

No. 08-9991

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH MOSLEY,

Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

**ON PETITION FOR WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

MOTION FOR STAY OF EXECUTION

**KENNETH MOSLEY IS SCHEDULED TO BE EXECUTED
ON JULY 16, 2009.**

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On May 18, 2009, after Petitioner Kenneth Mosley had filed his Petition for Writ of Certiorari, this Court granted certiorari in *Wood v. Allen*, 08-9156. *Wood* will answer the vexing AEDPA question that has split the circuits: the interaction between 28 U.S.C. § 2254(d)(2)'s "unreasonable determination of the facts" provision and 28 U.S.C. § 2254(e)(1)'s "clear and convincing" evidentiary burden necessary to overcome the presumption of correctness that attaches to state-court fact findings. This issue is subsumed in the Second Question Presented in Mr. Mosley's Petition for Writ of Certiorari:

Whether Petitioner received ineffective assistance of counsel where trial counsel failed to conduct a meaningful mitigation investigation and failed to present readily available mitigation evidence during the penalty phase of Petitioner's capital trial.

In rejecting Mr. Mosley's *Wiggins* claim, both the District Court and the Court of Appeals piggybacked the "clear and convincing" burden onto the "unreasonable determination of the facts" analysis. Absent a stay of execution, Mr. Mosley will be executed without having been afforded a proper review of his claim. Accordingly, Mr. Mosley asks this Court to stay his execution pending the disposition of *Wood*.

Wood raises the (d)(2)/(e)(1) issue in the context of a *Wiggins* failure-to-investigate claim. Specifically, this Court will resolve the following question:

Whether the rule followed by some circuits, including the majority in this case, abdicates the court's judicial review function under the Antiterrorism and Effective Death Penalty Act by failing to determine whether a state court decision was unreasonable in light of the entire state court record and instead focusing solely on whether there is clear and convincing evidence in that record to rebut certain subsidiary factual findings.

A stay of execution is warranted here because there is: (1) a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; (2) a significant possibility of reversal of the lower court's decision; and (3) a likelihood that irreparable harm will result if no stay is granted. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983); *Moore v. Texas*, 535 U.S. 1110 (2002).

In light of the *Wood* certiorari grant, at least four Members of the Court already consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction. Moreover, as indicated in Mr. Mosley's petition for writ of *certiorari*, there is a significant possibility of reversal of the Fifth Circuit's decision. That the circuit courts have split

on the issue demonstrates this possibility's significance. Finally, the harm to Mr. Mosley if no stay is granted—his execution—is irreparable. If this Court decides that under federal law Mr. Mosley, having been denied a hearing in federal court on his *Wiggins* claim, was not required to overcome the presumption of correctness of the state-court findings by clear and convincing evidence, he will have been executed without having his claim decided under a standard of review that entitles him to relief.

While most capital murder prosecutions involve the presentation of evidence in two stages, Mr. Mosley's trial had, in effect, only one phase. That phase concerned his guilt. Even though Mr. Mosley was on trial for his life, and even though the law contemplates that mitigating evidence will be presented at the punishment phase of trial, Mr. Mosley's counsel did not pursue any opportunity to mitigate Mr. Mosley's punishment. Trial counsel called only two witnesses during the punishment phase – a Garland Police Officer (obviously not a friendly witness) and a former co-worker – neither of whom were able to explain the effects of drug abuse on an individual. The latter witness ignorantly attributed Mosley's conduct to simple drug abuse -- a conclusion directly contradicted by the evidence developed in state habeas proceedings.

The failure to adduce mitigation evidence was not due to the lack of such evidence. The state habeas record clearly shows that Mr. Mosley suffered from a lifetime of mental health issues. He grew up in a very violent and abusive rural household. From an early age, he was exposed to a variety of lethal pesticides. Neuropsychological testing established that this environmental poisoning caused organic brain damage. That brain damage, coupled with depression and his abusive childhood, plagued Mr. Mosley throughout his life. Additionally,

these problems drove him to seek relief through extensive drug use. Unfortunately, the drug use served to exacerbate both the brain damage and depression he suffered. Eventually, Mr. Mosley was caught in a downward spiral of brain damage, depression, and drug abuse that made it impossible for him to function as a contributing member of society. He made several efforts to right himself by seeking drug treatment and related counseling. Notwithstanding these efforts, he failed. At the time Officer Moore was killed, Mr. Mosley was heavily drug dependent, severely depressed, isolated from his family and friends, and at the lowest point in his life.

