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 Fifth Circuit Court of Appeals

RESPONSE TO MOTION FOR STAY OF EXECUTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

BRIEF IN OPPOSITION TO MOTION FOR STAY OF EXECUTION

Petitioner Kenneth Mosley is currently scheduled for execution on July 16, 2009.[1] On April 23, 2009, Mosley filed a petition for writ of certiorari alleging in part that trial counsel were ineffective for failing to investigate and present mitigating evidence, including evidence of brain damage, pesticide poisoning, depression, and childhood abuse. The Director has filed a brief in opposition, and Mosley's petition is currently pending before the Court. On May 18, 2009, this Court granted certiorari review in *Wood v. Allen*, No. 08-9156, in which the petitioner also claims that trial counsel were ineffective for failing to investigate and present evidence of mental impairments for purposes of mitigation. Mosley now asks this Court for a stay of execution pending the Court's resolution in *Wood*.

Mosley fails to acknowledge that *Wood* involves a set of facts entirely distinct from those in his case. In brief, Wood's attorneys entrusted the punishment phase of his case to a novice attorney just barely out of law school. There was evidence that trial counsel failed to pursue an investigation into Wood's mental functioning, which was deemed borderline. Also, the record was silent regarding counsel's decision not to present that evidence. Finally, the

[1] However, this date is apparently going to be withdrawn, and Mosley's execution will more than likely be rescheduled for a date late in August.

district court originally granted Wood relief. And although the Eleventh Circuit reversed, one judge filed a stinging dissent. Nothing similar occurred in Mosley's case. Therefore, a stay of execution is not warranted.

REASONS FOR DENYING A STAY OF EXECUTION.

Mosley is not entitled to a stay of execution because he cannot demonstrate a substantial denial of a constitutional right that would become moot if he were executed. In *Barefoot v. Estelle,* this Court explained that a stay is appropriate only when there is a "reasonable probability" that certiorari will be granted, a "significant possibility" that the Court will reverse the lower court's decision after hearing the case, and a "likelihood" that the applicant will suffer irreparable harm absent a stay. 463 U.S. 880, 895 (1983).

Mosley's motion is premised on this Court's grant of certiorari review in *Wood v. Allen*. Specifically, this Court granted review regarding the following two questions:

> 1. Whether a state court's decision on post-conviction review is based on an unreasonable determination of the facts when it concludes that, during the sentencing phase of a capital case, the failure of a novice attorney with no criminal law experience to pursue or present evidence of defendant's severely impaired mental functioning was a strategic decision, while the court ignores evidence in the record before it that demonstrates otherwise?
>
> 2. 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?

Wood v. Allen, No. 08-9156, Order of May 18, 2009. Mosley contends that his execution should be stayed pending the resolution of the second question.[2] He claims that the lower courts focused on certain factual findings while disregarding evidence demonstrating the unreasonableness of the state court's decision. The problem with Mosley's complaint is that *Wood* involves a set of facts with little similarity to Mosley's case. Indeed, it is clear that the Court granted certiorari review on the above questions because these questions are intertwined, not unrelated as Mosley apparently believes. In order to illustrate this point, a discussion of the Eleventh Circuit's opinion in *Wood* is necessary.

I. *Wood v. Allen*.[3]

In *Wood*, the petitioner alleged that "his counsel were ineffective in the penalty phase because they: (1) did not present to the jury evidence of Wood's borderline intellectual functioning and special education classes; and (2) failed to adequately investigate those issues before deciding against presenting mental health evidence." *Id.* at 1289. Wood's lead counsel, Cary Dozier, had Wood

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[2] These are the questions as posed by Wood, not the Court. Given the facts of Wood's case, the Court's concerns may not be exactly the same.

