

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

WALTER LEROY MOODY, JR., Petitioner, v. WARDEN HOLMAN CF, Respondent.	WALTER LEROY MOODY, JR., Petitioner, v. JEFF SESSIONS, ATTORNEY GENERAL OF THE UNITED STATES, Respondent.
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On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

**CAPITAL CASE
EXECUTION SET FOR APRIL 19, 2018, AT 6 PM CDT**

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CAPITAL CASE

QUESTIONS PRESENTED

Walter Leroy Moody, Jr., a federal inmate serving seven life sentences and 400 years was temporarily sent to the State of Alabama, pursuant to a writ of habeas corpus ad prosequendum, for prosecution of capital offenses arising out of the same course of conduct. After Mr. Moody received a death sentence, at the hands of prosecutors in the office of then-Alabama Attorney General Jeff Sessions, he was transferred to a state correctional facility.

On January 9, 2018, the day after this Court denied certiorari on Mr. Moody's § 2254 challenge to his state court judgment, the State of Alabama sought an execution date. Mr. Moody asked the State of Alabama to return him to the physical custody of the federal government. After Mr. Moody's request to be returned to federal physical custody was denied, he filed a § 2241 petition seeking to have the warden of the state facility return him to federal physical custody, or cease attempting to execute him while he served his federal sentences. The District Court dismissed for lack of subject matter jurisdiction. On appeal, the Eleventh Circuit affirmed on an alternate basis: that Mr. Moody had no right to challenge any agreement between the State of Alabama and Attorney General of the United States Jeff Sessions concerning the interruption of his federal sentences.

At oral argument, Mr. Moody learned that Attorney General Sessions employs no process when determining whether to interrupt a commenced federal sentence. On April 16, 2018, Mr. Moody filed a habeas action against Attorney General Sessions, relying on *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998), and arguing that, assuming the Attorney General of the United States had the authority to make such an agreement, where doing so will result in an execution, some due process, including notice, was required. Concluding that no process was due, unless the prisoner could show the decision was due to an "unconstitutional motive . . . (i.e., on the basis of race, gender, religion, etc.)," the Eleventh Circuit denied relief.

The foregoing presents the following questions:

1. May the subject of a void act—who will be harmed by it—challenge that act?
2. Assuming the Attorney General of the United States has the authority to interrupt service of a federal sentence to permit a state to execute a federal prisoner, can he do so without notice or other process?

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PETITION FOR A WRIT OF CERTIORARI

Walter Leroy Moody, Jr., respectfully petitions for a writ of certiorari to review the decisions of the United States Court of Appeals for the Eleventh Circuit in two cases involving closely related questions. *See* Sup. Ct. R. 12.4.

OPINIONS BELOW

The opinion of the Eleventh Circuit in *Moody v. Warden Holman CF*, ___ F.3d ___, 2018 WL 1835319 (11th Cir. 2018) (*Moody I*), is reported. The final order of the Eleventh Circuit denying relief in *Moody v. Sessions*, No. 18-90010 (11th Cir. Apr. 18, 2018) (*Moody II*), is unreported and is included in Petitioner’s Appendix. Pet. App. A.

JURISDICTION

The decisions of the Eleventh Circuit Court of Appeals were filed on April 18, 2018, and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, § 1 of the United States Constitution, in relevant part, provides, “All legislative Powers herein granted shall be vested in a Congress of the United States”

Article II, § 1 of the United States Constitution, in relevant part, provides, “The executive Power shall be vested in a President of the United States of America.”

Article III, § 1 of the United States Constitution, in relevant part, provides, “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”

Title 18 U.S.C. § 3621(a) provides,

A person who has been sentenced to a term of imprisonment pursuant to the provisions of subchapter D of chapter 227 shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.

Title 18 U.S.C. § 3624(a) provides,

A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

STATEMENT OF THE CASE

In 1991, Mr. Moody was convicted of multiple federal offenses for which he was sentenced to “a total of SEVEN (7) LIFE sentences, and FOUR HUNDRED (400) years [which] shall be served concurrently[.]” Dist. Ct. Dkt.¹ 1-1 at 4 (capitalization in original). After Mr. Moody commenced serving those sentences at the United States Penitentiary in Marion, Illinois, the State of Alabama indicted him and obtained a writ of habeas corpus ad prosequendum (“Writ”) from the Jefferson County (Alabama) Circuit Court to prosecute Mr. Moody for state law violations, including capital murder. Dist.