In reviewing the *Wiggins* claim, the District Court and Court of Appeals required Mr. Mosley to prove that the state court findings involved an unreasonable determination of fact in light of the record *and* to overcome the presumption of the correctness of the state court findings by clear and convincing evidence. The Fifth Circuit conflated the review standards found in (d)(2) and (e)(1), imposing a heightened and inappropriate burden on Mr. Mosley. The two provisions occupy separate sections in AEDPA's scheme for a reason – they are not intended to be applied conjunctively. Rather, reviewing courts should analyze the propriety of state-court findings under (d)(2)'s “unreasonable determination” standard, without coupling the requirement that such determination be overcome by “clear and convincing evidence.”

The Fifth Circuit's “piggybacking” of (d)(2) and (e)(1) is apparent in its analysis of Mr. Mosley's *Wiggins* claim:

The district court similarly denied habeas relief to Mosley. There, Mosley argued that his counsel failed to investigate and present evidence that he had a long history of depression, which he self-medicated with drugs; that he suffers from frontal lobe impairment and diffuse brain injury; and that he was exposed to pesticides while growing up and working on a plantation in the segregated South. Despite this, the district court concluded that Mosley failed to overcome by clear and convincing evidence the presumption of correctness enjoyed by state court findings. Further, it determined that the state court's conclusions were not an

unreasonable application of federal law or based on an unreasonable determination of the facts in light of the presented evidence.

* * * *

Here, Mosley's counsel conducted a reasonable investigation. Counsel interviewed Mosley, Mosley's family members, friends, counselor, co-workers, and acquaintances. Counsel reviewed Mosley's medical records and consulted a psychiatrist. Nonetheless, Mosley argues that counsel's investigation was inadequate because it failed to uncover the possibility that Mosley suffered from brain impairment. According to Mosley, the investigation would have uncovered this had counsel heeded the psychiatrist's recommendation that Mosley undergo neuropsychological testing. However, Mosley's counsel's recollection of receiving such a recommendation differed from the psychiatrist's, and the state court found counsel's recollection more persuasive. Mosley has not controverted this finding with clear and convincing evidence. The district court's denial of this claim is therefore not debatable, and we deny a COA for this issue.

Mosley v. Quateman, 306 Fed. Appx. 40, **4 (5th Cir. 2008).

Mr. Mosley argues that he did, indeed, demonstrate the unreasonableness of the state court's findings that defense counsel's recollection – made without any resort to a file or case documents – was superior to the evaluating psychiatrist's, who kept meticulous records and continued to retain a file in this case. The state court's decision was unreasonable because it reached its credibility determination without the benefit of live testimony and without fully analyzing the fact that trial counsel had retained absolutely no file in this case. Thus, without the aid of any records, the state court unreasonably found trial counsel more credible than the treating psychiatrist who provided his recollection based largely on the files he retained in this case.

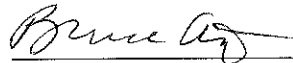
Had the Fifth Circuit properly applied AEDPA's standards of review, it would have been duty bound to assess whether the state court could have reasonably relied upon trial counsel's affidavit to the discredit of the opposing affidavit submitted by the evaluating psychiatrist.

Mandating that Mr. Mosley prove unreasonableness by clear and convincing evidence is inconsistent with AEDPA's standard of review.

CONCLUSION

The forthcoming resolution of *Wood* will undoubtedly impact Mr. Mosely's *Wiggins* claim. If this Court determines that it is error for reviewing courts to require that both § 2254(d)(2) and § 2254(e)(1) be separately satisfied, one serving as the evidentiary standard to the other, in the absence of a federal hearing, then Mr. Mosley will be entitled to relief. For this reason and the reasons contained in the Petition for Writ of Certiorari, Mr. Mosley asks this Court to stay his execution, scheduled for July 16, 2009, and defer ruling on his Petition for Writ of Certiorari until the questions presented in *Wood v. Allen* have been resolved.

Respectfully submitted,



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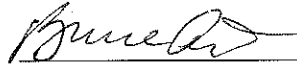
* Counsel of Record, Member Supreme Court Bar

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court; that I am counsel in this matter for Kenneth Mosley; that on this day, June 26, 2009, I caused the foregoing **Motion for Stay of Execution** to be served electronically on opposing counsel via e-mail delivery to:

Ms. Ellen Stewart-Klein
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and that all parties required to be served have been served.



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