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

PETITION FOR WRIT OF HABEAS CORPUS

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*****CAPITAL CASE*****
EXECUTION SCHEDULED FOR DECEMBER 5, 2012 AT 10:00 AM MST

QUESTION PRESENTED

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, Petitioner Richard Dale 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 a matter of days away from his scheduled execution.

The principles of *Furman* require the recognition that inconsistent and disproportionate sentences imposed in the same case and for the same crimes violate the Eighth Amendment.

This case presents the following question:

> In a capital case, with respect to the very same crime stemming from the identical facts, does the Eighth Amendment permit one co-defendant with lesser culpability to receive the death penalty when the other co-defendant with greater culpability has received a substantially lesser sentence.

PARTIES TO THE PROCEEDING

The petitioner in this case is Arizona death-row prisoner Richard Dale Stokley. Arizona's death row is located at Arizona State Prison Complex-Eyman. Executions in Arizona are carried out at Arizona State Prison Complex-Florence. The respondents in this case are therefore Charles Ryan, Director of the Arizona Department of Corrections, and Ron Credio, Warden of Arizona State Prison Complex-Eyman.

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INTRODUCTION

Arizona death-row prisoner Richard Dale Stokley asks that the Court issue a writ of habeas corpus freeing him from the unlawful sentence of death that the State of Arizona intends to carry out on Wednesday, December 5, 2012.

DECISIONS BELOW

The Arizona Supreme Court's opinion on direct appeal is reported at *State v. Stokley*, 898 P.2d 454 (Ariz. 1995), and is included in the appendix at page A-83. Stokley's initial habeas petition was denied by the district court on March 13, 2009. (A-50.) The district court's decision was affirmed by the court of appeals. *Stokley v. Ryan*, 659 F.3d 802 (9th Cir. 2011), *cert. denied*, No. 11-10249, 2012 WL 1643921 (U.S. Oct. 1, 2012). On November 21, 2012, the court of appeals denied Stokley's motion to stay its mandate. The panel's amended order is reported at *Stokley v. Ryan*, No. 09-99004, 2012 WL 5883592 (9th Cir. Nov. 21, 2012), and is included in the appendix beginning at page A-16. The dissents from the denial of Stokley's petition for rehearing en banc from that decision are reported at *Stokley v. Ryan*, No. 09-99004, 2012 WL 5928279 (9th Cir. Nov. 27, 2012), and are included in the appendix beginning at page A-1.

STATEMENT OF JURISDICTION

Stokley seeks enforcement of his federal constitutional right to be free from cruel and unusual punishment. This Court has original jurisdiction to grant the relief that Stokley requests under 28 U.S.C. §§ 2241 and 2242, Article III of the

United States Constitution and *Felker v. Turpin*, 528 U.S. 651, 664-65 (1996). Under the provisions of 28 U.S.C. § 2244(b), Stokley is unable to raise this claim in a second or successive petition. Therefore, this Court's jurisdiction under 28 U.S.C. § 2241 is the sole remaining vehicle for the enforcement of his Eighth Amendment rights.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment of the United States Constitution provides that "[e]xcessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment of the United States Constitution provides, in relevant part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

In 1992, Stokley was convicted of two counts of first-degree murder, and was sentenced to death. (A-117.) His co-defendant Randy Brazeal was allowed to plead guilty to second-degree murder with a maximum twenty-year sentence, despite his equal or greater participation in the crime. (A-269.) On direct appeal, the Arizona Supreme Court affirmed Stokley's conviction and conducted an independent review of his death sentence, determining that the mitigation evidence it considered was not sufficiently substantial to call for leniency. (A-83.) This Court denied certiorari.

Stokley v. Arizona, 516 U.S. 1078 (1996). The relevant record facts are outlined below.

A. Randy Brazeal planned and instigated the offense, sexually assaulted both victims, and killed one victim – all of which is corroborated by eyewitness testimony and forensic evidence.

