

No. 09-99004

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD DALE STOKLEY,
Petitioner-Appellant,

vs.

CHARLES L. RYAN, ET AL.,
Respondents-Appellees.

On Appeal from the United State District Court
District of Arizona, No. CV-98-0332-TUC-FRZ

PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

DEATH PENALTY CASE

****EXECUTION SCHEDULED FOR DECEMBER 5, 2012 AT 10 AM MST****

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Petitioner-Appellant Richard Dale Stokley requests that the panel reconsider its denial of his Motion to Stay Mandate and for Remand re: *Maples v. Thomas*, or alternatively, that the Court grant this petition for rehearing en banc.

Introduction

Stokley's habeas corpus petition was denied in 2009. (ER 35-77.)¹ This Court affirmed that denial in *Stokley v. Ryan*, 659 F.3d 802 (9th Cir. 2011), *cert. denied*, 2012 WL 1643921 (Oct. 1, 2012). However, in the time between this Court's decision and the filing of Stokley's petition for certiorari, the Supreme Court held in *Maples v. Thomas*, 132 S. Ct. 912 (2012), that abandonment by state post-conviction counsel could constitute cause to overcome the procedural default of claims presented in federal habeas corpus proceedings. *Id.* at 927. On the same day that Stokley's petition for certiorari was denied and jurisdiction returned to this Court, he filed a motion arguing that *Maples* warranted a stay of his habeas proceedings and a partial remand of his case to the district court to litigate whether abandonment by his post-conviction attorney constitutes cause for the default of his claim that the Arizona Supreme Court failed to consider and give effect to compelling mitigation evidence.

The panel, in a 2-1 ruling, denied Stokley's motion because it concluded that he had not proven that he was abandoned by his state post-conviction counsel, and

¹Stokley has filed the relevant ER citations under separate cover with this petition. The original ER citations were previously submitted in Dkt. Entry 16.

that alternatively, he had not shown prejudice from the Arizona Supreme Court's underlying constitutional violation. (Ninth Cir. Doc. No. 101-1 ("Majority Op.") at 3, 8-9.) In dissent, Judge Paez stated that Stokley had alleged a prima facie case of abandonment sufficient to overcome the procedural default of his underlying claim. (Ninth Cir. Doc. No. 101-2 ("Dissent") at 1.) Relying on *Holland v. Florida*, 130 S. Ct. 2569 (2010), along with *Maples*, Judge Paez recognized that a serious breach of the duty of loyalty can constructively sever the agency relationship in much the same way as actual abandonment. (Dissent at 2-3.) Judge Paez also reiterated that briefing on the issues before the court was limited, and that remand was necessary to allow development of Stokley's arguments regarding prejudice and the merits of his underlying claim. (Dissent at 7-9.)

Statement Pursuant to Federal Rule of Appellate Procedure 35(b)(1)

En banc review of this case is appropriate because the panel's decision conflicts with prior decisions of this Court and the United States Supreme Court, and because Stokley's case presents questions of exceptional importance.

- I. Burdened by a conflict of interest, Stokley's post-conviction lawyer engaged in partisan advocacy against him in the proceedings, resulting in a serious breach of the duty of loyalty, renunciation of her role as his advocate, and implicit abandonment of Stokley. This constitutes cause for the procedural default of Stokley's underlying claim. The majority's decision conflicts with the United States Supreme Court's decision in *Maples v. Thomas*, 132 S. Ct. 912 (2012), necessitating en banc review.

- II. Stokley's constitutional rights pursuant to the Eighth and Fourteenth Amendments to the United States Constitution were violated when the Arizona Supreme Court refused to consider relevant mitigation evidence during its independent review of Stokley's sentence. The majority's decision is in error and conflicts with several decisions of this Court and the United State Supreme Court, necessitating en banc review.
- III. The majority erred in holding that Stokley could not prove prejudice. That decision is in conflict with the Supreme Court's opinion in *Hitchcock v. Dugger*, and presents a question of exceptional importance necessitating en banc review.

