No. _____

IN THE SUPREME COURT OF THE UNITED STATES

In re Richard Dale Stokley, Petitioner.

*** CAPITAL CASE ***
EXECUTION SCHEDULED FOR 10:00 a.m. MST
(1:00 p.m. EDT) ON WEDNESDAY, DECEMBER 5, 2012

ON PETITION FOR A WRIT OF HABEAS CORPUS

APPLICATION FOR A STAY OF EXECUTION

REQUEST FOR STAY OF EXECUTION

Petitioner Richard Dale Stokley applies to this Court under 28 U.S.C. § 2101(f) for a stay of his execution **currently scheduled for 10:00 A.M. MST on Wednesday, December 5, 2012**. Concurrently with this document, Stokley is filing a petition for a writ of habeas corpus with this Court. The issue presented in Stokley's habeas petition will become moot if Stokley is executed as scheduled. *See Wainwright v. Booker*, 473 U.S. 935, 936 (1985) (Powell, J., concurring).

ARGUMENT

Stokley seeks a stay of his imminent execution so that this Court may give due consideration to his claim that his death sentence is unconstitutionally arbitrary and disproportionate in violation of the Eighth Amendment; in light of the

lenient treatment afforded his more culpable co-defendant, who has already been released from prison.

In *Furman v. Georgia,* 408 U.S. 238 (1972), the Court held that the death penalty was unconstitutionally cruel and unusual punishment, and immutably established that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under a legal system that permits the penalty to be arbitrarily, capriciously and inconsistently imposed. In this case, Stokley's co-defendant Randy Brazeal planned, instigated, and equally participated in the crimes for which Stokley was sentenced to death. Inexplicably, however, Brazeal was allowed to plead guilty to second-degree murder, received an extremely lenient sentence, and is now a free man, while Stokley is days away from being executed.

The Eighth Amendment arbitrariness proscription that this Court recognized in *Furman* holds to the promise that rational, proportionate, non-arbitrary punishment is at the core of the rule of law. This constitutional principle is clearly sacrificed under a system where a more culpable co-defendant walks free and the less culpable defendant is put to death.

Furman clearly established that "[i]f a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida,* 468 U.S. 447 (1984); *Godfrey v. Georgia,* 446 U.S. 420 (1980) (stating that

Furman established that "if a State wishes to authorize capital punishment it has a constitutional responsibility to ... apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."). Arizona has failed this test in Stokley's case, for without doubt there is no way to rationally distinguish between Stokley, for whom death is alleged to be an appropriate sanction, and Brazeal, for whom it is not.

If the *Furman* arbitrariness principle is to be given fulfillment, the Court should hold that the Eighth Amendment does not permit a defendant with less culpability to receive the death penalty when the co-defendant with greater culpability receives a lesser sentence.

Stokley requests that the Court grant him a stay of execution, grant his petition for a writ of habeas corpus, and remand his case to the district court for further proceedings. In deciding whether to grant a stay of execution, the Court balances the following four factors: (1) the likelihood of success on the merits, (2) the likelihood that the petitioner will suffer irreparable harm absent a stay, (3) the potential for harm to others during the stay, and (4) the public interest in a stay. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006). In this case each of these four factors counsel in favor of a stay.[1]

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[1] However, 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).

For the reasons contained in his petition for writ of habeas corpus, filed herewith, Stokley has a likelihood of success on the merits of his claims. There is no question that Stokley would suffer irreparable injury if he is executed in violation of the Eighth Amendment. *See Gregg v. Georgia*, 429 U.S. 1301, 1301 (1976) (Powell, J., in chambers). There is equally no question that issuing a temporary stay of execution pending resolution of the important question presented in Stokley's habeas petition would not cause substantial harm to others. Conversely, the State suffers comparatively little injury should this Court enter a stay to allow for plenary consideration of Stokley's petition. Given the time that has elapsed in carrying out the sentence imposed in this case, the State of Arizona cannot plausibly maintain that it would suffer prejudice if Stokley's execution were stayed now. As for the final factor, while the State of Arizona has an undeniable interest in enforcing its judgments, that interest is outweighed by the fact that it would not be in the public interest to conduct an execution that would violate the Constitution. Moreover, allowing an unconstitutional execution to proceed would undermine the public's confidence in Arizona's criminal justice system.

CONCLUSION

For these reasons, Stokley respectfully requests that this Court stay his upcoming execution.

Respectfully submitted: November 30, 2012.

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