

1 Jon M. Sands
Federal Public Defender
2 Cary Sandman (AZ Bar # 004779)
Jennifer Y. Garcia (AZ Bar # 021782)
3 Assistant Federal Public Defenders
407 West Congress Street, Suite 501
4 Tucson, Arizona 85701
(520) 879-7622 voice
5 (520) 622-6844 facsimile
cary_sandman@fd.org
6 jennifer_garcia@fd.org

7 Amy Beth Krauss (AZ Bar # 013916)
PO Box 65126
8 Tucson, Arizona 85728
(520) 400-6170 voice
9 abkrauss@comcast.net

10 *Counsel for Petitioner-Appellant*

11
12 IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

13
14 Richard Dale Stokely,
15 Petitioner-Appellant,
16 vs.
17 Charles L. Ryan, *et al.*,
18 Respondents-Appellees,

09-99004
District Court No.
4:98-cv-332-TUC-FRZ
DEATH PENALTY CASE
Motion to Stay Mandate and for
Remand re: *Maples v. Thomas*

19
20 Pursuant to Federal Rule of Appellate Procedure 41 and Ninth Circuit Local
21 Rule 41-1, Petitioner-Appellant Richard Dale Stokley respectfully moves the Court
22 to stay issuance of its mandate following the United States Supreme Court's denial
23 of the petition for certiorari in this matter, and for a remand of this case to the district
24 court for consideration of the application of *Maples v. Thomas*, 132 S. Ct. 912 (2012),
25 to a federal habeas corpus claim that the district court found procedurally defaulted
26 during the underlying proceedings in this case.

27 **INTRODUCTION**

28 Stokley's petition for writ of federal habeas corpus was denied by the district

1 court on March 17, 2009. (Dist. Ct. Doc. No. 98.) Stokley's appeal from that
2 decision was denied by this Court in *Stokley v. Ryan*, 659 F.3d 802 (9th Cir. 2011).
3 The United States Supreme Court denied his petition for certiorari on October 1,
4 2012. *Stokley v. Ryan*, No. 11-10249, 2012 WL 1643921 (Oct. 1, 2012) (order
5 denying certiorari). However, in the time between this Court's decision and the filing
6 of Stokley's petition for certiorari to the United States Supreme Court, that Court held
7 in *Maples* that abandonment by state post-conviction counsel could constitute cause
8 to overcome procedural default. 132 S. Ct. at 927. For the reasons explained below,
9 this ruling, which constitutes a significant change in the law concerning the doctrine
10 of cause and prejudice in federal habeas corpus proceedings, applies retroactively to
11 Stokley's federal habeas proceedings and warrants a stay of these proceedings and a
12 partial remand of this appeal to the district court to permit Stokley to litigate whether
13 abandonment by his post-conviction attorney constitutes cause for his failure (as
14 found by the district court) to exhaust his claim that the Arizona Supreme Court failed
15 to consider and give effect to compelling mitigation evidence as alleged in his federal
16 habeas petition and not currently before this Court.

17 **A. MAPLES CONSTITUTES A SIGNIFICANT CHANGE IN THE LAW, AND**
18 **STOKLEY SHOULD BE GIVEN THE OPPORTUNITY TO PROVE THAT**
19 **MAPLES APPLIES TO HIS CASE.**

20 This Court has inherent power to grant stays in pending appellate proceedings.
21 *See Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 880 n.6 (1998) (quoting *Landis v.*
22 *North American Co.*, 299 U.S. 248, 254-55 (1936)) (stating that the "power to stay
23 proceedings is incidental to the power inherent in every court to control the
24 disposition of the causes on its docket with economy of time and effort for itself, for
25 counsel, and for litigants"); *see also* 28 U.S.C. § 1651. Here, a stay would be an
26 equitable remedy that also furthers the interests of judicial economy, the resources of
27 counsel for both parties, and the public interest in the fair administration of justice.
28 *Compare Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (stating that
a stay may be appropriate where the resolution of related litigation could simplify

1 issues, proof or questions of law). Because Stokley has a compelling constitutional
2 claim that could be heard on the merits pursuant to *Maples v. Thomas*, 132 S. Ct. 912
3 (2012), he respectfully moves the Court to stay issuance of the mandate in his case
4 and remand it to the district court for reconsideration of the procedural default rulings
5 in light of *Maples*.

