

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

REPLY RE: 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 hereby replies to Respondents' opposition to his motion for panel rehearing and rehearing en banc, and renews his request 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

I. Stokley's claim meets the standards for panel rehearing or en banc review.

Respondents argue that Stokley has not shown how this claim is appropriate for panel rehearing or en banc review (Ninth Cir. Doc. No. 105 ("Response") at 2-4), but that is incorrect. Stokley has not argued that this case should be reviewed solely because it is a capital case; instead, he meets the required standards of Federal Rule of Appellate Procedure 35. As Stokley explained, the majority's decision regarding the underlying claim in this case directly conflicts with the Supreme Court's decisions in *Tennard v. Dretke*, 542 U.S. 274 (2004), and *Smith v. Texas*, 543 U.S. 37 (2004), in addition to conflicting with two decisions from this Court. In addition, the majority's application of the harmless error standard from *Brecht v. Abrahamson*, 507 U.S. 619 (1993)—despite Respondents' failure to argue it—violates *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and raises a serious question about the applicability of that standard to this legal claim. For these

reasons, Stokley urges the panel to grant rehearing of its decision, or alternatively, for the en banc Court to grant review.

II. Stokley's claim has not already been resolved against him by the Supreme Court.

In their response, Respondents make the same erroneous argument that they made before the panel. They assert that Stokley is alleging “the same *Maples* claim” as that made in Stokley’s petition for certiorari following his appeal. (Response at 4.) This is simply untrue. In the petition for certiorari, the claim before the Court concerned only whether Stokley had raised a colorable claim of ineffective assistance at sentencing based on his trial counsel’s failure to investigate and present evidence regarding Stokley’s traumatic brain injuries and their connection to the crime. *See, e.g., Stokley v. Ryan*, 659 F.3d 802, 811-14 (9th Cir. 2011). The panel’s opinion was issued prior to the Supreme Court’s decisions in *Maples* and *Martinez*; accordingly, the petition for certiorari did ask for a remand for the Court to consider the application of those cases to his ineffective assistance of counsel claim. There was nothing raised or decided in the certiorari proceedings that implicates the claim currently before the Court. And in any event, the denial of a petition for certiorari “carries with it no implication whatever regarding the Court’s views on the merits of a case which it has declined to review.” *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (Frankfurter, J., respecting denial of certiorari).

III. Stokley was abandoned by his state post-conviction counsel because her conflict of interest resulted in a breach of the duty of loyalty, constructively severing the attorney-client relationship.

Stokley has never argued that the facts of his case are identical to those in *Maples*. This is not a situation where his state post-conviction counsel left her practice or moved out of state; in fact, Stokley likely would have been in a better position if Harriette Levitt, his appointed attorney, had done so. (Dissent at 3-4. 6 n.3.) But while the factual situation is different, the end result was the same: Stokley was not represented by counsel acting on his behalf during the majority of his state post-conviction proceedings.

While Respondents argue that Stokley did not face “complete abandonment” by his counsel, they fail to address his arguments about Levitt’s breach of the duty of loyalty and the conflict of interest she had in the proceedings. The problems in this case cannot be reduced to a simple disagreement about which claims to raise in the post-conviction proceedings. (Response at 5-7.)

When Levitt was forced to resume her appointment to Stokley’s case, her actions were focused solely on protecting herself against the allegations that she had performed ineffectively on Stokley’s behalf. She took no steps to reestablish a relationship with Stokley or to address the problems that lead to Stokley’s bar complaint against her or what she called the “complete breakdown” of their relationship. She did not conduct any investigation, retain any experts, or comply

with her ethical duties in representing a client in capital post-conviction proceedings. Instead, the bulk of her time was spent attempting to refute allegations by Carla Ryan, who was briefly appointed to Stokley's case, and attacking the claims Ryan suggested in her motion to amend. Levitt actively worked against Stokley's best interests, and prevented him from raising claims on his own by refusing to provide him with his file.

In addition, any comparison of Stokley's case to this Court's decision in *Moormann v. Schriro*, 672 F.3d 644 (9th Cir. 2012), must fail. In *Moormann*, the petitioner sought federal review of a new claim that had not been brought in his initial federal habeas corpus petition. To excuse the procedural default of this new claim, Moormann argued that his state post-conviction attorney had failed to conduct the necessary investigation to develop and present that claim. This scenario is decidedly different from the one Stokley faced, where his counsel actively litigated against him in the proceedings. Levitt admitted that the attorney-client relationship had been destroyed, and the State vigorously fought the court's decision to replace her. There is nothing in this case that resembles the facts of *Moormann* case, and that decision does not control here.