[3] 542 F.3d 1281 (11th Cir. 2008).

examined by a psychologist for purposes of both guilt-innocence and punishment. *Id.* at 1289-90. The psychologist, Dr. Karl Kirkland, found that Wood was reading on a less than third-grade level, "could not use abstraction skills much beyond the low average range of intellect," and had at most a borderline IQ. *Id.* at 1290. Dr. Kirkland also found that Wood had problems with impulse control, acting out, and anger management. *Id.* Counsel did not show the report to the jury. *Id.*

A very inexperienced attorney, Kenneth Trotter, handled the bulk of the courtroom portion of the penalty phase. *Id.* However, Trotter relied on the two other experienced attorneys regarding which evidence to present. *Id.* On habeas review, Dozier testified that they would have presented any information in Dr. Kirkland's report had it been useful. *Id.* at 1291. Yet he could not specifically recall reading the report, although "I'm sure we did." *Id.* Trotter testified that Dozier stated he looked at the report but that it was not useful. *Id.* Attorney Frank Ralph recalled that he and Dozier sat down together and reviewed the report. *Id.* at 1291-92.

Shortly before trial, the two experienced attorneys, Dozier and Ralph, decided that Trotter would represent Wood at the penalty phase, although Trotter understood that he was there mainly to assist. *Id.* at 1292. Trotter testified that he did not believe the defense was prepared to move forward with

the penalty phase, but after consulting with Dozier and Ralph, "their concerns about that were alleviated." *Id.* As a result, Trotter proceeded, although it was clear to Ralph that Trotter was nervous about the case, specifically being in front of a jury. *Id.* Trotter then relied on the advice of the other attorneys, spoke to the investigator and Wood's family, and obtained a capital defense book to better prepare himself. *Id.* at 1292-93. After the guilt-innocence phase, Trotter suggested that Wood receive an additional psychological evaluation, but Dozier determined "that nothing in Dr. Kirkland's report merited going further." *Id.* at 1294. Trotter informed the trial court that the defense did not intend on introducing Dr. Kirkland's report but asked the court for permission to have Wood evaluated again prior to the final sentencing verdict. *Id.* at 1295. During the defense's case-in-chief, Trotter put three of Wood's family members on the stand to testify about Wood's troubled childhood and to portray him as a sympathetic person who possessed good qualities despite these hardships. *Id.* at 1296. Evidence that Wood's alcohol consumption played a role in the offense was also admitted. *Id.* at 1296-97. By a 10-2 vote, the jury recommended that Wood receive a death sentence. *Id.* at 1297. A month later, the sentencing judge sentenced Wood to death. *Id.* at 1298.

On state habeas review, three evidentiary hearings were conducted. *Id.* at 1299. The state court ultimately found that trial counsel investigated a

possible mental-health defense but, for strategic reasons, decided against presenting it. *Id.* at 1300-01. Essentially, the state court deferred to Dozier's judgment that another psychological evaluation was not needed. *Id.* However, the federal district court granted relief, holding that counsel possessed evidence of Wood's borderline intellectual functioning, should have placed that evidence before the jury, but failed to investigate the matter any further. *Id.* at 1302. The Eleventh Circuit reversed, holding that counsel (1) gathered evidence via an investigator; (2) put on mitigating evidence about Wood's upbringing; and (3) obtained a mental-health evaluation but decided not to present that evidence because it would not be in Wood's best interests. *Id.* at 1303. The state court record "was silent as to counsel's particular reasoning behind the best-interest decision." *Id.* at 1304. Nonetheless, the panel held that the state court correctly applied Eleventh Circuit precedent mandating that counsel will be presumed to have exercised reasonable professional judgment when the record is ambiguous or silent. *Id.* at 1304-05. The court determined that Wood failed to rebut the presumption with clear and convincing evidence. *Id.* at 1305. Further, the court noted that Dr. Kirkland's report contained evidence harmful to Wood, including evidence of nineteen prior arrests, contradictory evidence of Wood's alcohol intake the day of the murder, and Wood's description of shooting a prior girlfriend. *Id.* Finally, the court explained in detail why Wood did not suffer any

prejudice. *Id.* at 1309-1314.