¹ References to the District Court record in *Moody* I will be to “Dist. Ct. Dkt. ____.”

Ct. Dkt. 1-2 at 3. The Writ promised to return Mr. Moody to federal custody at the conclusion of state court proceedings.² *Id.*

The Writ was served on or about February 19, 1992. *Id.* at 2.

Ultimately, after years of delay, Mr. Moody was convicted of capital murder and sentenced to death. *Moody v. State*, 888 So. 2d 532 (Ala. Crim. App. 2003). Mr. Moody was unsuccessful in seeking relief from his state court judgment under 28 U.S.C. § 2254 and, following an appeal to the Eleventh Circuit Court of Appeals, the Supreme Court denied certiorari on January 8, 2018. Dist. Ct. Dkt. 16 at 4-5. The day after certiorari was denied on the § 2254 petition, the State of Alabama filed a Motion to Set an Execution Date.³ Dist. Ct. Dkt. 1-3. Mr. Moody sought, unsuccessfully, to have the State of Alabama comply with the terms of the Writ, and return Mr. Moody to the physical custody of the federal government to satisfy his federal sentences. Dist. Ct. Dkt. 1-4. The State of Alabama declined Mr. Moody's requests, maintaining that he lacked standing to challenge his physical custody status. Dist. Ct. Dkt. 1-5, 1-6.

² This was consistent with federal regulations. *See* 28 C.F.R. § 527.31(c) (requiring the state obtaining a federal inmate via a writ of habeas corpus ad prosequendum to guarantee that it “will return the inmate to the Bureau of Prisons’ custody promptly on conclusion of the inmate’s appearance in the state or local proceedings for which the writ is issued”).

³ The Alabama Supreme Court granted the motion, and Mr. Moody’s execution is scheduled for April 19, 2018, at 6 p.m. CDT. Dist. Ct. Dkt. 15.

Mr. Moody then filed a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (“Petition”) challenging: (1) the State of Alabama’s unlawful retention of him in violation of the Writ, federal law, and due process; and (2) alternatively, any attempt to execute him before he completes service of his federal sentences in a state facility. Dist. Ct. Dkt. 1. The District Court dismissed both claims for lack of subject matter jurisdiction, Dist. Ct. Dkt. 16 at 41, and Mr. Moody appealed.

The Eleventh Circuit invited the United States to file an amicus curiae brief setting forth its position with respect to the petition and to present oral argument. In its brief, filed on April 10, 2017, for the first time, the United States asserted that it was consenting to the execution of Mr. Moody by the State of Alabama, but was not surrendering primary jurisdiction over him. Br. of Amicus Curiae at 9 (“[T]he United States now confirms that it has relinquished custody of Moody to Alabama for purposes of carrying out his state sentence.”); *id.* at 9 n.5 (“A sovereign with primary jurisdiction may revoke its consent to another sovereign’s custody or jurisdiction over a prisoner, but that is not the case here.”).

At oral argument, the United States expressly refused to relinquish primary jurisdiction, asserting, “We still maintain primary jurisdiction [and] can ask for him back if we want to, as a result.” Recording of Oral Argument, *Moody I* (11th Cir. Apr. 12, 2018) (“OA Recording”), available at: <http://www.ca11.uscourts.gov/oral-argument-recordings>. On April 16, 2018,

as ordered at oral argument, *id.* at 1:08:15-1:08:45, the United States provided the following written confirmation of its position:

NOTICE OF THE UNITED STATES

Before the United States filed its amicus brief in this case and presented its position at oral argument, the Attorney General, Jefferson B. Sessions, III, informed the undersigned Deputy Assistant Attorney General, Matthew S. Miner, that the United States waives its right to exclusive custody of petitioner Walter Leroy Moody, Jr. and consents to his custody in Alabama for purposes of carrying out the capital sentence imposed on Moody in Alabama.

Notice of the United States, *Moody I* (11th Cir. Apr. 16, 2018).

On April 16, 2018, Mr. Moody filed an Emergency Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (“Emergency Petition”), naming Attorney General Sessions as the respondent. Emergency Pet. for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241, *Moody II* (11th Cir. Apr. 16, 2018). The United States responded by arguing, *inter alia*, that the Emergency Petition should be denied on the merits. Resp. of the United States, *Moody II* (11th Cir. Apr. 17, 2018). Mr. Moody filed a Reply to Response and Emergency Motion for Injunctive Relief. Reply to Resp. & Emergency Mot. for Injunctive Relief, *Moody II* (11th Cir. Apr. 17, 2018).