Argument

- I. **Burdened by a conflict of interest, Stokley's post-conviction lawyer engaged in partisan advocacy against him in the proceedings, resulting in a serious breach of the duty of loyalty, renunciation of her role as his advocate, and implicit abandonment of Stokley.**

All three judges on the panel agreed that *Maples* may encompass other forms of abandonment by counsel than those directly at issue in that opinion.² However, the majority concluded that Stokley could not show abandonment because “[t]he state courts did not view the relationship as a failed one.” (Majority Op. at 5.) But in *Maples*, the Alabama courts were as unconcerned over the petitioner's lack of counsel as the Arizona courts were in Stokley's case. *See Maples*, 132 S. Ct. at 918-21. Regardless of the state courts' view, fundamental

²Application of a legal rule does not require a “nearly identical factual pattern.” *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007); *see also Lockyer v. Andrade*, 538 U.S. 63, 76 (2003) (stating that an unreasonable application of clearly-established federal law can be found even when it involves a set of facts “different from those of the case in which the principle was announced”).

fairness and agency law justify the cause-and-prejudice exception to the exhaustion requirement under these circumstances. 132 S. Ct. at 927. And here, the principle of *Maples* applies because Levitt’s professional misconduct—her breach of the duty of loyalty—resulted in constructive abandonment.³

The state court appointed Levitt to represent Stokley in collateral proceedings.⁴ Levitt’s actions and inactions in this case arguably left Stokley in a worse position than he would have been in without any counsel at all. (Dissent at 3-4, 6 n.3.) Levitt never established an attorney-client relationship with Stokley and did not perform meaningful legal work on his behalf. And, Stokley was abandoned by Levitt after she was unwillingly reinstated to his case, took actions in direct conflict with Stokley’s interests in the litigation, and became an active partisan against him. *See Maples*, 132 S. Ct. at 923-24 (citing “hornbook agency law” 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

³This is not an argument Stokley has made for the first time in this procedural posture. In the district court, Stokley argued that Levitt’s actions destroyed any attorney-client relationship, and that her actions in impeding Stokley from presenting his claims in state court constituted cause for any procedural default of his claims. (ER 376-92.) The district court denied Stokley’s argument, citing *Coleman v. Thompson*, 501 U.S. 722 (1991).

⁴As noted by Judge Paez, Levitt is the same attorney whose alleged inadequate state post-conviction representation was at issue in the Supreme Court’s recent decision in *Martinez v. Ryan*, 132 S. Ct. 1309, 1320–21 (2012). (Dissent at 1.) *See* Br. for Petitioner at 6, *Martinez v. Ryan*, No. 10-1001 (U.S. Aug. 4, 2011) (identifying Ms. Levitt as Martinez’s state post-conviction attorney).

breach of loyalty to the principal”). The majority ignored Stokley’s arguments regarding Levitt’s breach of the duty of loyalty and her conflict of interest, focusing instead on the fact that she remained his attorney. (Majority Op. at 3-4.) The majority’s conclusion “is true only in the most formal sense and obscures the real issue, which is Levitt’s abandonment that was fully consummated after her forced reinstatement.” (Dissent at 6 n.3)

The problems with Levitt’s representation began at the outset. Ignoring the basic elements of ethically establishing an attorney-client relationship, Levitt engaged in no substantive communication with Stokley prior to filing the petition.⁵ (ER 601-02; ER 859-61.) Levitt’s billing records reflect that she did not begin reviewing the trial transcripts until eight months after her appointment. (ER 860-61.) Then, she expended a total of 7.5 hours researching all possible post-conviction legal issues, and drafting and filing the post-conviction petition. (*Id.*) Despite the extra-record nature of post-conviction proceedings, Levitt did not conduct any independent investigation aside from a few brief telephone calls to prior prosecution and defense team members regarding one of the issues she raised. She did not retain any expert witnesses. The petition Levitt eventually filed (after

⁵Levitt did have one twenty-minute telephone conference with Stokley prior to filing the petition, but this took place soon after her appointment and before she reviewed the record. This brief communication took place as the result of a collect call placed by Stokley. (ER 860.) In fact, during the entire course of her representation of Stokley, Levitt never once met him in person. (ER 601-02; ER 859-62.)

first missing the initial filing deadline), raised just two claims and included three-and-a-half pages of legal argument. (ER 872-880.)