6 In *Maples*, the Supreme Court recognized for the first time that abandonment
7 by state post-conviction counsel can constitute cause for overcoming procedural
8 default. 132 S. Ct. at 927. In that case, the Court held that although it was not
9 disturbing the “general rule” from *Coleman v. Thompson*, 501 U.S. 722, 753-54
10 (1991), that merely negligent conduct by a state post-conviction attorney does not rise
11 to the level of cause to overcome a procedural default, it is “markedly different” when
12 an attorney’s conduct constitutes actual abandonment of the client under agency
13 principles. *Maples*, 132 S. Ct. at 922-23. In cases like *Maples*’ where his counsel
14 had failed to serve as *Maples*’ agent in any meaningful sense, counsel’s failures can
15 be significant enough to be considered an external impediment to the exhaustion
16 requirement and can thus constitute cause for default of claims. *Id.* at 927 (“There
17 was indeed cause to excuse *Maples*’ procedural default. Through no fault of his own,
18 *Maples* lacked the assistance of any authorized attorney during the 42 days Alabama
19 allows for noticing an appeal from a trial court’s denial of post-conviction relief. . .
20 . *Maples* was disarmed by extraordinary circumstances quite beyond his control.”).
21 Because Stokley also argued below that his state post-conviction counsel had
22 abandoned her role as advocate for Stokley and impeded his ability to present his
23 claims in state court due to her conflict of interest, and that this abandonment
24 constituted cause for the procedural default of one of his claims, he should be given
25 the opportunity to address the applicability of the Supreme Court’s holding in *Maples*
26 to his case.

1 **B. STOKLEY ARGUED BELOW THAT ABANDONMENT BY HIS STATE POST-
2 CONVICTION COUNSEL CONSTITUTED CAUSE FOR THE DEFAULT OF HIS
3 CLAIM.**

3 In Claim B2 of his Second Amended Petition for Writ of Habeas Corpus,
4 Stokley argued that the state courts violated his rights pursuant to the Eighth and
5 Fourteenth Amendments to the United States Constitution when they failed to
6 consider or give effect to mitigation evidence that he established by a preponderance
7 of the evidence. (Dist. Ct. Doc. No. 33 at 32-44.) As part of this claim, Stokley
8 argued that the Arizona Supreme Court failed to consider or give effect to a
9 significant amount of mitigation evidence, including evidence of Stokley's good
10 character and honesty; his family history of instability, abuse, and neglect resulting
11 in a history of chronic and severe drug abuse and several suicide attempts; his mental
12 disabilities and organic impairments; his cooperation with law enforcement; his good
13 behavior in jail; his lack of prior felony record; and his capacity for rehabilitation.
14 All of this evidence was presented to the trial court at sentencing, but the trial court
15 failed to give it any mitigating weight because the court mistakenly believed that it
16 could not consider or give effect to any mitigation evidence that was not directly
17 related to Stokley's culpability for the crime in this case. In its independent review,
18 the Arizona Supreme Court repeated these errors. As a result, Stokley's Eighth and
19 Fourteenth Amendment rights were violated. *See, e.g., Williams v. Ryan*, 623 F.3d
20 1258, 1270-71 (9th Cir. 2010) (finding unconstitutional error in the Arizona state
21 courts' use of a causal nexus test in considering and weighing mitigation evidence);
22 *Styers v. Schriro*, 547 F.3d 1026, 1035-36 (9th Cir. 2008) (same).