On the afternoon of April 18, 2018, the Eleventh Circuit decided both *Moody I* and *Moody II*.

In *Moody I*, the Eleventh Circuit affirmed on an alternate basis: that a death-sentenced inmate has no right to challenge a decision between sovereigns to alter the order in which sentences are served. *Moody I*, __ F.3d __, 2018 WL 1835319 at *9. In doing so, it rejected Mr. Moody’s arguments that Attorney General Sessions lacks the authority—pursuant to 18 U.S.C. §§ 3621(a) and 3624(a)⁴ and the separation of powers doctrine, Reply Br. at 1-9, *Moody I* (Apr. 13, 2018)—to interrupt a commenced federal sentence. *Id.* at *8.

In *Moody II*, the Eleventh Circuit denied Mr. Moody’s challenge to Attorney General Sessions’ exercise of discretion in releasing exclusive custody over him and consenting to his execution because “it seems to us that where, as here, there is a valid sentence imposed by a different sovereign, the exercise of executive discretion by the Attorney General in ceding primary jurisdiction [sic⁵] should not be disturbed absent allegations of unconstitutional motive, as in the selective prosecution and substantial assistance contexts.” Pet. App. A at 6a (citations omitted).

This timely petition for writ of certiorari followed.

⁴ The opinion contains a typo as to the subsection of § 3621 relied on by Mr. Moody, and does not mention his citation to § 3624(a) or explicitly mention his separation of powers argument. *See* Reply Br. at 2, 6-9, *Moody I* (11th Cir. Apr. 13, 2018).

⁵ As noted above, the United States will not cede primary jurisdiction over Mr. Moody.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because the Eleventh Circuit’s opinion has decided an important question of federal law that conflicts with this Court’s decisions in *Bond v. United States*,⁶ *I.N.S. v. Chadha*⁷ and *Marbury v. Madison*.⁸

May the subject of a void act—who will be harmed by it—challenge that act? The answer—whether it involves a violation of separation of powers challenge or an executive branch official exceeding his statutory authority—must be “yes.” This Court should grant the writ as to question one because the Eleventh Circuit’s decision in *Moody I* (1) decides an important federal question and is in conflict with this Court’s precedent, Sup. Ct. R. 10(c); and (2) involves an attempt by the Executive Branch to usurp both the judicial power (by disturbing a final judgment of an Article III court) and the legislative power (by nullifying a law eliminating executive discretion to disturb federal sentences).

A. The Attorney General of the United States does not have the authority to interrupt a federal sentence which has commenced and, under *Bond*, *Chadha*, and *Marbury*, Mr. Moody may seek to invalidate the attempt.

In 1984, Congress removed any discretion the Attorney General, via the Bureau of Prisons, had to release a federal inmate from his or her sentence before it was fully satisfied. 18 U.S.C. §§ 3621(a) (“A person who has

⁶ 564 U.S. 211 (2011).

⁷ 462 U.S. 919 (1983).

⁸ 5 U.S. 137 (1803).

been sentenced to a term of imprisonment . . . *shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed*, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.”) (emphasis added) and 3624(a) (“A prisoner *shall* be released by the Bureau of Prisons on the date of the expiration of the prisoner’s term of imprisonment, less any [good] time” or on “the last preceding weekday” before a weekend or holiday on which the release date falls.) (emphasis added).

Section 3624(a) “ma[d]e[] all sentences basically determinate.” *Mistretta v. United States*, 488 U.S. 361, 367 (1989). Prior to its enactment, “the Executive Branch [had] the discretion to release a prisoner before the expiration of the sentence imposed by the judge . . . [with] the Executive Branch’s parole official eventually determin[ing] the actual duration of imprisonment.” *Id.* at 364-65 (citations omitted). An earlier attempt to minimize sentencing disparities among individual judges “did not disturb the division of sentencing responsibility among the three Branches.” *Id.* at 365 (“The judge continued to exercise discretion and to set the sentence within the statutory range fixed by Congress, while the prisoner’s actual release date generally was set by the [Executive Branch].”).

“[I]n the absence of statutory or constitutional authority to the contrary, a sentence runs continuously from its date of imposition.” *In re Liberatore*, 574 F.2d 78, 90 (2d Cir. 1978) (citations omitted). “[O]nce entered,

such a valid final judgment based on ‘prior jurisdiction’ may only be modified in accordance with the laws of the sovereignty whose courts imposed that judgment.” *Id.* (citation omitted). Where an official lacks “authority to order interruption” of a sentence being served, any attempt to do so is invalid and “cannot be[] cured by any unauthorized ‘consent’ on the part of the” primary sovereign. *Id.* (citations omitted).