During a Fourth of July festival in Elfrida, Arizona in 1991, several teens, including the 13-year old victims, camped out for the weekend. (A-179 through A-184; A-163 through A-164.) On the evening of July 7, at approximately 10:00 p.m., Randy Brazeal arrived at the campsite, began making disturbing sexual remarks to the children, and repeatedly entered the tent where four of the young girls, including the victims, were preparing to sleep.[1] (A-190 through A-191.)

Over the course of the evening, Brazeal was also repeatedly observed talking alone with the thirteen-year old victims, Mary Snyder and Mandy Meyers. As the children were going to bed, Brazeal was observed entering the girls' tent and whispering something to Mandy and Mary. No one was able to overhear what was being said. (A-162; A-169 through A-172.) However, later, Mandy and Mary left their tent, reporting that they were going to the bathroom, but instead walked out to the road to meet Brazeal. (A-195 through A-196; A-171 through A-172.)

At this time, Stokley was camping in a tent on the site of the festival with a friend, Jim Robinson. During the course of the weekend-long celebration, Stokley,

[1]For instance, Brazeal told some of the boys how much he liked a girl's "pussy" (A-165 through A-67), and he alleged to another witness that one of the teen girls was sexually active and that she was going around "screwing everybody," (A-188; A-193).

Robinson, and others performed as stuntmen in Old West re-enactments to help raise money for a local charity. (A-100; A-181.) There has never been any evidence that Stokley engaged in any inappropriate behavior with any of the children during the several days he spent at the camp site, nor that he had any history of mistreating children, sexually or otherwise.

Stokley, however, did have a long history of mental illness and he suffered from a significant form of neurological dysfunction which manifested in severe impairments to the frontal lobes of his brain. A crucial element of Stokley's life history is that he suffered no less than twenty-seven frontal blows to his head, creating a staggering high risk that he would eventually suffer serious damage to his brain. (A-129 through A-139; A-140 through A-143.)

For example, Stokley's history revealed a frontal head blow in 1955 with loss of consciousness; a head trauma in 1964 to the back of the head from a brick; a 1972 head trauma occipitally from an iron skillet; a 1978 motorcycle accident with a posterior blow to the head; a 1980 frontal blow from a car jack with loss of consciousness; a 1984 rock climbing fall with loss of consciousness; and a 1990 head trauma from a cast-iron frying pan with loss of consciousness. (A-129 through A-139; A-140 through 143.) In 1982, when the twenty-nine-year-old Stokley was hit in the head with a "heavy beer mug," causing a depressed skull fracture, he underwent surgery that required a burr hole to be drilled into his skull, and which left a large defect in the superior parietal region of his brain. (A-200 through A-203.) In 1986,

Stokley suffered another frontal head injury and other injuries when he fell from a moving vehicle and rolled down an embankment, resulting in right-sided paralysis and hospitalization. (A-238 through A-267.)

Stokley also had a long history of mental illness, suicide attempts, and depression, which resulted in at least two prior psychiatric hospitalizations, as well as a serious history of alcohol dependence, and emotional and physical abuse in his childhood. Nevertheless, Stokley, who was thirty-eight years old at the time of the 1991 offense, had no criminal or social history that presaged his involvement in offenses like those that are the subject here. He had no felony record, had never served time in prison, had never caused anyone to suffer any serious physical harm, and had never exhibited any sexually-inappropriate behavior.

On the night of the offense, Stokley was looking for a ride from the camping area to an outdoor water tank nearby so that he could take a bath—the campsite had no shower facilities—and Brazeal agreed to take him there in his car. (A-213.) Witnesses observed Stokley make preparations to bathe by borrowing soap and carrying a towel. Stokley got into Brazeal's car for the express purpose of driving to the water tank to wash. (A-213.) However, Brazeal, who had already secretly convinced Mary and Mandy to meet him at the road, stopped the car and picked them up there. (A-218.) The next day, both Stokley and Brazeal were arrested for the murders of Mary and Mandy. Each defendant gave a statement to the police.

