IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09–99004

Richard Dale Stokley, Petitioner-Appellant, v. Charles L. Ryan, Respondent-Appellee.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CIV– 98–0332–TUC-FRZ

RESPONSE TO PETITIONER'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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INTRODUCTION

Stokley seeks rehearing or en banc review of the panel's decision denying his request to stay the issuance of the mandate. Stokley argues that the panel erred by rejecting his assertion that *Maples v. Thomas*, 132 S. Ct. 912 (2012), provides a basis for relief because in Stokley's view his counsel "abandoned" him in state post-conviction proceedings. Stokley's claim fails, however, because counsel did not abandon him. Although Stokley and his counsel disagreed on strategy matters, that disagreement did not result in abandonment under *Maples*. In addition, Stokley contends the panel erred in finding that the Arizona Supreme Court did not violate *Eddings v. Oklahoma*, 455 U.S. 104 (1982), in considering his proffered mitigation evidence. The state court did not preclude Stokley from presenting any mitigation he could muster and considered all of his proffered mitigation.

On September 26, 2011, a three-judge panel unanimously upheld the district court's denial of Stokley's habeas petition challenging his two first-degree murder convictions and death sentences. *Stokley v. Ryan*, 659 F.3d 802 (9th Cir. 2011). In doing so, the panel carefully reviewed the state court record that Stokley submitted with this petition.

This case is not appropriate for rehearing, much less en banc consideration. The federal rules expressly provide that en banc review "is not favored" and usually will not be ordered except where needed to secure "uniformity of …

decisions" or in cases of "exceptional importance." F. R. App. P. 35(a). Similarly, the parallel circuit rule recognizes rehearing may be appropriate if the opinion "*directly* conflicts" with other cases "and *substantially* affects a rule of national application in which there is overriding need for national uniformity…." Ninth Circuit Rule 35–1 (emphasis added). Stokley's claims do not satisfy this standard.

Moreover, this case is not one of "exceptional importance" within the meaning of the federal and circuit rules. Though it is a capital case, it does not present significant or extraordinary legal issues. Stokley would have this Court grant rehearing to find cause to excuse a claim that would not have been presented in state court, even if he and counsel had gotten along famously.

Further, even if the *Eddings* claim is considered, Stokley has failed to show actual prejudice. The Arizona Supreme Court weighed and considered the proffered mitigation. Given Stokley's age of 38 years at the time he murdered two children, it was reasonable for the court to find no mitigating evidence of his childhood. It was also reasonable for the majority to conclude, in light of the aggravating circumstances, that any causal nexus error did not prejudice Stokley.

After Stokley's petition for rehearing or en banc review was denied, he petitioned the United States Supreme Court for a writ of certiorari. His petition alleged, in pertinent part, that the Court's new holding in *Maples v. Thomas*, 132 S. Ct. 912 (2012), signified a change in the law that warranted relief. In *Maples*,

the Court held that abandonment by post-conviction counsel could provide cause to excuse procedural default in a habeas claim. The Supreme Court denied his petition. *Stokley v. Ryan,* No. 11–10249, 2012 WL 1643921 (Oct. 1, 2012).

Stokley then filed a motion in this Court to stay issuance of the mandate, alleging the same *Maples* claim. The panel ordered oral argument, and then denied the motion in a 2–1 decision. *Stokley v. Ryan*, 2012 WL 5670171 (9th Cir. November 15, 2012). The majority ruled that Stokley failed to satisfy *Maples* because there was not a "near-total failure to communicate," *Holland v. Florida*, 130 S. Ct. 2549, 2563 (2010), nor had Stokley been "left without any functioning attorney of record." *Id*. at *2–4 (citing *Maples*, 132 S. Ct. at 927).

The majority further ruled that, even if *Maples* provided Stokley with cause to excuse procedural default, he could not show actual prejudice, citing *Brecht v. Abrahamson*, 507 U.S. 612, 623 (1993) (prejudice requires showing the error has a "substantial and injurious effect" on the sentence). *Id*. at *3. The dissenting judge voted to stay the mandate and remand the matter to the district court for a finding of cause of prejudice.[1] *Id*. at *7.

Stokley now argues for a panel rehearing or rehearing en banc. The State of

[1] As the majority observed, Stokley's counsel conceded that these issues could be resolved on the record and that a remand was unnecessary to develop any factual record. (Majority Op. at 3, n.3.) The State agrees that a remand would serve no purpose.

Arizona urges this Court to deny his petition.

THE PETITION SHOULD BE DENIED BECAUSE STOKLEY DOES NOT MEET MAPLES' HIGH STANDARD OF ABANDONMENT.

