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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Richard Dale Stokley, Petitioner-Appellant, vs. Charles Ryan, et al., Respondents-Appellees.	Case No. 09-99004 District Court No. CV-98-00332-TUC-FRZ **REPLY IN SUPPORT OF MOTION TO STAY MANDATE AND FOR REMAND RE: *MAPLES V. THOMAS*** **DEATH PENALTY CASE**

Petitioner Richard Dale Stokley, through counsel, hereby replies to Respondent's Response to Motion to Stay Mandate and for Remand re: *Maples v. Thomas*. (Ninth Cir. Doc. No. 88.) For the following reasons, Stokley urges the Court to grant his motion to stay the mandate and to remand the case to the district court for reconsideration of its procedural default rulings in light of *Maples v. Thomas*, 132 S. Ct. 912 (2012).

I. Introduction

Stokley has requested that this Court stay issuance of its mandate and remand the case to the district court for consideration of a substantial constitutional

claim; a claim which the district court previously dismissed as inexcusably procedurally defaulted. (*See* Dist. Ct. Doc. No. 33 at 32-44; Dist. Ct. Doc. No. 49 at 39-59; Dist. Ct. Doc. No. 59 at 5-14.) Respondents do not dispute the procedural history outlined in the stay motion, and they do not dispute the legitimacy of the underlying constitutional claim; nor could they. The uncontroverted record shows that during its independent review of Stokley's capital sentence, the Arizona Supreme Court decided Stokley's appeal in a manner that was decidedly "contrary to . . . clearly established Federal law as determined by the Supreme Court of the United States." *See* 28 U.S.C. § 2254(d)(1).

By way of example, Respondents do not dispute that the Arizona Supreme Court decided Stokley's appeal contrary to the rule announced in *Skipper v. North Carolina*, 475 U.S. 1 (1986), when it excluded from its mitigation calculus relevant evidence of Stokley's good behavior during his pretrial incarceration. *State v. Stokley*, 898 P.2d 454, 524 (Ariz. 1995). The Arizona court just as clearly violated *Eddings v. Oklahoma*, 455 U.S. 104 (1982), when it held that other mitigation evidence, including evidence of an abusive, dysfunctional childhood, would not be considered relevant mitigation unless the evidence had an explanatory nexus to the offense. *Stokley*, 898 P.2d at 524. These state-imposed limitations on consideration of relevant mitigation are also contrary to the Supreme Court's established law. *Williams v. Ryan*, 623 F.3d 1258, 1270-71 (9th Cir. 2010); *Styers v. Schriro*, 547 F.3d 1026, 1035-36 (9th Cir. 2008). And what is more, as noted above, Respondents do not contest the fact that Stokley's capital sentencing rested on unconstitutional footing. Instead, Respondents argue that grounds for remand under Federal Rule of Appellate Procedure 41 are lacking, or that the new rule of law announced in *Maples* would not apply to Stokley. As explained below, these arguments do not withstand scrutiny.

II. Stokley Has Demonstrated Adequate Grounds for a Rule 41 Stay.

Respondents contend that grounds for stay of the mandate following the Supreme Court's denial of certiorari are not present. This is incorrect. This Court has inherent power to stay its mandate following the Supreme Court's denial of certiorari. *Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004). What is more, an intervening change in the law is an exceptional circumstance that will justify a stay of a mandate following denial of certiorari. *Id*. (citing *Alphin v. Henson*, 552 F.2d 1033, 1035 (4th Cir. 1977) (holding that an intervening change in the law justifies a stay of the mandate and a remand to the district court); *accord Bell v. Thompson*, 545 U.S. 794, 806 (2005) (citing *Alphin v. Henson* and its corresponding finding that a change in the law would qualify as rare exceptional circumstance allowing for a stay of mandate following denial of certiorari); *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1530 (9th Cir. 1989) (holding that a change of law shortly after panel opinion justifies recall of mandate). As explained below, the Supreme Court's decision in *Maples v. Thomas*, 132 S. Ct. 912 (2012), as applied to Stokley's case, represents a change in the law which warrants a stay of the mandate and a remand to the district court for a proper consideration of Stokley's claims.

III. The Contours of *Maples* and its Application to Stokley's Case.

Prior to the Supreme Court's decision in *Maples*, the Court had consistently held that the acts and omissions of state post-conviction counsel would be attributable to the client petitioner and would not constitute cause to excuse a procedural default. *Coleman v. Thompson*, 501 U.S. 722 (1991). In Stokley's case, the district court relied on *Coleman* when it held that the actions of Stokley's post-conviction counsel would not excuse default of the claims which are the subject of the pending motion for stay of the mandate. (Dist. Ct. Doc. No. 59 at 5-14.) In *Maples*, the Court qualified its decision in *Coleman*, deciding that evidence

showing post-conviction counsel's abandonment of the client would demonstrate that counsel was not operating as the client's agent, and in these circumstances counsel's default could not be attributable to the client petitioner. 132 S. Ct. at 922-23. The Court adopted longstanding agency principles to support its decision; *e.g.*, citing what it characterized as "hornbook agency law" in the Restatement (Second) of Agency § 112 (1957) that "the authority of an agent terminates, if without the knowledge of the principal, he acquires adverse interests, or if he is otherwise guilty of a serious breach of loyalty to the principal." *Id.* at 923-24. *Maples* marked a clear shift in the Supreme Court's procedural default jurisprudence, clearly limiting the reach of *Coleman.* Yet the record demonstrates that the district court simply applied the *Coleman* default rule, which on the presented facts, and in view of the *Maples* decision, was clearly the wrong standard for the assessment of cause and prejudice.