IV. The Arizona Supreme Court unconstitutionally excluded relevant mitigation evidence during its independent review of Stokley's sentence.

In arguing against Stokley's underlying claim, Respondents continue to ignore the plain language of the Arizona Supreme Court's opinion. (Response at

7-10.) The court began by stating that it would consider each “alleged” mitigating circumstance, *Stokley*, 898 P.2d at 472, then went through each of them in turn. Under the heading “Family History,” the court stated that “[a] difficult family background alone is not a mitigating circumstance.” *Id.* In support of that proposition, the court cited *State v. Wallace*, 773 P.2d 983 (Ariz. 1989), which stated:

A difficult family background, in and of itself, is not a mitigating circumstance. If it were, nearly every defendant could point to some circumstance in his or her background that would call for mitigation. A difficult family background is a relevant mitigating circumstance if a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control

Id. at 986.

This citation makes the court's meaning clear – without more, evidence of childhood abuse was not considered mitigation. This is an express violation of the rule of *Eddings v. Oklahoma*, 455 U.S. 104 (1982). *Stokley's* evidence of good behavior in jail was treated in the same manner, expressly violating the rule of *Skipper v. South Carolina*, 476 U.S. 1 (1986). The Arizona Supreme Court specifically stated that it was rejecting that evidence as mitigation. *Stokley*, 898 P.2d at 473. There is nothing in the opinion that changes these conclusions, and the court makes clear that when making the final determination as to whether the mitigation evidence was sufficient to call for leniency, it did not consider the evidence of *Stokley's* childhood abuse or good behavior in jail. *Id.* at 474 (“We

have considered the nonstatutory mitigating factors of lack of prior felony record and his mental condition and behavior disorders.”). Nothing in the court’s opinion supports the majority’s decision or Respondents’ arguments that the Arizona Supreme Court considered this evidence in mitigation.

In addition, Respondents’ argument that the Supreme Court’s decisions in *Tennard v. Dretke*, 542 U.S. 274 (2004), and *Smith v. Texas*, 543 U.S. 37 (2004), cannot apply to Stokley’s case because they were not clearly-established federal law at the time of his sentencing and direct appeal is incorrect. The Supreme Court made clear in those decisions that the Eighth Amendment requirement that all relevant evidence be considered in mitigation of a capital sentence was not new; this requirement could be traced back to *Eddings* and *Penry v. Lynaugh*, 492 U.S. 302 (1989) (“*Penry I*”). See *Smith*, 543 U.S. at 45 (also citing *Payne v. Tennessee*, 501 U.S. 808 (1991) and *Boyde v. California*, 494 U.S. 370 (1990)). All these cases were decided well before Stokley’s trial.

And, even if Respondents were correct that *Tennard* and *Smith* do not apply to Stokley’s case, this argument has no practical effect under the circumstances. This claim was raised in Stokley’s federal habeas petition in 1999 (ER 489-501), relying on *Eddings* and *Skipper* as the clearly-established federal law for purposes of the constitutional analysis. While *Tennard* and *Smith* definitively explain the nature of the constitutional violation that occurs as the result of state-imposed

limits on mitigation evidence, those violations themselves are framed here as violations of *Eddings* and *Skipper*. Finally, because this claim was not raised in the state court proceedings, if this Court finds that Stokley has shown cause and prejudice for the default of the claim, it will be reviewed *de novo*. *Cone v. Bell*, 556 U.S. 449, 472 (2009).

VI. Stokley has shown that he was prejudiced by Levitt's abandonment because the excluded mitigation evidence could have made a difference in his sentence.

Both the majority and Respondents discuss the facts of Stokley's crime, arguing that based on those facts, the mitigation evidence excluded by the Arizona Supreme Court would not have changed Stokley's sentence. (Response at 10-11.) However, Stokley was not the only participant in this crime, and the facts reveal that the co-defendant Randy Brazeal actually played a more active role in the crime than Stokley. As explained in the Opening Brief:

On the Fourth of July weekend in 1991 a celebration took place in Elfrida, Arizona. [Stokley] was living in a tent on the site of the festival with his friend, Jim Robinson. (ER 1945.54.) A group of local teens were also camping out at the festival. (ER 1945.50–1945.55, 1945.28–1945.29, 2085.) The evidence showed that as the weekend festivities unfolded, [Stokley] had no plan, design, interest or motivation to harm anyone; his primary activity that holiday weekend had been to participate in old west re-enactments to help raise money for a local charity. (ER 142, 1945.52.) Then on the evening of July 7, a twenty year old man named Randy Brazeal arrived at the site of the festival. Brazeal was observed making inappropriate sexual remarks to several of the children and he was overheard telling some of the boys about how much he liked a girl's pussy. (ER 1945.31–1945.33.)