The majority properly ruled that Stokley failed to satisfy the exacting standard set forth in *Maples*, which is that only "*complete abandonment* of representation can justify a belated opening of a mater considered closed." *Moorman v. Schiro*, 672 F.3d 644, 647, citing *Maples*, 132 S. Ct. 912 (emphasis added). In *Maples*, the lawyers stopped acting as counsel without telling him and failed to file a notice of appeal on his behalf. In reality, Maples "had been reduced to pro se status." *Id*. at 927.

Nothing of the sort happened to Stokley. As the majority found, the record plainly shows that Stokley "was always actively represented by counsel," however much he complains about their relationship. Stokley, 2012 WL 5670171, at *2. Neither Arizona courts—nor this Court, when it unanimously affirmed the denial of Stokley's habeas petition—have ever viewed Stokley's relationship with PCR counsel as a failed one. *Id*. Rather, as the majority observed, "the clash here was one of substantive disagreement, not abandonment." *Id*. That characterization is affirmed by Stokley himself, whose complaints about PCR counsel centered on her refusal to raise issues he suggested. (*See, e.g*., ER 271).

Even if *Maples* could be read, as the dissent suggests, to provide cause in

circumstances when the agency relationship is "constructively severed," 2012 WL 5670171, at *4, Stokley's petition must still be denied. Regardless of Stokley's feelings about PCR counsel, the difficulties in their relationship did not reduce him to the "pro se status" found in *Maples*. While Stokley frequently blamed PCR counsel for rejecting the type and number of issues that he believed should be raised in the PCR proceeding, he was never "without any functioning attorney of record." *Maples*, 132 S. Ct. at 927. As the majority observed, PCR counsel—not Stokley—was responsible for evaluating potential claims and strategically choosing which ones to bring. 2012 WL 5670171, at *2 (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). And "[PCR counsel] made that judgment …." *Id*.

Thus, even if Stokley can show that PCR counsel was ineffective or negligent, the majority properly concluded that "he has not demonstrated that [PCR counsel] *abandoned* him within the meaning of Maples." *Id*. (emphasis supplied and footnote omitted.) This Court recently reached a similar conclusion in *Moorman v. Ryan*, 672 F.3d at 648 ("[A]lleged failure to investigate may be a claim of serious negligence, but it is not 'abandonment,'" citing *Maples*, 132 S. Ct. at 923).

Further, even if *Maples* could be read to provide cause to excuse Stokley's procedural default, "current counsel does not attempt to revive the claims that

Levitt rejected." 2012 WL 5670171, at *2–3. In other words, Stokley wants this Court to find cause to excuse defaulting a claim that he does not argue was negligently absent from the state court proceeding: the *Eddings-Tennard* claim, which he raised for the first time in his habeas petition. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Tennard v. Dretke*, 542 U.S. 274 (2004). Stokley fails even to argue, much less show, that PCR counsel's actions are responsible for his failure to exhaust this claim in state court.

Moreover, the panel, in affirming the denial of Stokley's habeas petition, already assumed (without deciding) that PCR counsel's conduct—the same conduct Stokley complains of here—was sufficient to establish cause and prejudice to permit the court to evaluate Stokley's ineffective assistance claim. *See* 659 F.3d at 810–11. Stokley has, in effect, already been given the benefit of *Maples*.

THE PETITION SHOULD BE DENIED BECAUSE STOKLEY CANNOT SHOW PREJUDICE, EVEN ASSUMING HE CAN SHOW CAUSE.

The majority[2] properly found that Stokley failed to show actual prejudice, even assuming he could show cause to excuse his procedural default. 2012 WL 5670171, at *3.

Stokley argued that the Arizona Supreme Court failed to consider proffered

[2] The dissent did not address the issues of prejudice or the merits of the claim. (Dissent at 7.)

mitigation that dealt with his childhood because it did not constitute mitigation. The majority described the claim as colorable, but nonetheless rejected it because the Arizona court "reviewed and discussed each of the aggravating and mitigating factors individually," as well as weighed and considered "all the evidence presented in mitigation at sentencing." *Id*. (citing *State v. Stokley*, 898 P.2d 454, 465, 468, 472–73 (Ariz. 1995). Several times in its opinion the Arizona court expressly announced it would consider all proffered mitigation, including that pertaining to Stokley's childhood. Ultimately, the state court found Stokley's family history not mitigating, particularly since he was 38 years old when he murdered the two girls. *Stokley*, 898 P.2d at 473.

Stokley's reliance on *Williams v. Ryan*, 623 F.3d 1258 (9th Cir. 2010) or *Styers v. Schiro*, 547 F.3d 1026, (9th Cir. 2008) is unavailing. This Court concluded that the record in those cases demonstrated that the Arizona courts failed to consider mitigation evidence proffered by the defendants. But in *Styers*, after this Court's remand, the Arizona Supreme Court disagreed with this Court's interpretation of the state court's use of a causal nexus test. *State v. Styers*, 254 P.3d 1132, 1135 n. 3 (Ariz. 2011) (finding that the Arizona Supreme Court had in fact previously considered Styers' PTSD as mitigation evidence).