After Stokley received a copy of the petition, he wrote a letter to the judge outlining his serious concerns. (ER 872; ER 717-18.) In the letter, Stokley stated that the petition was “sorely lacking and wholly inadequate.” (ER 717.) He informed the judge that he spoke to Levitt by phone and informed her that he was “concerned and dissatisfied with her work and the brevity of this 6-page, 2 issue Rule 32 [petition].” (*Id.*) He stated that it was “evident that [his] present appeal was handled with a lick and a promise, rather than being given the conscientious analysis and preparation which should be applied.” (*Id.* at 2.) Stokley further requested a stay of the proceedings and appointment of competent counsel because “the Rule 32 [petition] is a disgrace, and a good example of the very ‘ineffective assistance of counsel’ which it is meant to relieve.” (ER 717-18.) Stokley also wrote to the Arizona Capital Representation Project asking for help (ER 715-16), and filed a complaint with the State Bar of Arizona against Levitt.⁶ A copy of Stokley’s letter to the court was sent to Levitt, but the court took no action on his concerns. (ER 861.)

⁶A copy of Stokley’s bar complaint and its disposition is contained in the attached Appendix. The complaint was not adjudicated. Instead, Stokley was informed that his complaint could be dealt with in post-trial proceedings, and “[i]f there [was] a judicial determination that the lawyer acted improperly, [the bar counsel would] review the matter at that time.”

After receiving this communication, Levitt received notice of the bar complaint that Stokley had filed. (ER 861.) Levitt's billing records show that she spent one hour reviewing and preparing her reply to the State's objections to the post-conviction petition and an additional thirty minutes responding to the bar complaint. (ER 861.) After the trial court denied the petition on the merits (ER 124), Levitt filed a motion to withdraw, citing "irreconcilable differences" and a "complete breakdown of the attorney/client relationship." Levitt requested that new counsel be appointed. (ER 866.) The trial court granted the motion and appointed Carla Ryan as Stokley's new post-conviction counsel. (ER 867.)

Ryan immediately began work on Stokley's case, requesting the appointment of co-counsel and additional time in which to file a motion for reconsideration. (ER 845-47; ER 852-53.) However, the State just as quickly intervened to thwart the appointment. It "strenuously" opposed Ryan's motion for appointment of co-counsel, arguing that Ryan was requesting "a side-kick" to "milk this case for all it is worth as a cash cow." (ER 842-44; Dissent at 5-6.) The State also moved to reinstate Levitt, arguing that Stokley had no right to the effective assistance of post-conviction counsel and that Levitt's performance was thus "irrelevant." (ER 854-56; ER 833-40.)⁷

⁷The State also incorrectly argued that Stokley's "dissatisfaction apparently did not arise until after he learned that the petition had been unsuccessful,"

Within a matter of days, Ryan responded to the motion to reinstate Levitt, filed a reply to the State's opposition to her motion for appointment of co-counsel, and filed a motion alleging prosecutorial misconduct based on the State's actions in seeking Levitt's reinstatement. (ER 833-41; ER 730-41; ER 813-20.) During this litigation, and less than thirty days after her appointment, Ryan also filed a motion to amend the post-conviction petition, identifying more than thirty additional claims. (ER 681-701) Ryan expressly stated that the list of potential claims was not exhaustive, as she had not conducted the required investigation, retained expert witnesses, or considered all appropriate claims.⁸ (ER 681-701.) Before Ryan could proceed further, the trial court granted Respondents' motion as "well-taken," ordering that Levitt be reinstated. (ER 122.)

Once reinstated, Levitt filed a petition for review with the Arizona Supreme Court, challenging the trial court's denial of the six-page petition she had filed. (ER 665.) Levitt's petition for review was not designed to defend the petition; she included arguments regarding "Issues Raised by Carla Ryan," where Levitt

ignoring both the letter Stokley had written to the court and the bar complaint he had filed. (ER 846.)