Brazeal told [Stokley]'s friend Jim Robinson, that one of the teen girls was sexually active, and that she was going around screwing everybody. (ER 1945.60, 1945.65.) On more than one occasion that evening, Brazeal was discovered inside the girls' tent and it was [Stokley] who helped drag Brazeal out from there. (ER 1945.61–1945.62.)

Over that evening, Brazeal was also observed meeting alone with Mary Snyder and Mandy Meyers. Brazeal knew Mandy because he had been dating Mandy's 16 year old sister. (ER 1945.35.) At one point, Brazeal was seen entering the girls' tent and whispering something to Mandy and Mary. No one was able to overhear what was being said. (ER 1945.27, 1945.34–1945.37.) Later, Mandy and Mary (apparently by pre-arrangement with Brazeal) left their tent, reporting that they were going to the bathroom. They never returned. (ER 1945.66–1945.67, ER 1945.36–1945.37.)

The record does not reflect that [Stokley] ever had any prurient interest in teen girls, or woman of any age. However, [Stokley] did have a well-documented prior history of mental illness, and as a result of a series of well-documented severe head injuries, he had also sustained permanent damage to the frontal lobes of his brain. (ER 443–453.) What is more, persons who suffer from disorders such as those which affected [Stokley], frequently self-treat their troubling symptoms with alcohol, and for over 20 years that is what [Stokley] did. (ER 1652, 1664, 1666, 356–359.) On the evening of July 7, [Stokley] and Brazeal were seen drinking beer, and over a quart of Jim Beam whiskey. (ER 1945.56–1945.59, 1945.63–1945.64, 1945.39–1945.42.)

However, while Brazeal alone was devising a means to rendezvous with Mary and Mandy, the evidence is just as clear that all Petitioner wanted to do in the late hours of July 7 was to find a place to take a bath. (ER 2089.) [Stokley] had been camping at the festival site which had no bathing facilities and Brazeal agreed to accommodate [Stokley] by agreeing to drive him to the location of an outdoor water tank located several miles from the camping area near Gleeson, Arizona. (ER 2089.)

As they were leaving the camping area, apparently by pre-arrangement solely between Brazeal and the girls, Brazeal picked up Mary and Mandy and took them along on the drive to [Stokley]'s water tank bathing destination. (ER 2094.) The next day both [Stokley] and Brazeal were arrested for the murders of Mary and Mandy. In his later confession, [Stokley] related that after Brazeal dropped him off at the water tank, Brazeal drove off with Mary and Mandy. When [Stokley] finished his bath, he eventually located Brazeal's car and saw Brazeal having sexual relations with one of the girls in the back seat of the car. (ER 2074.) Brazeal told [Stokley] that the girls needed to be killed; that he had sex with both girls, and he told [Stokley] that the girls "are going to rat, and they're going to get you too." (ER 2089.) [Stokley] admitted to the police that after being told this, he had sexual relations with Mandy and that he caused her death. (ER 2091.) [Stokley] stated that Brazeal, who already had sexual relations with both girls, killed Mary. (ER 2091.) [Stokley] cooperated with the police investigation, by leading the investigators to a mine shaft where the girls' bodies were located. (ER 1945.70–1945.71, ER 1945.45–1945.49.)

(See Ninth Cir. Doc. No. 14 ("Opening Br.") at 4-6.)¹

Despite his actions on the night of the crime, Brazeal was allowed to plead guilty to second-degree murder with a maximum twenty-year sentence.² (ER 167.) This makes clear that the facts of the crime in this case do not preclude a sentence other than death, and as Stokley pointed out in his petition, the kind of mitigation evidence that was unconstitutionally excluded here can make a difference to a capital sentencer. (Petition at 16.) And, Respondents are not entitled to the benefit of harmless error review of Stokley's claim pursuant to *Brecht* because they failed

¹The ER cites in this section are to the ERs filed in the underlying appeal.

²Brazeal has already been released from prison after serving his twenty-year sentence.

to raise that argument in these proceedings. (Petition at 16-17.) Finally, they ignored Stokley's arguments about its questionable applicability under these circumstances, making it even more clear that the majority's decision should not stand under these circumstances.

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 20th 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 2,565 words.

Dated: November 20, 2012

s/Jennifer Y. Garcia

Certificate of Service

I hereby certify that on November 20, 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 A. Rangel
Legal Assistant
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