In a dissenting opinion, Circuit Judge Barkett stated that Wood was entitled to relief because "[a] fair reading of the entire record compels the conclusion that Wood's lawyers, in fact, did not adequately prepare for the penalty phase and their direct testimony concedes as much." *Id.* at 1315. Judge Barkett first noted "the appalling lack of preparation that went into the penalty phase" by highlighting Trotter's lack of experience and nervousness about taking over the punishment phase. *Id.* at 1316. Although the majority characterized Dozier and Ralph as being in control of the entire case,"Ralph's overwhelming testimony is that Trotter alone handled the penalty phase of Wood's trial, and that Ralph had nothing to do with it. Ralph was clear that counsel 'decided Ken Trotter would handle [the penalty phase] ... that that was going to be his responsibility.'" *Id.* at 1317. Judge Barkett also questioned Dozier's participation in the penalty phase, stating again that the record indicated Trotter handled the punishment phase and was not merely acting at the direction of Dozier and Ralph. *Id.* Moreover:

> Dozier did not recall whether he handled any of the witnesses for the penalty phase or whether he read Dr. Kirkland's report before trial or met with Dr. Kirkland, but he was "sure Frank [Ralph] or Trotter or some of us did." Dozier could not remember counsel's penalty phase strategy, noting that the "[o]nly thing [he] remember[ed] was something about [Wood's] childhood, and [he did not] recall what it was all about." Moreover, Dozier *did not recall* even having considered introducing evidence at the penalty phase

> based on Dr. Kirkland's findings. Dozier reiterated that it was "Trotter [who] handled the aggravating circumstances as far as the sentencing process went [and that] [b]asically [he (Dozier)] and Mr. Ralph were basically the trial lawyers." Dozier again stated that he and Ralph "basically designated Trotter to do the sentencing aspect of it."

Id. (emphasis in original). Further, the judge emphasized Trotter's discomfort with the "independent" role he was given:

> A couple of months before trial, Trotter expressed his frustration at the lack of supervision and guidance he was receiving in a letter to Kevin Doyle, a capital defense attorney from the Southern Poverty Law Center, stating, "I have been stressed out over this case and don't have anyone with whom to discuss the case, *including the two other attorneys.*" (emphasis added). Thus, there is little indication in the record that either Ralph or Dozier offered any guidance to Trotter—a lawyer with only a few months of legal experience—on how to proceed in the penalty phase of a capital case.

Id. at 1318.

Judge Barkett also criticized the defense's decision not to move for a continuance to better prepare for punishment and get a second psychological evaluation. *Id.* The judge believed that Dr. Kirkland's original findings should have given counsel a reason to pursue Wood's low intellectual functioning. *Id.* at 1319. And even though Trotter requested a second evaluation before sentencing, none of the defense attorneys followed up on the request. *Id.* The judge also noted that (1) Trotter never asked Wood's family about potential mental impairments; (2) Trotter failed to directly contact Wood's teachers;

(3) Trotter subpoenaed Wood's school records, but when that failed to produce the records, the defense did not follow up with any legal action to enforce the subpoena; (4) Trotter did not bring up the defense's request for state prison records until the day the jury was seated for the punishment phase, and the defense never saw the records; and (5) Trotter finally mentioned Dr. Kirkland's report to the judge at the sentencing hearing but presented no other evidence to support Dr. Kirkland's statements. *Id.* at 1319-20. The judge summarized:

> Simply put, the weight of the evidence in the record demonstrates that Trotter, an inexperienced and overwhelmed attorney, was given primary responsibility for investigating and preparing for the penalty phase of Wood's trial, and he was not given any significant assistance from the rest of the trial team. He realized too late what any reasonably prepared attorney would have known: that evidence of Wood's mental impairments could have served as mitigating evidence and deserved investigation so that it could properly be presented before sentencing. Due to Trotter's inexperience, and to Ralph and Dozier's lack of participation in preparation for the penalty phase, no investigation of Wood's mental retardation was conducted at all, and that alone is the reason it was never presented to the jury in mitigation. There can be no other reasonable reading of this record.

