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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-99004

Richard Dale Stokely,

Petitioner,

-vs-

Charles L. Ryan, et al.,

Respondents.

CIV 98-0332-TUC-FRZ

RESPONSE TO MOTION TO
STAY MANDATE AND FOR
REMAND RE: *MAPLES V.*
THOMAS

Respondents urge this Court to deny Petitioner Stokley's motion to stay the mandate and remand in light of *Maples v. Thomas*, 132 S. Ct. 912 (2012), for the reasons stated in the Memorandum of Points and Authorities.

DATED this 9th day of October, 2012.

RESPECTFULLY SUBMITTED,

THOMAS C. HORNE

ATTORNEY GENERAL

S/JONATHAN BASS

ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR RESPONDENTS

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MEMORANDUM OF POINTS AND AUTHORITIES

Respondents oppose Stokley’s motion because he cannot show any circumstance to warrant a stay under the Federal Rules of Appellate Procedure, nor can he show that his post-conviction counsel abandoned him within the meaning of *Maples*, even assuming *Maples* applies retroactively. In any event, this Court addressed the underlying ineffective assistance claim on the merits in his appeal. Remand is unnecessary.

THE MOTION IS CONTRARY TO THE RULES.

This Court “must issue the mandate immediately when a copy of a [United States] Supreme Court order denying the petition for writ of certiorari is filed.” Fed.R.App. 41(d). The Supreme Court denied Stokley’s petition on October 1, 2012, the same day the order was filed. While the Court has recognized that Rule 41(b) “may authorize” a stay after certiorari is denied, “the circumstances where such a stay would be warranted are rare.” *Bell v. Thompson*, 545 U.S. 794, 806 (2005) (addressing Rule 41). For reasons addressed more specifically below, Stokley’s circumstances are not a rare exception to Rule 41(d)’s requirement that the mandate “must” be issued. This Court therefore should deny his motion and issue the mandate.

MAPLES PROVIDES NO REASON TO REMAND; THIS COURT PRESUMED NEGLIGENCE BY STOKLEY’S COUNSEL.

Preliminarily, Stokley cannot show that *Maples* applies retroactively. He

1 requests a stay and remand to district court so that he can prove that state post-
2 conviction counsel effectively “abandoned” him, justifying cause for his default.
3
4 (Mot. at 5.) After this Court denied Stokley’s appeal, but before he filed his
5 petition for a writ of certiorari, the Supreme Court “recognized that complete
6 abandonment of representation can justify belatedly reopening a matter consider
7 closed.” *Moormann v. Schriro*, 672 F.3d 644, 647 (2012), citing *Maples*, 132 S.
8 Ct. 912. Stokley unsuccessfully argued in his cert petition that *Maples* applied.

9
10 Stokely cites no authority for his contention that the holding in *Maples*
11 constituted a “significant change in the law.” (Mot. at 2.) But even if it did so, or if
12 it created a new rule, the *Maples* court did not state whether the holding should
13 apply retroactively. *See* 28 U.S.C. § 2244(b)(2)(A) (new rule must be made
14 retroactive by the Supreme Court).
15
16

17 Even if *Maples* were to apply retroactively, however, it provides no reason
18 to remand. In *Maples*, lawyers representing Maples ceased representation without
19 telling him; they did not serve as his agents in any meaningful sense, and they left
20 him in a situation where he lacked the assistance of any authorized attorney, so
21 “that, in reality, he had been reduced to a pro se status.” 132 S. Ct. at 927.
22
23 Significantly, they failed to file a notice of appeal on Maples’ behalf.
24

25 By contrast, Stokley has made no showing that his post-conviction counsel
26 abandoned him within the meaning of *Maples*. Stokley was always represented by
27 active counsel. The fault he attributed to his post-conviction counsel was that she
28

1 was negligent and interfered with his attempts to fairly present his claims in state
2 court. Such alleged failure is not “abandonment,” and are hardly the actions of an
3 attorney who has left his client to fend for himself. *E.g., Towery v. Ryan*, 673 F.3d
4 933, 935–36 (9th Cir. 2012) (no abandonment where habeas counsel failed to
5 include a “fully exhausted *Eddings-Tennard* claim in the amended petition”);
6 *Moormann*, 672 F.3d at 647 (no abandonment where defendant was “always
7 represented by active counsel”). Unlike Maples’ counsel, Stokley’s continued to
8 act as his agent, and he is bound by counsel’s actions. *Maples*, 132 S. Ct. at 922
9 (“[W]hen a petitioner’s postconviction attorney misses a filing deadline, the
10 petitioner is bound by the oversight and cannot rely on it to establish cause.”).
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15 In any event, this Court, in denying Stokley’s appeal, presumed negligence
16 by post-conviction counsel so as to proceed to resolve his ineffective assistance
17 claim on the merits. *Stokley v. Ryan*, 659 F.3d 802, 810–12. That is, this Court
18 “assume[d] without deciding that Stokley can show cause and prejudice for his
19 failure to present his claim in the state courts.” *Id.* Thus, the relief that Stokley
20 requests, the chance to argue that post-conviction counsel’s “abandonment”
21 constituted cause for default, is something that he has already received. A remand
22 is unnecessary.
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This Court, therefore, should deny Stokley's motion and immediately issue the mandate, pursuant to Rule 41(d).

RESPECTFULLY SUBMITTED this 9th day of October, 2012

THOMAS C. HORNE
ATTORNEY GENERAL

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DIVISION CHIEF COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 9, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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