

No. 17A1145
CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

◆
WALTER LEROY MOODY, JR.,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

◆
On Petition for a Writ of Certiorari to the
Court of Appeals for the Eleventh Circuit

OPPOSITION TO MOODY'S
APPLICATION FOR STAY OF EXECUTION

Steve Marshall
Alabama Attorney General

James R. Houts
Deputy Attorney General

State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300 Office
(334) 353-3637 Fax
jhouts@ago.state.al.us

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EXECUTION SCHEDULED FOR APRIL 19, 2018

CAPITAL CASE

Petitioner has filed a “consolidated” petition for writ of certiorari and a “consolidated” application for a stay of execution, seeking relief against two independent sovereigns. Respondent-Warden Cynthia Stewart cannot speak on behalf of the United States. Thus, this opposition to Moody’s application for a stay of execution represents the position and interests of Warden Stewart, as an officer and employee of the State of Alabama.

REASONS FOR DENYING THE STAY

Walter Leroy Moody, Jr., was convicted of the murder of United States District Judge Robert Vance by both the United States and the State of Alabama after receiving full and fair trials conducted in accordance with the constitution. Today, Moody comes to this Court seeking a stay of execution to prohibit the State from carrying out its valid state-court criminal judgment. He does so not on the basis of innocence, an irregularity in his trial proceedings, or other error relating to the State of Alabama’s valid judgment, but because he would like to serve his non-capital, federal (life) sentences before being subjected to justice at the hands of the State.

After the United States convicted Moody of multiple felonies for causing the deaths of Judge Vance and attorney Robbie Robertson, and for sending explosive devices to the main courthouse for the Eleventh Circuit Court of Appeals and the NAACP office in Jacksonville, Florida, through the United States mail, the State of Alabama sought to try Moody for murder of Judge Vance under state law. The federal government produced Moody under a writ of habeas corpus *ad prosequendum* and

Moody was tried, convicted, and sentenced to death. Moody was transferred to the State's death-row unit and the federal government consented to Moody's remaining in state custody. Since February 1997, Moody has lived on the death-row unit of the Holman Correctional Facility.

Not once during the past twenty years did Moody inquire as to why he was not returned to the federal Bureau of Prisons following his state trial; that is, until the State moved the Alabama Supreme Court for an execution date following this Court's denial of certiorari review after his habeas proceedings challenging his state-court judgment. It is undisputed that the United States filed a detainer with the Alabama Department of Corrections in 1998 evidencing its consent to Alabama's maintaining custody of Moody pursuant to that state-court judgment.

Once the State of Alabama sought an order authorizing Moody's execution, in January of this year, he inquired of the Commissioner of the Alabama Department of Corrections about his return to federal custody. Moody was informed that the United States had consented to his remaining in state custody and had evidenced its consent by filing a detainer. Thereafter, Moody elected to file a successive habeas petition against the warden of Holman Correctional Facility, alleging that she had a duty to return him to federal custody. Moody's claim has been rebuffed by the district court and the Eleventh Circuit, although for different reasons.

The issues presented by Moody, and the procedural history of this case, evidence two factors warranting denial of the requested stay. First, Moody does not have a substantial likelihood of success on the merits. Second, Moody's delay in

seeking to vindicate his claims weigh heavily against his request. A third reason, implicit in the nature of Moody's specific claims, also weighs against the requested stay: no party's legally-recognizable interests will be harmed if Moody's execution is allowed to proceed.