Id. at 1320.

Regarding the state court's finding that a silent record supported counsel's professional judgments, Judge Barkett concluded that the record revealed otherwise. *Id.* at 1321. First, Dozier was not the *de facto* lead attorney at punishment. *Id.* Second, the finding that counsel made a reasonable strategic

decision not to further investigate Wood's mental impairment was belied by the fact that Trotter attempted to obtain and present that evidence but "tried too late." *Id.* at 1322. Specifically, "Trotter's belated attempts to argue that Wood's mental impairments should be considered as mitigating evidence directly contradict the finding that Wood's counsel made a decision not to present mental impairment evidence during the penalty phase. Rather, Trotter's efforts prove that counsel hoped to do just that." *Id.* Third, even if counsel chose not to present this evidence, the judge believed that the decision was unreasonable given the lack of investigation. *Id.*

Finally, Judge Barkett agreed with the district court that counsel's deficiencies resulted in prejudice. Wood's mental impairments were essential to mitigation "because it would have offered the necessary context for the jury to have properly evaluated Wood's aberrant behavior before recommending a sentence." *Id.* That evidence would have also suggested that Wood was less morally culpable. *Id.* Additionally, the judge noted the close 10-2 vote by the jury—the minimum required under Alabama law—in recommending a death sentence. *Id.* at 1325. And, again, the judge turned to trial counsel's own statements in determining that Wood suffered prejudiced:

> At the Rule 32 hearing, Trotter admitted candidly, "I would like to have done more. I wished I could have done more. And I recall that at the penalty phase the verdict was ten to two. And I felt like if I could have just done a little more that maybe it could have been

> nine to three and that that would have been enough. And I regret that whatever it was to require that little more wasn't there." Moreover, Ralph testified, "I don't think that Trotter ... brought out enough of Wood's background through enough witnesses of the type of upbringing that he had had .... I felt like there were more circumstances in his background that were potentially mitigating that were not explored ...." Ralph further testified that the evidence presented at the penalty phase "seemed inadequate given the circumstances." Despite these observations, neither Ralph nor Dozier sought to introduce any evidence in addition to what Trotter presented.

Id. at 1323.

II. Mosley's Case Has Few If Any Similarities.

Mosley's suggestion that his case is somehow analogous to *Wood* is clearly erroneous. First, two federal judges are of the opinion that Wood should be granted relief. Not a single judge in Mosley's case has reached that conclusion. Indeed, the Fifth Circuit did not even grant Mosley a certificate of appealability ("COA") on his ineffectiveness claim. *Mosley v. Quarterman*, 306 Fed.Appx. 40 (5th Cir. 2008) (unpublished).

Second, this is not a case where the lead attorney might have passed off an entire phase of the trial to a fearful attorney fresh out of law school. Moreover, Mosley's attorneys never expressed any reservations about their preparedness for trial, nor did they make remarks critical of their performance or investigation.

Third, Wood's expert specifically found that Wood had borderline intellectual functioning. That finding must have raised a red flag with this Court. Mosley, on the other hand, does not come remotely close to mental retardation. His own state habeas expert concluded he "was of average intelligence, demonstrated a normal range of emotion, and exhibited no psychosis." *Mosley v. Quarterman*, 2008 WL 656887, *23 (N.D. Tex. 2008).

Fourth, the suspect factual finding in *Wood* was that counsel never provided a reason why they failed to pursue Wood's mental impairments for mitigation purposes. Dozier apparently looked at the doctor's report but only stated that it was not useful. Given a silent record, the state and federal appellate courts simply deferred to the attorneys. On the other hand, Dr. Jaye Crowder, the psychiatrist who examined Mosley before trial, informed Mosley's co-counsel, Wayne Huff, that *he* should not be called as a witness because his testimony would do more harm than good. "Huff concurred with this opinion because Crowder essentially stated that there was nothing wrong with [Mosley] other than his drug use." *Id.* at 22. Unlike Wood's case, deference must surely be afforded to an attorney who is told by his own expert that it is a bad idea to place him on the stand.