Respondents' protests to the contrary notwithstanding, the facts of Stokley's case fit squarely into *Maples*. Stokley's state post-conviction lawyer Harriette Levitt[1] was not merely negligent; although she was, egregiously so. She also abandoned her role as attorney for Stokley in the proceedings, and took up the mantle of the prosecutor, advocating against her client's interests in the proceedings. (*See* Opening Br. at 24-30, 80-82; Reply Br. at 29-35; *see also* Dist. Ct. Doc. No. 49 at 5-19.) As noted in *Maples* "hornbook agency law establishes" that "authority of an agent terminates if [the attorney agent] . . . is otherwise guilty of a serious breach of loyalty to the principal [client]." *Id.*

[1]Levitt was the same post-conviction attorney whose alleged inadequate assistance was at issue in the Supreme Court's recent decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). *See* Brief for the Petitioner at 6, *Martinez v. Ryan,* No. 10-1001 (U.S. Aug. 4, 2011).

As explained above, a serious breach of loyalty is plainly evident in Stokley's case. Respondents' argument that Stokley's case presents as one of simple negligence is unavailing. For similar reasons, Respondents' citation to this Court's decisions in *Towery v. Ryan*, 673 F.3d 933, 945-46 (9th Cir. 2012), and *Moormann v. Schriro*, 672 F.3d 644, 647-48 (9th Cir. 2012), are inapposite, given that each of these cases revealed at worst negligent conduct, and not abandonment or other serious breach of the duty of loyalty by state post-conviction counsel. In addition, these cases are further distinguishable in that they were in a different procedural posture than Stokley's case. Towery argued that pursuant to Federal Rule of Civil Procedure 60(b), he was entitled to relief from judgment because his previous federal habeas counsel had abandoned him by failing to include an exhausted claim in his federal habeas petition. *Towery*, 673 F.3d at 935-36. According to Towery, the Supreme Court's opinion in *Maples* provided him with an equitable exception to the statutory bar on second or successive petitions. *Id.* Moormann moved for permission to file a second or successive federal habeas petition based on *Maples*, or in the alternative, for the Court to recall its mandate and allow him to file "a belated Rule 60(b) motion in the district court." *Moormann*, 672 F.3d at 646 (noting that "[t]he standard Moormann must meet to file a second or successive petition is very high"). Due to the current procedural posture of Stokley's case, the strictures of Rule 60(b) or 28 U.S.C. § 2244(b) do not apply to this litigation.

Respondents finally argue that *Maples* would not apply to pending cases, citing 28 U.S.C. § 2244(b)(2)(A). This is incorrect for multiple reasons. First, because the Supreme Court gave Maples himself retroactive benefit of its decision, *id*. at 928, the decision must be given retroactive effect in all other courts where the application for habeas relief is still pending. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 90, 96 (1993) ("[W]e hold that this Court's application of a rule of

federal law to the parties before the Court requires every court to give retroactive effect to that decision.") In addition, since *Maples* did not announce a rule of constitutional law, no bar exists to limit its application in pending cases. *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1188 (9th Cir. 2011). And third, section 2244(b)(2)(A) does not apply because that subsection only applies to a new claim of constitutional law raised in a second or successive habeas petition. This case is not in that procedural posture because the underlying claim is not new.

Finally, Respondents argue that this Court has already assumed without deciding that Stokley could show cause and prejudice for the failure to present his ineffective assistance of counsel claim. Respondents argue that remand would be disfavored in these circumstances. This is not correct. Although this Court assumed Stokley had made a colorable showing of cause and prejudice for any default of that claim, it made no decision on the subject, finding instead that even assuming cause and prejudice, Stokley's underlying ineffective assistance of counsel claim lacked merit. The Court observed the pending certiorari grant in *Maples*, but noted it was not necessary to reach the *Maples* question in resolving Stokley's ineffective assistance claim. *Stokley*, 659 F.3d at 811 n.4. Most importantly, however, Stokley's ineffective assistance claim is not the subject of this stay and remand motion; as noted above, the claim at issue here involves the Arizona Supreme Court's unconstitutional failure to consider uncontroverted evidence in mitigation of Stokley's sentence. This is a different claim than the one that was the subject of this Court's opinion in this case.

Stokley has demonstrated an intervening change in the law, which satisfies the threshold requirement of exceptional circumstances before a mandate can be stayed following the denial of certiorari. *Beardslee* 393 F.3d at 901. "Once the threshold standard of exceptional circumstances has been satisfied warranting a temporary stay of the mandate, the usual standard for issuing a COA applies." *Id.*

A petitioner obtains a COA by showing that reasonable jurists could debate whether the petition should have been resolved differently, or that the issues presented deserve encouragement to proceed further. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). "The COA ruling is not, however, an 'adjudication of the actual merits' of petitioner's claim." *Beardslee*, 393 F.3d at 902 (quoting *Miller El*, 537 U.S. at 336-37). As the Supreme Court has cautioned, the threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. *Id.* Stokley has shown that his procedural claim of cause and prejudice arising under *Maples* and his underlying constitutional claim would be more than debatable among jurists of reason. He satisfies the requirements for a COA. The proper course is to remand the defaulted constitutional claim to the district court so that it can reconsider the cause and prejudice issue under the proper standard and rule accordingly on the merits of the claim.

IV. Conclusion

For the preceding reasons, Stokley respectfully moves the Court to stay its mandate and vacate that portion of the district court judgment that dismissed Stokley's constitutional claim that the state court excluded relevant mitigation from its consideration, and remand the case to the district court for further proceedings.

Respectfully submitted this 22nd day of October, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 2012, I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following registrant(s):

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