⁸The majority states that the claim at issue here is not one that Ryan flagged in her motion to amend, but that is of no moment. Ryan never intended her list to include all potential claims for relief. (Dissent at 6 n.3.) Ryan litigated numerous issues surrounding her appointment and looming deadlines while also reviewing Stokley's case. In addition, the majority stated that the omission of Stokley's underlying claim was "telling" (Majority Op. at 4), but such an inference does not comport with its later conclusion that the claim was colorable (*id.* at 5-6).

defended herself from claims of incompetence and then argued that the claims Ryan sought to raise on Stokley's behalf were without merit. (ER 674-76.) Levitt engaged in advocacy against Stokley and his claims, and focused on defending her own actions. (Dissent at 6 n.3 (noting that Levitt "systematically dismantled" the claims suggested by Ryan in the motion to amend).) This was a conflict of interest, and Levitt's partisan actions not only breached her duty of loyalty to Stokley, but also indicated that she was incapable of functioning as his advocate.

Meanwhile, after reinstatement of Levitt and denial of the motion to amend, Ryan sought the Arizona Supreme Court's review of those decisions. (ER 651.) Ryan argued that the ethically-conflicted Levitt had taken up the role of the prosecutor, advocating against the very claims that Stokley was attempting to raise. (ER 618-19.) Ryan also argued that it was improper for the State to intervene in the selection of counsel, observing that its actions subverted Stokley's rights to the full and fair presentation of his constitutional claims in the state court necessary to exhaust his claims for later federal review. (ER 621-30.) Stokley weighed in at this stage as well, making his objections to the trial court's actions clear. (ER 268-69; *see also* Dissent at 5 ("This appeal is about life or death, and should not be about personalities or interference by the AG because they prefer one attorney over another. Sure they'd prefer an attorney who does nothing over one who fights.").)

The Arizona Supreme Court ignored Levitt's conflict of interest and denied Ryan's appeal; but in light of Ryan's argument that valid claims had been omitted from the original petition, the court granted Levitt leave to file a supplemental petition. (ER 120.) But Levitt had no interest in serving as Stokley's advocate. Levitt again refused to meet with Stokley, and correspondence between Stokley and Levitt indicated that she refused to provide Stokley with access to the record so he could make a *pro per* effort to identify claims. (Dissent at 4 n.2 (recognizing that "this refusal further supports a prima facie case of a serious breach of the duty of loyalty and interference with Stokley's attempts to fairly present his claims").) This was inexcusable because Levitt never reviewed any portion of the record herself. (ER 600-03.) In fact, on remand Levitt conducted no independent investigation of potential issues, and she spent a total of one hour evaluating the single issue she did raise. Her billing records confirm a grand total of two hours spent in preparation of the supplemental petition. A significant portion of that petition is consumed with additional arguments that Levitt asserted in opposition to claims that Stokley had suggested to Levitt in what should have been privileged attorney-client communications, had such a relationship existed. (ER 604-12.)

Subsequently, Levitt filed a supplemental petition arguing that trial counsel was ineffective for not investigating and presenting evidence related to Stokley's brain damage and diminished mental capacity. (ER 607-09.) Levitt did nothing to

investigate or to develop the factual or legal basis of the claim. (ER 600-03.) However, Levitt had already engaged in partisan prosecutorial advocacy against this claim when she argued in the petition for review that it was meritless. (ER 691-94; ER 674-76.) In fact, after submitting her unsubstantiated supplemental petition, Levitt filed a written request for a ruling, revealing her desire for a quick dismissal. “These filings do not support the majority’s suggested narrative of a loyal advocate making difficult strategic decisions in the best interests of her client.” (Dissent at 7.)