23 As noted above, Stokley raised this claim in his Second Amended Petition for
24 Writ of Habeas Corpus. (Dist. Ct. Doc. No. 33 at 32-44.) Respondents argued that
25 the claim was procedurally defaulted because it was not presented in state court.
26 (Dist. Ct. Doc. No. 44 at 30-31.) In his traverse, Stokley argued that the claim was
27 in fact exhausted through several different channels, but also alternatively that he
28 could prove cause and prejudice for any default. (Dist. Ct. Doc. No. 49 at 39-59.) As

1 cause for such default, Stokley argued that his state post-conviction counsel Harriette
2 Levitt abandoned her role as advocate for Stokley and had ceased to act as Stokley's
3 agent; instead, driven by a conflict of interest, she impeded Stokley from presenting
4 his claims in the proceedings.¹ (*Id.* at 5-21.) In reply, Respondents disagreed with
5 Stokley's arguments regarding the agency relationship, stating that "if there is no such
6 constitutional right to counsel, whatever the lawyer does or fails to do *cannot* be
7 "cause." (Dist. Ct. Doc. No. 59 at 6; *see also id.* at 5-14.)

8 In determining whether the claim was defaulted, the district court agreed with
9 Respondents, stating that all of Stokley's agency arguments were, in essence, a claim
10 that state post-conviction counsel was ineffective. (Dist. Ct. Doc. No. 70 at 27.)
11 Because there is no constitutional right to the effective assistance of counsel in state
12 post-conviction proceedings, the district court held that the agency arguments
13 "necessarily fail[ed] to establish cause." (*Id.*) The court denied Stokley's request for
14 an evidentiary hearing on cause and prejudice, and declined to reach the question of
15 prejudice. (*Id.* at 30.) Based on this ruling, the district court dismissed Stokley's
16 claim with prejudice and did not rule on the merits. (Dist. Ct. Doc. No. 70 at 36.)

17 C. **IN LIGHT OF *MAPLES*, THIS COURT SHOULD REMAND THIS CASE FOR**
18 **FACTUAL DEVELOPMENT IN SUPPORT OF STOKLEY'S CAUSE**
19 **ARGUMENTS.**

20 Because this Court lacks a complete record upon which it could address the
21 merits of a *Maples* argument in this case, it should stay the current proceedings and
22 remand the case to the district court. *See Loveland v. Hatcher*, 231 F.3d 640, 644-45
23 (9th Cir. 2000) (remanding to district court for evidentiary hearing to develop cause
24 and prejudice argument); *see also Runningsagle v. Ryan*, No. 07-99026 (9th Cir. July
25 18, 2012) (remanding case to district court for reconsideration of procedural default

26
27 ¹The Court detailed some of the problems with Levitt's representation of
28 Stokley in this case in its opinion, recognizing that, "at a minimum, Stokley was
placed in an untenable and unenviable situation during the state post-conviction
proceedings." *Stokley*, 659 F.3d at 810.

1 holdings in light of *Martinez v. Ryan*; *Lopez v. Ryan*, No. 09-99028 (9th Cir. April
2 26, 2012) (same). Stokley has already presented evidence to the district court that he
3 has a significant federal constitutional claim that the Arizona Supreme Court failed
4 to consider and give effect to mitigation evidence. However, because the court
5 rejected his arguments regarding cause for the procedural default of that claim,
6 Stokley was prevented from fully developing the factual record supporting his claims
7 that he was abandoned by his post-conviction counsel and that he was prejudiced as
8 a result. Accordingly, Stokley moves that he be permitted to return to the district
9 court for the opportunity to properly develop the factual basis for his allegations and
10 to fully litigate cause and prejudice for the default of his claim.

11 **CONCLUSION**

12 For the foregoing reasons, Stokley respectfully requests that this Court stay
13 issuance of the mandate in this appeal and remand the case to the district court for
14 consideration of an additional federal claim under *Maples*.

15 Respectfully submitted this 1st day of October, 2012.

16 Jon M. Sands
17 Federal Public Defender
18 Cary Sandman
19 Jennifer Y. Garcia

20 By /s/ Jennifer Y. Garcia
21 Counsel for Petitioner-Appellant
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2012, 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.

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 to:

Jonathan Bass
Assistant Attorney General
Arizona Attorney General's Office
Capital Litigation Section
400 West Congress Street, Suite 315
Tucson, Arizona 85701

/s/ Michelle Young
Legal Assistant
Capital Habeas Unit