proposition is of consequence to the determination of the action is a question that is governed by the substantive law." *United States v. Hall*, 653 F.2d 1002, 1005 (5th Cir. 1981). Which means that

---

[21] The Sixth Circuit drew a distinction between formal discovery and Twyford's request to gather "imaging of his own brain." Pet.App.15a. But *Pinholster* has no "self-discovery" exception to its evidence-restriction rule. The source of the evidence makes no difference because all new evidence is barred on a § 2254(d)(1) claim.

"the matter sought to be proved must be part of the hypothesis governing the case." *United States v. Waldrip*, 981 F.2d 799, 806 (5th Cir. 1993). And when the evidence sought does "not bear on any issue involving the elements" to be proved, it is "not of consequence to the determination of the action." *United States v. Dean*, 980 F.2d 1286, 1288 (9th Cir. 1992).

The "governing hypothesis" of Twyford's case is that the Ohio Court of Appeals unreasonably applied this Court's precedents based on the record before that court at the time of its decision. A later-collected brain scan that was *not* before the state court has no logical effect on that analysis. Thus, it is not at all clear that the type of evidence Twyford seeks would even be discoverable in a routine civil case under normal discovery rules. But as this Court has admonished before, a "habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Yet the Sixth Circuit's rule circumvents these normal limitations and expands habeas discovery into completely impermissible and irrelevant territory that until now has been totally prohibited in habeas cases.

Indeed, *Pinholster* is used to bar evidence that "plausibly relates" to habeas claims all the time in the form of affidavits and laboratory reports gathered through counsel's own investigative efforts even

outside of informal discovery.[22] In all such cases the offered evidence more than "plausibly" relates to the federal claims—it unequivocally relates to them. Yet it is barred because *all* new evidence, regardless of its level of connection to the federal claim is *irrelevant* to the question § 2254(d)(1) asks.

The Sixth Circuit's error was to focus solely on the probability aspect of relevance—plausible relationship to a fact—without any consideration of whether that fact is one of consequence to the legal theory at issue. By decoupling the two concepts, the Sixth Circuit has permitted discovery into subject matter that has no relationship to the case. A § 2254(d)(1) case is not focused on what counsel did, but on what the state

---

[22] *See e.g.*, *Ross v. Thaler*, 511 Fed. Appx. 293, 306 (5th Cir. 2013) (district court correctly refused to consider affidavits petitioner obtained from trial counsel that were never before the state court); *Storey v. Stephens*, 606 Fed. Appx. 192, 195 (5th Cir. 2015) (per curiam) (affirming refusal to consider second affidavit of an expert whose first affidavit was considered by the state post-conviction court); *Bethel v. Allbaugh*, No. 17-CV-367-JHP-FHM, 2018 WL 5846346 at *2 (N.D. Okla. Nov. 8, 2018) (declining to consider a substitute affidavit of a witness whose affidavit was before the state court); *Stringer v. Woods*, No. 14-cv-13874, 2015 WL 7450403 at *5 (E.D. Mich. Nov. 24, 2015) (concluding affidavits of two witnesses not presented to the state court were "categorically barred"); *Stinson v. Cates*, No. CV 09-6417 SJO (FFM), 2012 WL 1604846 at *5 (C.D. Cal. Apr. 2, 2012) (declining to consider affidavit of the victim first presented in the federal court); *Parmaei v. Neely*, No. 1:09CV288-03-MU, 2011 WL 4048974 at *5 (W.D.N.C. Sept. 12, 2011) (declining to consider new affidavits and a new crime lab report).

court did, and whether it was an unreasonable or contradictory application of this Court's precedent.

This case perfectly illustrates the problem. At his 1993 trial, Twyford's counsel faced two competing psychological theories. The first explained that Twyford's own childhood sexual and physical trauma caused him to quickly and emotionally attach to children and view himself as their "protector against abusive individuals," which motivated him to avenge the rape of his girlfriend's daughter. Pet.App.217a. With that background, the theory explained that Twyford planned a hunting trip as a ruse to lure the victim to a remote location where, with guns in hand, he and an accomplice shot the victim, dismembered the body, and disposed of it in such a way that they believed the victim's identity was concealed.

The second theory was that Twyford was so psychologically damaged—in part due to a suicide attempt when he was thirteen years old that left bullet fragments in his brain—that he was incapable of forming rational thoughts or planning and organizing a complex murder and coverup. The problem with the second theory was that Twyford's own written confession gave exacting details about the plan to commit the murder and dispose of the body that undermined the suggestion that he was incapable of rational thought. Trial counsel went with the first theory—the one Twyford's confession did not undermine.

In his state post-conviction case, Twyford claimed that his counsel should have gone with the second psychological theory. But the state court ruled on the merits that Twyford's psychological expert at trial gave "a coherent and logical explanation" for Twyford's behavior and that counsel could not be found deficient for choosing "one competing psychological explanation over another." Pet.App.239a. Twyford is challenging that disposition in his present federal habeas petition. And under *Pinholster* and the AEDPA, that review should have been straightforward and quick—looking only to the evidence before the state courts, did they contradict or unreasonably apply this Court's precedent when they found that counsel's choice of psychological theories was reasonable.