Here, the Arizona courts considered and weighed the value of Stokley's childhood mitigation evidence that was offered, finding it not mitigating, given

Stokley's age. *See Stokley*, 898 P.2d at 468 ("Consistent with our obligation in capital cases to independently weigh all potentially mitigating evidence . . . [w]e turn, then, to a consideration of the mitigating factors."); *Stokley*, 2012 WL 5670171, at *3. The Arizona courts did not preclude Stokley from presenting all the mitigation he could muster. The panel majority correctly concluded that the Arizona courts completed their constitutional duty by considering Stokley's mitigation. *See Kansas v. Marsh*, 548 U.S. 163, 175 (2006) ("In aggregate, [this Court's] precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here.").

Stokley further contends that the state courts finding that his mitigation was not weighty because he failed to demonstrate any impact of his mitigation on his behavior at the time of the murders was a violation of *Smith v. Texas*, 543 U.S. 37 (2004), and *Tennard v. Dretke*, 542 U.S. 274 (2004). First, *Smith* and *Tennard* were decided years after Stokley was sentenced and his direct appeal decided. Thus, these cases were not clearly established Supreme Court precedent at the time for purposes of AEDPA review. *See* 28 U.S.C. § 2254(d)(1); *Williams*, 623 F.3d at 1282 (Ikuta, J., partially dissenting). Second, *Smith* and *Tennard* are not applicable here. In those cases, the sentencer was completely precluded from considering

relevant mitigation. In contrast, the state court here was not precluded from considering all of Stokley's proffered mitigation.

In light of the significant aggravating circumstances, the panel majority properly found that Stokley was not actually prejudiced, even assuming an *Eddings* violation. 2012 WL 5670171, at *3. As the majority noted, the aggravating circumstances were: (1) Stokley was an adult at the time of the crimes and the victims were under the age of 15; (2) Stokley was convicted of another homicide committed during the commission of the offense; and (3) Stokley committed the offenses in an especially heinous, cruel, and depraved manner. The majority summed up these circumstances as follows:

> The sentencing court found the following facts beyond a reasonable doubt. Stokley was convicted of murdering two 13-year-old girls over the July 4th weekend in 1991. Stokley is a person of above average intelligence. At the time of the crime, he was 38 years old. Stokley intended that both girls be killed. He killed one of the girls and his co-defendant killed the other.
>
> Before the men manually strangled the girls to death, both men had sexual intercourse with the victims. Both bodies were stomped upon with great force, and one of the children bore the clear chevron imprint from Stokley's tennis shoes on her chest, shoulder, and neck.
>
> Both victims were stabbed in their right eyes with Stokley's knife, one through the bony structure of the eye socket. The girls likely were unconscious at the time of the stabbing. The girls' bodies were dragged to and thrown down a mine shaft.

Id. n. 3 (quotation marks omitted).

On these facts, the majority correctly concluded that there was no reasonable likelihood that, but for a failure to fully consider Stokley's family history or good behavior in jail during pre-trial incarceration, the Arizona courts would not have sentenced him to death. *Id*. at *3. In reaching this conclusion, the majority properly relied on *Brecht*, 507 U.S. at 623. In *Brecht*, the Supreme Court held that the proper standard for collateral review of constitutional trial errors was not the reasonable doubt standard applied in cases on direct review, but rather the *Katteakos* standard applicable to non-constitutional trial errors. Thus, instead of demonstrating a reasonable probability the trial error contributed to the verdict (or in this case, the sentence), the defendant must show that the error "had substantial and injurious effect or influence …." *Kotteakos v. U. S*., 328 U.S. 750, 776 (1946).

The Supreme Court determined that this standard, which imposes a higher burden on habeas petitioners, like Stokley, better serves states' interests in the finality of their criminal judgments. *Brecht*, 507 U.S. at 637. The majority supported its conclusion with *Cullen v. Pinholster*, 131 S.Ct. 1388, 1408 (2011), which held that in a *Strickland* challenge the test for prejudice at sentencing in a capital case is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.) 2012 WL 5670171, at *3 (quotation marks omitted).

Thus, because the alleged causal nexus error could not have had a "substantial or injurious effect" on Stokley's death sentence, the majority properly found that he could not establish actual prejudice.

CONCLUSION

For the forgoing reasons, this Court should deny Stokley's petition for panel rehearing and rehearing en banc.

DATED this 20th day of November, 2012.

Respectfully submitted,

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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 November 20, 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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