A. Moody has not established a substantial likelihood of success on the merits.

The district court concluded that Moody did not possess Article III standing to bring his claim against Respondent. While this was the correct view, the Eleventh Circuit disagreed with the district court's rationale and affirmed on the merits, based on record before the court. Importantly, under the rationale employed by either court, Moody has no chance of success on the merits of his claim.¹

A central issue in the Eleventh Circuit was whether the district court properly found that Moody lacked Article III standing based on his legal claim, brought by way of a habeas action by a state prisoner against a state warden. Moody sought a stay of execution in that court, on the basis that "there is a significant possibility of success on the merits as to whether the District Court had subject matter jurisdiction to consider the Petition." Emergency Mtn. for Stay of Execution, *Moody v. Warden*, No. 18-11229-P (11th Cir. April 13, 2018). But as this Court noted in *Munaf v. Geren*, 553 U.S. 674, 690 (2008), jurisdictional issues have nothing to do with the merits of a claim for purposes of a preliminary injunction. This Court observed:

¹ In fact, Moody's appeal made his prospects on the merits more dim. The Eleventh Circuit's rationale, if it correctly resolved the Article III question, would require a dismissal of Moody's petition with prejudice, rather than without as under the district court's judgment.

A difficult question as to jurisdiction is, of course, no reason to grant a preliminary injunction. It says nothing about the “likelihood of success on the merits,” other than making such success more *unlikely* due to potential impediments to even reaching the merits. Indeed, if all a “likelihood of success on the merits” meant was that the district court likely had jurisdiction, then preliminary injunctions would be the rule, not the exception. In light of these basic principles, we hold that it was an abuse of discretion for the District Court to grant a preliminary injunction on the view that the “jurisdictional issues” in Omar’s case were tough.”

Id. *Munaf* applies with equal force to Moody’s case. Far from establishing a likelihood of success on the merits, the constitutional-standing question makes Moody’s ultimate success on the merits less likely. This is especially true considering that the jurisdictional question exists voluminous precedent adverse to Moody’s position has referenced a prisoner’s lack of standing. Whatever the term “standing” means as applied in those cases, it has consistently meant (for decades) that prisoners are not entitled to relief on the grounds that Moody presents.

To review Moody’s claims, this Court would have a duty to revisit the Article III standing issue. *See Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016). Here, that question involves whether the independent action of the United States (the party who ceded custody of Moody to Alabama in 1997) was that of a third party (and separate sovereign) not present before the district court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)). The Article III question also involves a determination of whether redressability can be obtained through Warden Stewart and the State of Alabama, when neither the district court nor the State may order

the United States to exercise its discretion under the rule of comity in a particular manner. *See Lujan*, at 568-70 (finding the redressability component of Article III standing lacking because the Secretary of the Interior's ability to influence funding agencies was speculative and doubtful, particularly in the light of the position taken by the United States Solicitor General);² *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, (2006) (finding the redressability component of Article III standing lacking because the district court could not afford the relief sought by ordering a state legislature to allocate additional tax revenues (that themselves were speculative) in a manner favorable to the plaintiffs).

As a separate sovereign, the State of Alabama was permitted to rely on the United States' consent to its continued possession and custody of Moody pursuant to a valid state-court criminal judgment. Neither the district court nor the State possessed a legal right to order the United States to exercise its discretion under the rule of comity in a particular way. Thus, Moody's *habeas* lawsuit against the Warden – challenging the United States Attorney General's compliance with federal law – could not have provided redress. That is, as a separate sovereign the State of Alabama had no authority to speak on behalf or to exercise discretion under the rule of comity on behalf of the United States. *See Simon*, 426 U.S. at 42 (using the corollary of

² Additionally, this Court found that later participation in the lawsuit by the USAID and Department of State did not retroactively create redressability and jurisdiction that did not exist at the outset. *Lujan*, 504 U.S. at 569 n.4. Thus, the United States' appearance as *amicus* in the Eleventh Circuit did not cure the constitutional-standing deficiency posed by Moody's decision to pursue habeas relief against a state warden, when the relief he sought was an order requiring the United States to appear, seek Moody's return, and to accept Moody's return to custody.

plaintiffs' claim to determine that the component of redressability was lacking because it was purely speculative that a favorable ruling would result in additional hospital services to indigent persons); *see also Bowman v. Wilson*, 672 F.2d 1145, 1153 (3rd Cir. 1982) ("Those who assert jurisdiction, not those in their custody, are the beneficiaries of the rule allocating priority of prosecution to the sovereignty who first takes custody of a person.").