In *Marbury*, this Court explained that a cabinet officer “acts . . . in two capacities. As the agent of the President, he is not liable to a mandamus . . . As a ministerial officer he is compellable to do his duty, and if he refuses, is liable to indictment. A prosecution of this kind might be the means of punishing the officer, but a specific civil remedy to the injured party” is also available. *Marbury*, 5 U.S. at 149-50.

In *Bond*, this Court rejected the very reasoning relied upon by the Respondents and the Eleventh Circuit, explaining:

Amicus contends that federal courts should not adjudicate a claim like Bond’s because of the prudential rule that a party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. In amicus’ view, to argue that the National Government has interfered with state sovereignty in violation of the Tenth Amendment is to assert the legal rights and interests of States and States alone. That, however, is not so. As explained below, Bond seeks to vindicate her own constitutional interests. The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to a State.

Bond, 564 U.S. at 220 (internal quotation marks and citations omitted).

In *Chadha*, this Court held that an individual harmed by an act done pursuant to a statute may challenge the constitutionality of that statute, even if “a consequence of his prevailing will advance the interest of the Executive Branch in a separation of powers dispute with Congress, rather than simply [his] private interest.” *Chadha*, 462 U.S. at 936. This is because, if the litigant is successful, the challenged action will be void. *Id.* (“If the veto provision violates the Constitution, and is severable, the deportation order against Chadha will be cancelled.”). This Court rejected the argument that it should decline to entertain Chadha’s challenge “because Chadha is merely challenging Congress’ authority under” the Constitution. *Id.* at 940.

Mr. Moody’s challenge to the agreement of the two sovereigns as to his custody status is essentially indistinguishable from the argument against Chadha’s suit: Mr. Moody allegedly lacks the ability to challenge an agreement between the sovereigns—regardless of its legality—because he is attempting to vindicate the interests of one of the two sovereigns. Just as this Court rejected that reasoning in *Chadha*, the Eleventh Circuit should have rejected it here, concluding that Mr. Moody—the person injured by the Attorney General of the United States’ violation of law—could seek to invalidate the action that will result in his execution.

B. Permitting the Attorney General of the United States to interrupt a federal sentence duly imposed by an Article III court after it is commenced would violate the separation of powers and is cognizable under *Bond* and *Chadha*.

The federal government is comprised of three co-equal branches whose powers are separated. U.S. Const. art. I, § 1, art. II, § 1, art. III, § 1. This separation was “intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power . . . [t]o preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded.” *Chadha*, 462 U.S. at 957-58; *see also Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (“The Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just Government . . . Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.”). When one branch attempts to exercise the powers of another, the resulting attempt is without effect. *See, e.g., Bond, Chadha; Marbury*.

“[T]he Supreme Court has from the beginning maintained the rule that” another branch of government “may not retroactively disturb final judgments of the Federal courts,” and “adherence to that rule [i]s a protection of the separation of powers.” *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487, 1493 (6th Cir. 1993) (citing *Hayburn’s Case*, 2 U.S. 409 (1792)); *see also Plaut*, 1 F.3d at 1496 (“Applying the general principles of existing law to specific circumstances, and enforcing the rights between parties created thereby constitute the essence of the judicial power.”).

In both *Plaut* and *Hayburn's Case*, the other branch of government was the legislative, but there is no reason to believe that the executive branch fares any better in usurping the judicial power. *See United States v. Nixon*, 418 U.S. 683, 704 (1974) (The judicial power “can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto[.]”).

Mr. Moody has standing to challenge an act done in violation of the separation of powers, even if doing so would vindicate the powers of one of the branches of government, *Chadha*, 462 U.S. at 935-36, or a State, *Bond*, 564 U.S. at 220. The United States District Court for the Northern District of Georgia, which imposed Mr. Moody's federal sentences, is an Article III court “establish[ed]” by Congress. 28 U.S.C. § 90. Congress has removed the authority and discretion of the executive branch “to release a prisoner before the expiration of the sentence imposed by the judge.” *Mistretta*, 488 U.S. at 367 (citations omitted). The legislative branch has revoked the executive branch's authority to interrupt a federal sentence, and the determinate sentencing procedure that has existed since 1984 prevents the executive

