

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Richard Dale Stokley, Petitioner

vs.

Charles L. Ryan, Director, Arizona Department of Corrections,
and Ron Credio, Warden, Arizona State Prison Complex—Eyman Unit,
Respondents.

***** CAPITAL CASE *****

EXECUTION SCHEDULED: DECEMBER 5, 2012 at 10 AM (MST)

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPLICATION FOR A STAY OF EXECUTION

Jon M. Sands
Federal Public Defender
*Cary Sandman (Ariz. Bar No. 004779)
Jennifer Y. Garcia (Ariz. Bar No. 021782)
Estela Dimas (Ala. Bar No. 1321-E57D)
Golnoosh Farzaneh (Cal. Bar No. 261557)
Ellie Hoecker (Cal. Bar No. 268830)
Assistant Federal Public Defenders
407 West Congress Street, Suite 501
Tucson, AZ 85701
(520) 879-7622
Cary_Sandman@fd.org

Amy B. Krauss (Ariz. Bar No. 013916)
P.O. Box 65126
Tucson, AZ 85728
(520) 400-6170
Attorneys for Petitioner Richard Dale Stokley
** Counsel of Record*

REQUEST FOR STAY OF EXECUTION

Pursuant to 28 U.S.C. § 2101(f), Petitioner Richard Dale Stokley hereby requests a stay of his upcoming execution, currently scheduled for **Wednesday, December 5, 2012, at 10:00 am MST (12:00 pm EST)**. Concurrent with this document, Stokley is filing a petition for writ of certiorari asking the Court to review an order of the United States Court of Appeals for the Ninth Circuit that denied his motion to stay the appellate mandate, and remand to the district court for reconsideration of its procedural-default ruling. This issue will become moot if Stokley is executed as scheduled. *See Wainwright v. Booker*, 473 U.S. 935, 936 (1985) (Powell, J., concurring).

ARGUMENT

To obtain a stay of execution, a death-row prisoner must show that four factors, balanced against each other, weigh in his favor: (1) a likelihood of success on the merits; (2) a likelihood of suffering irreparable harm without a stay; (3) the balance of hardships tips in his favor; and (4) a stay is in the public interest. *See Rhoades v. Blades*, 661 F.3d 1202, 1203 (9th Cir. 2011) (citing *Beaty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011)). Instead of showing a likelihood of success on the merits, the prisoner may alternatively demonstrate that “serious questions going to the merits” of his claims are presented in his appeal, and he may obtain a stay as long as the other three factors weigh in his favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). In this case, Stokley has presented serious questions about the conflicts between the Ninth Circuit’s order in this case,

prior decisions from that Court, and decisions from this Court and other circuit courts. These conflicts must be resolved to forestall the arbitrary application of improper standards of review to meritorious constitutional claims, and to clarify the cause-and-prejudice analysis for procedurally-defaulted claims of structural error.

1. **Stokley has presented serious questions about the standard of review applicable to claims involving the systemic exclusion of relevant mitigation evidence.**

Stokley's petition for certiorari asks the Court to resolve the question of whether the Arizona Supreme Court's violation of *Eddings v. Oklahoma* in his case constituted structural error, and if so, whether Stokley was required to demonstrate actual prejudice to overcome the procedural default of this claim. These questions demonstrate a pervasive divide between decisions of this Court and multiple circuit courts. In Stokley's case, the court below agreed that he proved a prima facie case of abandonment by his state post-conviction attorney pursuant to *Maples v. Thomas*, 132 S. Ct. 912 (2012), and agreed that he had raised a colorable claim that the Arizona Supreme Court violated his Eighth Amendment rights by categorically excluding relevant and compelling mitigation evidence during its independent review of Stokley's sentence. Despite these conclusions, the panel went on to hold that any error by the Arizona Supreme Court was harmless, and thus Stokley could not show actual prejudice to overcome the procedural default of the claim. This holding presents both an intra- and inter-circuit conflict, and a conflict with decisions from this Court. This Court should grant Stokley's petition for certiorari to resolve these irreconcilable conflicts on serious questions going to the merits of

Stokley's claims, and accordingly, this factor weighs in Stokley's favor as to the appropriateness of a stay of execution.

2. Stokley will suffer irreparable harm absent a stay of execution.

Without a stay of execution, Stokley will be executed on December 5, 2012, despite his meritorious constitutional claim regarding the systemic exclusion of relevant and compelling mitigation evidence during his direct appeal. His execution would moot his appeal, and leave the serious questions raised in his petition for writ of certiorari unresolved. Thus, this factor also weighs in favor of a stay of execution.

3. The balance of hardships tips in Stokley's favor.

Stokley will suffer irreparable harm if the denial of his Eighth Amendment right to individualized sentencing results in his execution. Conversely, the State suffers no injury should this Court enter a stay to allow for plenary consideration of Stokley's petition. Should this Court ultimately affirm the district court, the State's executioners presumably will be available to carry out Stokley's execution. And if this Court should remand for further proceedings, then the state courts will have an opportunity to cure a constitutional defect in the sentencing process, thereby vindicating the State's interest in having the first opportunity to cure constitutional errors in the administration of its criminal law. *See Engle v. Isaac*, 456 U.S. 107, 128 (1982) ("In criminal trials [the states] also hold the initial responsibility for vindicating constitutional rights."). Insofar as failing to grant a stay of execution

imposes an irredeemable hardship only on Stokley and not the State, the third factor favors Stokley as well.

4. A stay of execution is in the public interest.

Finally, a stay of execution is in the public interest. In general, the public interest is served by enforcing constitutional rights. *See Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). This appeal focuses on Stokley's Eighth Amendment right to have individualized consideration of his mitigation evidence despite the Arizona Supreme Court's systemic exclusion of such evidence. The public interest weighs in favor of addressing this systemic problem, and ensuring that Stokley's sentence is constitutionally imposed before it is carried out by the State of Arizona on December 5, 2012.

CONCLUSION

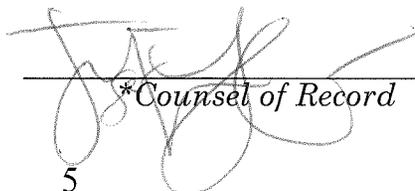
For the foregoing reasons, the considerations for granting a stay of execution weigh entirely in Stokley's favor, and thus Stokley requests that this Court enter a stay of execution to permit it to fully consider this appeal without it becoming moot by virtue of his execution.

Respectfully submitted:

November 29, 2012.

Jon M. Sands
Federal Public Defender
*Cary Sandman
Jennifer Y. Garcia
Estela Dimas
Golnoosh Farzaneh
Ellie Hoecker

Amy Krauss



*Counsel of Record