But even if this Court ultimately determined the existence of Article III standing, the fact that this issue is present and real warrants the denial of a stay. *See Munaf*, 553 U.S. at 690. Additionally, the standing issue is present only because numerous courts, in numerous cases, have held that prisoners lack standing to challenge custody decisions reached between two sovereigns. *See, e.g., Weekes v. Fleming*, 301 F.3d 1175, 1180 n.4 (10th Cir. 2002); *United States v. McCrary*, 220 F.3d 868, 870-71 (8th Cir. 2000); *Bowman*, 672 F.2d at 1154; *Weathers v. Henderson*, 480 F.2d 559, 559-60 (5th Cir. 1973) (per curiam); *Delong v. United States*, 474 F.2d 719, 720 (5th Cir. 1973); *In re Nix*, 465 F.2d 377, 377-78 (5th Cir. 1972); *Chunn v. Clark*, 451 F.2d 1005, 1006 (5th Cir. 1971); *Derengowski v. U.S. Marshal*, 377 F.2d 223, 223-24 (8th Cir. 1967). Whether that term is intended to reference constitutional standing or prudential standing makes no difference in the end.³ However "standing" is ultimately defined, these cases uniformly establish that Moody's claims lack merit.

³ Other than the fact that Article III standing is a constitutional limitation on the power of federal courts and courts should refrain from deciding hypothetical cases, such as those where the petitioner lacks constitutional standing.

Although Respondent doubts the Eleventh Circuit lacked the constitutional authority to reach the merits of Moody's petition, its decision in that regard illustrates why a stay is unwarranted. The Eleventh Circuit's discussion of *Ponzi v. Fessenden*, 258 U.S. 254 (1922), *Morse v. United States*, 267 U.S. 80, 82 (1925), and *Kelly v. Oregon*, 273 U.S. 589 (1927), correctly recognized two controlling issues. First, that "primary jurisdiction in the criminal realm is a matter of comity that can be waived by the first sovereign in favor of the second sovereign, and [second] (b) that a prisoner does not have a cognizable right in habeas corpus to complain about the order of his prosecutions or sentences." *Moody v. Warden, Holman Corr. Fac.*, __ F.3d __, 2018 WL 1835319, at *6 (11th Cir. 2018). That is, if Moody's petition stated a case or controversy for Article III purposes, the Eleventh Circuit correctly identified why his petition lacked merit.

Based on the United States' consent to the State of Alabama's execution of Moody's state-court sentence, the probable lack of Article III jurisdiction over Moody's petition against Warden Stewart, and the Eleventh Circuit's correct analysis of the merits of Moody's claims, a stay of execution is unwarranted. The improbability that Moody's petition could be considered on the merits, combined with the demonstrated lack of legal merit of his claims, is sufficient to deny the stay.

B. Moody's delay in seeking to clarify his custody status weighs heavily against granting a stay.

Moody's legal and factual theories have evolved throughout the short life of this proceeding. Moody's original communications were with the Commissioner of the Alabama Department of Corrections and his habeas petition was filed against

Warden Stewart, an employee of the Alabama Department of Corrections. Thus, Moody's initial actions in this case reflected a clear understanding that he was held in the custody of the Alabama Department of Corrections. His habeas petition could only challenge the State's custody.

Three days ago, Moody realized that Alabama did nothing wrong in accepting the United States' consent to the State's maintenance of custody pursuant to his state court sentence. On Monday, he filed a last-minute habeas petition naming the United States Attorney General. By his own actions, Moody has conceded that his legal dispute is with a separate sovereign, the United States, rather than Warden Stewart.