branch from modifying a judgment of a federal district court as to a sentence.⁹

The Attorney General, in his ministerial role as the custodian of federal inmates, must comply with his duties under §§ 3621(a) and 3624(a). *See Marbury*, 5 U.S. at 149-50. Mr. Moody began serving his federal sentences before he was transferred to the State of Alabama on the Writ. Those federal sentences are still being served, 18 U.S.C. §§ 3621(a) and 3624(a), albeit in the physical custody of the State of Alabama.¹⁰ Attorney General Sessions has no authority to interrupt Mr. Moody's federal sentences, whether by ceding primary jurisdiction or in some other fashion. Any act to the contrary (whether called an "agreement" or something else) is void. *See In re Liberatore*, 574 F.2d at 90 (Where an official lacks "authority to order interruption" of a sentence being served, any attempt to do so is invalid and "cannot be[] cured by any unauthorized 'consent' on the part of the" primary sovereign.) (citations omitted).

This Court should grant the writ as to question one to permit Mr. Moody to challenge the Attorney General of the United States' usurpation of

⁹ The President, of course, has the authority to end a federal sentence early. He or she may do so by pardon or commutation. U.S. Const. art. II, § 2, cl. 1.

¹⁰ This is lawful. 18 U.S.C. § 3621(b) ("The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility . . . whether maintained by the Federal Government or otherwise[.]").

the judicial power by disturbing a final judgment of an Article III court, and usurpation of the legislative power by disregarding and nullifying a law enacted by Congress that eliminated executive discretion over sentence lengths and mandated that Mr. Moody—and inmates like him—remain in the legal custody of the federal government until their sentences are exhausted.

This Court should grant the writ because the Eleventh Circuit’s opinion has decided an important question of federal law that has not been, but should be, settled by this Court.

In *Moody I*, the Eleventh Circuit recognized that “[t]hree Supreme court cases from the 1920s set the stage for [the] review of Mr. Moody’s claims”: *Ponzi v. Fessenden*, 258 U.S. 254 (1922); *Morse v. United States*, 267 U.S. 80 (1925); and *Kelley v. Oregon*, 273 U.S. 589 (1927). *Moody I*, __ F.3d __, 2018 WL 1835319 at *5. After summarizing the three cases, however, the court concluded, none of them “directly control here” because they are distinguishable. *Id.* at *6. Filling the void left by this Court, the Eleventh Circuit reasoned, “Nevertheless, the cases provide important background, as they indicate (a) that primary jurisdiction in the criminal realm can be waived by the first sovereign in favor of the second sovereign, and (b) that a prisoner does not have a right cognizable in habeas corpus to complain about the order of his prosecutions or sentences.” *Id.* (citing B. Van Arsdale, et al., Federal Procedure § 22:52 (Feb. 2018)).

There is every reason to believe that this Court would decide the issue differently based on *Ponzi*, as the Eleventh Circuit acknowledged. *Id.* (“*Ponzi* suggests that the consent of the United States to have a convicted federal prisoner tried in state court should not prevent enforcement of an initial (and unexpired) federal sentence[.]”). Given that this is an important issue concerning the scope of habeas relief and involves a life, this Court should grant the writ and answer question one.

This Court should grant the writ because the Eleventh Circuit’s decision in *Moody II* has decided an important question of federal law that conflicts with this Court’s decision in *Ohio Adult Parole Auth. v. Woodard*.¹¹

In *Woodard*,¹² every justice agreed that an inmate subject to a valid death sentence retains a life interest of some kind. *Woodard*, 523 U.S. at 281 (Rehnquist, C.J., joined by Scalia, Kennedy, and Thomas, JJ.) (“We agree that respondent maintains a residual life interest, *e.g.*, in not being summarily executed by prison guards.”); *id.* at 288 (“A prisoner under a death sentence remains a living person and consequently has an interest in his life.”) (O’Connor, J., joined by Souter, Ginsburg, and Breyer, JJ.); *id.* at 291 (“There is, however, no room for legitimate debate about whether a living

¹¹ 523 U.S. 272 (1998).

¹² *Woodard* concerned “whether an inmate [sentenced to death] has a protected life or liberty interest in clemency proceedings[.]” *Woodard*, 523 U.S. at 276. Chief Justice Rehnquist “announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and III, and an opinion with respect to Part II in which Justice Scalia, Justice Kennedy, and Justice Thomas join.” *Id.* at 275.

person has a constitutionally protected interest in life. He obviously does.”)
(Stevens, J., concurring in part and dissenting in part).