Stokley once again objected, submitting letters to the trial judge and to the Arizona Supreme Court, asking for assistance from a lawyer who would help him investigate and develop the factual basis of his claims, but his pleas for assistance once again were ignored by the courts. (ER 268-71.) As this Court previously noted, Levitt’s supplemental petition was quickly dismissed. *Stokley v. Ryan*, 659 F.3d 802, 810 (9th Cir. 2011) (“The supplemental petition was as vague as Levitt’s initial petition, and it failed to comply with Arizona Rule of Criminal Procedure 32.5, which requires petitioners to submit “[a]ffidavits, records, or other evidence currently available to the defendant” in support of claims to post-conviction relief”). (ER 116-19.) Following this denial, the Arizona Supreme Court denied both petitions for review and the state-court proceedings concluded. Levitt breached her duty of loyalty to Stokley and constructively abandoned him in these

proceedings, giving rise to the showing of cause under *Maples*. Based on this record, the majority's conclusions about Levitt's representation cannot stand.⁹

II. The Arizona Supreme Court refused to consider relevant mitigation evidence during its independent review of Stokley's sentence.

Stokley's arguments on cause and prejudice are necessary to excuse the procedural default of a claim he raised in the district court. (ER 489-501.) In that claim, Stokley argued that the state courts violated his rights pursuant to the Eighth and Fourteenth Amendments to the United States Constitution when they failed to consider or give effect to relevant mitigation evidence. (ER 489-501.) All three judges on the panel agreed that this claim is colorable (Majority Op. at 5; Dissent at 1), but the majority incorrectly concluded that the Arizona Supreme Court's decision might comport with constitutional principles and that in any event, Stokley cannot show prejudice from the violation. Both conclusions are incorrect and incompatible with other decisions from this Court and the Supreme Court.

During Stokley's direct appeal, the Arizona Supreme Court failed to consider relevant, significant mitigation evidence because it found that the

⁹As a final note, the majority also states that "Stokley's counsel stated that the record contained sufficient evidence to justify the relief requested and did not raise any issues that required factual development." (Majority Op. at 3 n.1.) But, the statement made by Stokley's counsel only involved the cause determination itself, not the additional required showing of prejudice or the merits of the underlying claims. (Dissent at 8.) In fact, Stokley has stressed that based on the district court's ruling on his cause argument (ER 114), he has never been provided with an opportunity to fully brief either his arguments on prejudice or the merits of the underlying claim itself.

proffered evidence did not constitute mitigation. *See State v. Stokley*, 898 P.2d 454, 472-74 (Ariz. 1995); *see also Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982); *Lockett v. Ohio*, 438 U.S. 586, 597-609 (1978). When considering Stokley's "chaotic and abusive childhood," the court stated that "[a] difficult family background alone is not a mitigating circumstance." 898 P.2d at 473. The court stated that such evidence can only be considered mitigation "if a defendant can show that something in his background had an effect or impact on his behavior that was beyond the defendant's control." *Id.* In addition, when reviewing evidence of Stokley's good behavior in jail while awaiting trial and sentencing, the court stated that it "reject[ed]" such evidence as a mitigating factor because a defendant would be "expected" to behave well while awaiting sentencing. *Id.* (citation omitted).

These are exactly the type of state-imposed limitations on mitigation evidence that the Supreme Court denounced in *Smith v. Texas*, 543 U.S. 37 (2004), and *Tennard v. Dretke*, 542 U.S. 274 (2004). Although the Arizona Supreme Court's opinion unequivocally shows that it excluded relevant mitigation contrary to *Eddings*, *Smith*, and *Tennard*, the majority's decision incorrectly suggests that the court may have later considered all of Stokley's mitigation during the independent review of his sentence. In its independent review, the Arizona Supreme Court expressly stated the mitigating factors it considered when deciding

whether the evidence was sufficiently substantial to call for leniency, and Stokley's family history and behavior during incarceration were not among them. *Stokley*, 898 F.2d at 474. The state court did not consider Stokley's family history or incarceration behavior after unconstitutionally striking this evidence as irrelevant.

Stokley's case is indistinguishable from other cases where this Court held that the Arizona Supreme Court employed unconstitutional limiting tests to its consideration of mitigation. *See Styers v. Schriro*, 547 F.3d 1026, 1035 (9th Cir. 2008) (holding that the Arizona Supreme Court's statement that it had "considered all the proffered mitigation" when conducting an independent review of capital sentence did not cure the application of unconstitutional causal-nexus test to exclude evidence that Styers suffered from post-traumatic stress disorder); *see also Williams v. Ryan*, 623 F.3d 1258 (9th Cir. 2010) (reversing a decision by the Arizona Supreme Court when the court refused to consider evidence of Williams's drug use because "[w]ithout a showing of some impairment at the time of the offense, drug use cannot be a mitigating circumstance of any kind" (citation omitted)). Nothing differentiates Stokley's case from *Styers* and *Williams*, and the panel's decision otherwise was not only incorrect, but in stark contrast to this Court's established precedent.