Yet the Sixth Circuit's rule has abetted Twyford's efforts to evade the AEDPA's and this Court's delay-avoiding rules. Twyford waited until *fifteen years* into his federal case to seek additional psychological testing. He has now dragged out litigation on that issue for another three years.

New brain imaging might "plausibly relate" to an assessment of Twyford's psychological state thirty years ago, at least broadly speaking. But it does nothing to illuminate the question before the court in this case, just as similar evidence will be irrelevant in other cases. This is so because, when assessing counsel's performance, the core question is whether the

choice counsel made was objectively reasonable. But if that choice was reasonable, evidence in support of the choice his counsel rejected is not relevant. Yet the Sixth Circuit's rule permits developing alternative-choice evidence even before determining whether the choice made was reasonable.

And there will always be more evidence that could be developed for just about any claim—every capital petitioner in every case can come up with some additional thing that he can speculate might "plausibly" relate to a claim. This will lead to an endless series of requests that extend the life of the litigation for years or decades, all without any burden to establish any realistic chance the evidence can be considered by the federal court.

Consider the possibilities just in this case. There are innumerable additional investigative requests Twyford could seek under the Sixth Circuit's rule: batteries of every brain scan imaginable—but only one at a time; physical examinations only possible with equipment at specialized facilities to determine if Twyford could aim and fire a rifle; a visit to the crime scene so experts can determine if Twyford was physically capable of getting to the location of the murder; or mental exams designed to determine if Twyford was really capable of writing his confession. The list is limited only by the creativity of defense counsel—and each assisted by a federal court order to state officials to transport Twyford, each resulting in

more delay, and none resulting in any evidence that can be considered under *Pinholster*.

Indeed, as *Pinholster* recognized, it is "strange" for a federal court "to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state Court." 563 U.S. at 182-83. Even stranger is to allow petitioners to delay their case to engage in years-long discovery battles that can be of no consequence to the legal issues before the habeas court.

Delay is the usual goal of death-sentenced habeas petitioners. The Sixth Circuit created a rule that, if left unchecked, allows petitioners to delay their cases to develop evidence that is most likely inadmissible or irrelevant under the very limited review permitted by the AEDPA and this Court's precedent designed to curb this very kind of delay. Other petitioners will follow where the Sixth Circuit has led. And petitioners outside that circuit will certainly ask for similar treatment. Even if they do not succeed, the time spent litigating the issue will give them the victory they seek—delay.

The AEDPA and this Court's precedent were meant to stand in the way of the very delay the Sixth Circuit's rule abets. As such, it directly conflicts with Congress's intent and the Court's precedent.

****

No citizen or law enforcement officer should die or suffer injury just so a death row inmate can go on an evidence-gathering lark. The Court should reverse to prevent that from happening.

The Court should also reverse because the Sixth Circuit's rule permits evidence gathering that serves no purpose other than delay. Rules that facilitate delay contravene the AEDPA's and this Court's precedent that are designed to avoid it. The Court should reverse and return our federal courts to the expeditious path habeas cases should follow.

CONCLUSION

This Court should reverse the Sixth Circuit.

Respectfully submitted.

SEAN D. REYES
Utah Attorney General
MELISSA HOLYOAK
Utah Solicitor General
Counsel of Record
THOMAS B. BRUNKER
Deputy Solicitor General,
Criminal Appeals
AARON G. MURPHY
Assistant Solicitor General
350 N. State Street, Suite 230
P.O. Box 142320
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email:melissaholyoak@agutah.gov

Counsel for *Amici Curiae*
State of Utah

Dated: March 4, 2022

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

MARK BRNOVICH
Attorney General
State of Arizona

LESLIE RUTLEDGE
Attorney General
State of Arkansas

ASHLEY MOODY
Attorney General
State of Florida

CHRISTOPHER M. CARR
Attorney General
State of Georgia

LAWRENCE WASDEN
Attorney General
State of Idaho

THEODORE E. ROKITA
Attorney General
State of Indiana

DEREK SCHMIDT
Attorney General
State of Kansas

DANIEL CAMERON
Attorney General
State of Kentucky

JEFF LANDRY
Attorney General
State of Louisiana

LYNN FITCH
Attorney General
State of Mississippi

ERIC SCHMITT
Attorney General
State of Missouri

AUSTIN KNUDSEN
Attorney General
State of Montana

DOUGLAS J. PETERSON
Attorney General
State of Nebraska

JOHN M. O'CONNOR
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

JASON R. RAVNSBORG
Attorney General
State of South Dakota

HERBERT SLATERY, III
Attorney General
State of Tennessee

KEN PAXTON
Attorney General
State of Texas

JASON S. MIYARES
Attorney General
State of Virginia