Fifth, Judge Barkett believed that Wood suffered prejudice because the mitigating evidence was powerful, his crime was serious but not so heinous that

a jury would never consider anything other than death sentence, and the jury's vote was close. Here, Mosley shot a police officer five times at point blank range, had multiple prior convictions, once raped a woman, and graphically insulted the jury when he testified. The jury deliberated for twenty-seven minutes before returning unanimous answers to the special issues requiring the court to sentence Mosley to death. 1 CR 5.[4] In short, no prejudice occurred.

Sixth, Wood's assertion that the Eleventh Circuit failed to consider the entire record may have merit considering his expert's findings, Trotters inexperience and trepidation, counsel's equivocations, the possible lack of investigation, and counsel's failure to explain their decision not to further investigate Wood's mental impairments. But Mosley's claim that the lower courts made a similar error is completely baseless.

The following are the facts pertaining to Mosley's allegation that counsel failed to investigate and present evidence of his alleged mental impairments and abuse. State habeas expert Dr. Ethel Hetrick conducted several neuropsychological tests on Mosley and determined that he had frontal lobe dysfunction. Dr. Paula Lundberg-Love concurred with Dr. Hetrick's opinion and

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[4] "CR" refers to the clerk's record of pleadings and documents filed with the court during trial, preceded by volume number and followed by page number. "SHCR" refers to the state habeas record, preceded by volume number and followed by page number(s).

believed that Mosley's mental impairments—poor impulse control, inattentiveness, and failure to inhibit behaviors—were probably congenital or caused by head trauma or exposure to pesticides. Affidavits provided by family members and Mosley himself stated that he was abused and exposed to pesticides as a child. Dr. Emily Fallis, who examined Mosley, opined that his deficits could be caused by drug abuse but more likely are due to pesticide exposure. Dr. Fallis stated that cocaine abuse may have exacerbated Mosley's problems and that Mosley may have been self-medicating his impairments.

However, as stated, Dr. Crowder found that Mosley had no impairments inconsistent with drug abuse. Moreover, lead counsel Jim Oatman testified via affidavit that he spoke extensively with Mosley and his family and reviewed medical records. Neither Mosley nor his family stated that he had a history of mental illness, head injuries, or brain damage. Everyone indicated that Mosley's problems were due to drug abuse; no one mentioned pesticide exposure. The pesticide issue is also undermined by the fact that Mosley's family members would have also been exposed to them, but they did not report that anyone else in the family experienced mental deficiencies as a result of such exposure.

Further, Mosley's medical records showed that he was treated for drug addiction, not mental illness. Indeed, although Charter Hospital records show that Mosley was diagnosed with major depression at one point, the depression

was attributed to cocaine withdrawal and a stressful life situation. He was also placed on an anti-depressant because he was craving cocaine. Additional treatment center records mention nothing about depression, which refutes the notion that Mosley was self-medicating his alleged brain impairments. TDCJ records revealed that Mosley reported that he did not have mental or emotional problems, never received psychiatric treatment, and showed no symptoms of a mental problem.

Through his investigation, Oatman learned that Mosley's father "whipped" the children, but he did not discover any evidence of abuse that would have mitigated Mosley's culpability. More importantly, although Mosley and his family now claim that counsel failed to make a proper inquiry into his mental impairments and alleged child abuse, their complaints are rendered moot because Mosley refused to allow any of them to testify at trial. He even threatened to disrupt the proceedings if counsel attempted to call anyone in his family to testify. Mosley has never explained how counsel could have demonstrated that he was raised in chaotic household without permitting his family to take the stand.