Four members of this Court (Justices O’Connor, Souter, Ginsberg, and Breyer), concluded, “[We] believe that the Court of Appeals correctly concluded that some *minimal* procedural safeguards apply to clemency proceedings. Judicial intervention might, for example, be warranted in the fact of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.” *Id.* at 289 (emphasis in original) (O’Connor, J., joined by Souter, Ginsberg, and Breyer, JJ.).

Ultimately, Justice O’Connor concluded, “The process respondent received, including notice of the hearing and an opportunity to participate in an interview, comports with Ohio’s regulations and observes whatever limitations the Due Process Clause may impose on clemency proceedings.” *Id.* at 290.¹³

In Justice Gorsuch’s recent concurrence in *Sessions v. Dimaya*, 584 U.S. ___, 2018 WL 1800371 (Apr. 17, 2018), he noted the “faithful expression

¹³ Justice Stevens, providing a fifth vote for the holding that some process is due in executive clemency, would have remanded to the District Court “for a determination whether Ohio’s procedures meet the minimum requirements of due process.” *Id.* at 295 (Stevens, J., concurring in part and dissenting in part).

of ancient due process and separation of powers principles the framers recognized as vital to ordered liberty under our Constitution,” including the Fifth Amendment’s “guarantee that ‘life, liberty, or property’ may not be taken ‘without due process of law’ . . . [which] means the government generally may not deprive a person of those rights without affording him the benefit of (at least) those ‘customary procedures to which freemen were entitled by the old law of England,’” including notice. *Dimaya*, 584 U.S. at ___, 2018 WL 1800371 at *17 (Gorsuch, J., concurring in part and concurring in the judgment) (citations omitted).

The authority of Attorney General Sessions to waive primary jurisdiction over a federal inmate who has begun serving his federal sentence is considerably less discretionary than the constitutional authority of a governor to grant executive clemency to a death-sentenced inmate. *Compare Jarecha v. I.N.S.*, 417 F.2d 220, 225 (5th Cir. 1969) (“[W]here administrative discretion is exercised without the guidance of regulations, such as is the case here, the requirements of due process (aside from the requirements of notice, fair hearing, etc.) are met if the written decision of the administrative agency . . . [permits] reviewing courts . . . to ascertain whether [the] decision is arbitrary[] [and] capricious”), *with Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981).

The Bureau of Prisons (“BOP”) has a policy—Designation of State Institution for Service of Federal Sentence—that includes procedures for

determining when and how to make a federal sentence concurrent to a state sentence. BOP Policy No. 5160.05, https://www.bop.gov/policy/progstat/5160_005.pdf. The BOP also has a policy governing the release of federal inmates to state authorities, which “should occur within a reasonable period of time before the inmate’s release from the Federal sentence, *ordinarily within the last 90 days*.” BOP Policy No. 5140.035(5)(b) (emphasis added). Furthermore, there is a complex process required, and such a transfer cannot be considered “[i]f the inmate has an unsatisfied committed fine.” BOP Policy No. 5140.035(6). The “State authorities” are to be provided “with a letter that states the inmate may not be released on bail, bond, or his or her own recognizance as long as the Federal sentence is in operation; and requests the appropriate Regional Inmate Systems Administrator (RISA) be informed of any escape, death, or other release of the inmate prior to the Federal release date (pending arrival of a formal detainer request from the U.S. Marshals Service).” BOP Policy No. 5140.35(9)(a).

Mr. Moody did not even receive notice—until seven days before his scheduled execution—that Attorney General Sessions had applied no standards in deciding to “consent” to his execution while he is still serving his federal sentences. This lack of notice alone is incredibly troublesome. *See Dimaya*, 584 U.S. ___, 2018 WL 1800371 at *17 (Gorsuch, J., concurring in part and concurring in the judgment) (“Perhaps the most basic of due process’s customary protections is the demand of fair notice.”) (citation

omitted). The lack of any procedure becomes even more disturbing in light of Attorney General Sessions' own role in securing Mr. Moody's state court sentence when he was Alabama's Attorney General. Pet. App. A at 5a ("Mr. Moody suggests that the Attorney General may have a conflict of interest due to his involvement in the state prosecution during his service as the Attorney General of Alabama.").

This Court should grant the writ as to question two because the Eleventh Circuit's decision concerns an important federal question and is in conflict with this Court's precedent, especially given the stakes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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