III. Stokley should be afforded an opportunity to prove prejudice.

Finally, the majority incorrectly held that even if the Arizona Supreme Court has committed constitutional error by failing to consider relevant mitigation evidence, the resulting constitutional violation was harmless because Stokley had not shown that the court's error had a substantial and injurious effect on the verdict as required by *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). As an initial matter, Respondents have never argued that any constitutional error here was harmless; instead, they have only argued that no constitutional violation occurred. Although the majority cites *Hitchcock v. Dugger*, 481 U.S. 393 (1987), for the fact that a harmless analysis applies in this situation, the Court in that case declined to undertake such an analysis specifically because the respondent had not urged it.

In addition, it is far from clear that such an analysis is required for Stokley to prevail on this claim – there is no indication that the Supreme Court analyzed the excluded mitigation evidence in *Tennard* or *Smith* for harmless error, and this Court did not do so in *Styers* or *Williams*. The *Hitchcock* Court mentions the possibility of conducting such review, but does not consider the question of its applicability. The systemic exclusion of relevant mitigation evidence may well rise to the level of structural error, making harmless error review inapplicable. *See, e.g., Brecht*, 507 U.S. at 629-30 (noting that some errors “infect the entire trial process,” defying analysis of harm); *see also Tennard*, 542 U.S. at 287-88 (stating

that the only applicable test is whether the evidence might serve as a basis for a sentence less than death). Under those circumstances, application of the *Brecht* standard to determine the prejudice resulting from an established cause would be inappropriate.

Further, this standard is especially troublesome when assessing error in evaluating mitigation evidence in a capital case; the Court in *Tennard* noted that the standard a panel of federal appellate judges might apply in evaluating mitigation evidence is not necessarily the same as the simple question of whether the evidence might serve as the basis for a sentence less than death. 542 U.S. at 287; *see also Lambright v. Stewart*, 241 F.3d 1201, 1208 (9th Cir. 2001) (noting that “[e]vidence of mental disabilities or a tragic childhood can affect a sentencing determination even in the most savage case”); *see also Ainsworth v. Woodford*, 268 F.3d 868, 874-78 (9th Cir. 2001) (finding prejudice from counsel’s failure to present evidence of the defendant’s “troubled childhood, his history of substance abuse, and his mental and emotional problems” despite the brutal facts of the underlying crime). These unexplored discrepancies are further evidence that Judge Paez was correct in concluding that a remand is necessary to allow the district court to consider, for the first time, briefing by both parties on prejudice and on the merits of Stokley’s constitutional claim. (Dissent at 8-9.) This Court is simply not

in a position to make a reasoned decision on these serious constitutional issues in the absence of a developed record. (*Id.*)

Conclusion

For the preceding reasons, Stokley respectfully requests that the panel's order be withdrawn and that the panel reconsider its denial of Stokley's motion. Alternatively, Stokley requests that the Court grant rehearing en banc. If the Court grants rehearing en banc, Stokley further requests the opportunity to file supplemental briefing on the issues raised in this petition.

Respectfully submitted this 19th day of November, 2012.

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By s/ Jennifer Y. Garcia
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Certificate of Compliance with Circuit Rules 35-4 and 40-1

I hereby certify that pursuant to Circuit Rule 35-4 and 40-1, the attached petition for panel rehearing and for rehearing en banc is proportionately spaced, has a typeface of 14 points, and contains 4172 words.

Dated: November 19, 2012

s/ Jennifer Y. Garcia

Certificate of Service

I hereby certify that on November 19, 2012, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit through 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.

s/ Nancy Rangel

Legal Assistant

Capital Habeas Unit