Mosley's claim suffers from additional flaws as well: (1) Dr. Hetrick's conclusion that Mosley has frontal-lobe impairment due to pesticide exposure is not only at odds with the information in the medical records and that

provided by the family, but it also was likely influenced by the fact that Mosley became upset that he might miss a meal while she was testing him; (2) Dr. Lundberg-Love admitted that scant evidence exists concerning the effects of repeated exposure to pesticides; (3) Although there is some dispute regarding whether Dr. Crowder advised Huff that Mosley should be examined by a neuropsychologist, there is no question that Dr. Crowder informed counsel to present an expert *who had not examined Mosley* to testify regarding how long-term cocaine abuse affects impulse control and aggression. And Crowder's new affidavit quotes from a letter he sent to Huff prior to trial that mentions nothing about Mosley needing neuropsychological testing; (4) Defense investigator Cliff Jenkins stated in his affidavit that the defense acquired and reviewed Mosley's medical records and that he talked to one of Mosley's drug counselors, which is additional evidence that counsel examined Mosley's medical history; (5) Mosley confirms in his own affidavit that counsel asked him questions about his medical records and the information contained in them; (6) Mosley's experts do not exactly agree regarding what caused his alleged brain deficiencies; and (7) Mosley's medical records show that he refused to finish treatment for drug addiction even after employees of the programs contacted him. *Mosley v. Quarterman*, 2008 WL 656887 at *19-*30; 1 SHCR 118-60, 288-98; 2 SHCR 331-32, 526-43.

Obviously, defense counsel had few options at punishment—Dr. Crowder informed counsel he should not testify and Mosley would not permit his family to take the stand. Thus, counsel called one witness to show that Mosley exhibited remorse, and a friend of Mosley's testified that Mosley was a decent man who ruined his life because of drug use. The defense's strategy was to show that Mosley became violent only because he took drugs and that, without them, he would not be dangerous. Mosley, however, did not aid his cause when he took the stand against counsel's advice and ended his testimony with a profanity-laced tirade directed at the jury.

Further, assuming for a moment that Mosley's claims are true, he does not explain how this new defense—frontal lobe dysfunction caused by pesticides or trauma and exacerbated by drug use—is superior to the defense his attorneys offered at trial. If anything, that argument is counterintuitive; a jury is more likely to consider an individual who commits violence attributable to permanent brain damage more dangerous than one whose violence can be alleviated by substance abuse treatment.

In sum, the lower courts reviewed all of the evidence in the case, even evidence submitted in federal court that is plainly unexhausted. *Mosley v. Quarterman*, 2008 WL 656887 at *26. Mosley's chief complaint is that defense counsel Huff lost his records but was deemed credible by the state court, while

doctors who kept records were not. This constitutes a distortion of the entire record. As shown, Mosley's evidence of brain damage caused by pesticide exposure is at best contradictory and at worst refuted. He is also complaining about an alleged brain dysfunction minor in comparison to Wood's. More importantly, Mosley's suggestion that this state court finding places his case within the confines of *Wood* is absurd. In *Wood*, the state court deferred to counsel's judgment even though counsel knew Wood suffered from borderline mental functioning yet failed to offer a reason for not presenting that evidence. Mosley's attorneys were not informed of anything remotely similar. In fact, their own expert stated he could not help. Mosley does not explain how his claim would succeed if Huff had only retained his files. His allegation is wholly conclusory in this regard.

The bottom line is that while Mosley argues the state court "focus[ed] solely on whether there is clear and convincing evidence in th[e] record to rebut certain subsidiary factual findings" instead of determining "whether a state court decision was unreasonable in light of the entire state court record," he is actually not pleased with the federal courts's resolution of his claim after reviewing the entire record. The lower courts's analyses satisfied the dictates of AEDPA. *Id.* at *28 ("Not only has [Mosley] failed to overcome the presumption of correctness regarding the state habeas court's findings, but

[Mosley] has also failed to establish that the conclusions reached by the state habeas court were an unreasonable application of federal law or were based on an unreasonable determination of the facts in light of the evidence presented at the state level."). For these reasons, Mosley is not entitled to a stay of execution under *Barefoot v. Estelle*.

CONCLUSION

For the above reasons, the Director respectfully requests that Mosley's motion for stay of execution be denied.

Respectfully submitted,

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