This is important because Moody never sought to clarify his custody status during the past twenty-one years, even though he was moved directly to the State's death-row unit immediately after his state trial. Moody has never explained why it would have been reasonable for him to assume that the federal government designated a state's death-row unit to house him for non-capital federal offenses. Moody had every reason to assert the claims he now pursues during the previous two decades. Had Moody timely pursued his claim against the federal government (or, the State), a stay would have been unnecessary. There was no impediment to his doing so.

This Court has held that "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. So much so, that "[a] court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at

such a time as to allow consideration of the merits without requiring entry of a stay.’” *Id.* (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)). Federal courts “can and should protect States from dilatory or speculative suits.” *Hill*, 547 U.S. at 585. Respectfully, this Court should exercise that equitable authority now to swiftly deny Moody’s request for a stay.

C. Under Moody’s own reasoning, there is no relative harm to denying a stay.

As is typically the case, the State’s interests in enforcing its valid criminal judgments is a necessary consideration in this case. As this Court has observed on prior occasions, “equity must be sensitive to the State’s strong interest in enforcing its criminal judgments without undue interference from the federal courts.” *Hill*, 547 U.S. at 584. Respondent asks this Court to consider this factor and to give it considerable weight as it considers Moody’s request.

Additionally, inasmuch as Moody is seeking to have his federal life sentences enforced ahead of the State’s death sentence, the harm that would come from denying a stay is minimal. Both the federal government and the State have imposed sentences reflecting that Moody should never leave his current state of imprisonment during his natural life. Further, the United States has thrice indicated that it has no objection to the state-court sentence being carried out. If Moody’s state sentence is carried out, no harm will come to either the federal government or the State.

While “harm” would certainly befall Moody if he is executed, a similar type of harm will come to him whether he serves his federal or state sentence to conclusion. Whatever interest Moody had in his life became forfeit once the State’s capital

sentence survived federal habeas scrutiny. This is so because Moody's challenge is not to the sufficiency or lawfulness of his death sentence. Indeed, he implicitly concedes he is subject to the death penalty for the murder of Judge Vance committed within the State of Alabama.

Because Moody's custody is a matter of comity between two independent sovereigns, the harm-analysis required by his stay request must focus on whether a premature end to his federal sentence would harm the United States. The United States' answer to that question has been a consistent "no." In *Ponzi v. Fessenden*, 258 U.S. 254 (1922), this Court recognized the importance of the federal government's consent in cases involving the rule of comity between the United States and a state. This Court recognized the authority of the Attorney General to exercise discretion as "the hand of the president in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses be faithfully executed. *Id.* at 262. There, the trial court was "given all the jurisdiction needed to try and hear [the prisoner] by the consent of the United States" and such arrangement "work[ed] in no way to the harm of the prisoner or of either sovereignty." *Id.* at 266.

The "harm" at issue in this case would be the harm to the federal government if Moody's federal sentences are prematurely terminated because of his execution. Arguably, the question presented by Moody is a false dilemma. If he is executed, at the time of his death he will have served a sentence of life imprisonment at the time of his death.

The question of whether a federal sentence has been interrupted – the most recent iteration of Moody’s claim since he filed his petition, but which can be found nowhere in that petition – involves whether the prisoner is entitled to federal credit for time served in state custody. *See, e.g., Free v. Miles*, 333 F.3d 550, 553-55 (5th Cir. 2003); *Weekes v. Fleming*, 301 F.3d 1175, 1181-82 (10th Cir. 2002). Assuming *arguendo* this question can be reached even though Moody raised it for the first time on appeal, no harm would be prevented by staying Moody’s execution. Whether Moody is credited with twenty-one years toward his multiple federal life sentences at the time the State executes its judgment is a meaningless question, under the circumstances. If Moody is executed, the federal sentence of life imprisonment will have been executed simultaneously.

CONCLUSION

For the above-mentioned reasons, Respondent respectfully requests that this Court deny Moody’s application for a stay of execution.

Respectfully submitted,
Steve Marshall
Attorney General

s/ James R. Houts
James R. Houts*
Alabama Deputy Attorney General
*Attorney of Record