With no promise of benefit or lenient treatment, Stokley gave a lengthy inculpatory statement, all of which was consistent with the physical evidence, and accepted responsibility for his involvement in one murder. Stokley described that after he was dropped off at the water tank, Brazeal drove away with Mary and Mandy. Stokley took his bath, and then looked for Brazeal's car, which was out of view. He eventually located the car and observed Brazeal raping one of the girls in the back seat of the car. (A-206.) Brazeal informed Stokley that Brazeal had raped both of the girls, that the girls needed to be killed, and that the girls "are going to rat, and they're going to get you too." (A-213.) Stokley admitted to the police that after being told this, he became overstressed, lost control, and then raped Mandy and killed her. (A-215.) Stokley stated that Brazeal, who already raped both girls, killed Mary. (A-215.) Stokley cooperated with the police investigation by leading the investigators to the girls' bodies at the bottom of an abandoned mine shaft. (A-198 through A-199; A-173 through A-177.)[2]

Brazeal, by contrast, provided a clearly false exculpatory version of the events, claiming he had not sexually assaulted or murdered either victim. Brazeal's account was entirely contradicted by the forensic evidence, which was made available after Brazeal entered his guilty plea. Most notably, fingerprint and DNA evidence indicated that Brazeal had raped both victims and killed one of them. For

[2]In earlier proceedings, Stokley presented evidence that his severe brain impairments furnished a clear explanatory nexus to his participation in the offense. *Stokley v. Ryan*, 659 F.3d 802 (9th Cir. 2011), *cert. denied*, No. 11-10249, 2012 WL 1643921 (U.S. Oct. 1, 2012).

example, DNA analysis revealed the presence of Brazeal's semen in Mandy's vaginal sample; the presence of Brazeal's semen on the back seat of the car; and the presence of a "mixed stain" in Brazeal's underwear matching the DNA of Mandy and Brazeal. (A-147 through A-151.) On the hood of Brazeal's car, the police discovered the presence of semen, a human buttock print, and Brazeal's fingerprints located above and to the side of the buttock print – evidence that after raping one of the girls inside the car, Brazeal raped the other girl on the hood of his car. (A-144.)[3]

Further, contradicting Brazeal's claim of innocence was undisputed evidence from the medical examiner that Mary's body bore stomping injuries which were consistent with the pattern of Brazeal's boots, and the same medical examiner concluded that Mary had been strangled by Brazeal; all of which was consistent with what Stokley had stated in his confession. (A-158 through A-159.) Based on all the forensic evidence, which was not available until after Brazeal pled guilty, Stokley's sentencing judge found beyond a reasonable doubt that Brazeal, not Stokley, had murdered Mary. (A-119.)

B. The county prosecutor agrees to allow Brazeal to plead guilty to second-degree murder and receive a twenty-year sentence, but rejects Stokley's offer to plead guilty to the indictment and serve life in prison.

Three months after the crimes and just prior to learning the results of the DNA testing, the Cochise County Attorney permitted Brazeal to plead to second-

[3]In his confession, Brazeal had falsely accused Stokley of sexually assaulting one of the girls on the hood of the car. (A-144; A-153 through A-157.)

degree murder. Brazeal received two maximum twenty-year sentences, to run concurrently. (A-125.) This deal did not require Brazeal to testify against Stokley, and had no corresponding benefit for the state.[4]

After the resolution of Brazeal's case in October, Stokley offered to plead guilty to the charges in indictment and to accept a term of 164 years, effectively a life without parole sentence. (A-298.) However, the County Attorney rejected the offer and insisted on pursuing the death penalty for Stokley, notwithstanding evidence that clearly showed: (i) that Brazeal alone had planned the liason and instigated the crimes, and that Brazeal was responsible for luring the victims into his vehicle and taking them to a remote location; (ii) that Brazeal's post-arrest exculpatory statements were patently false; and (iii) that Stokley's statements about Brazeal's direct complicity in the murders were corroborated by substantial physical evidence, even prior to the DNA evidence becoming available. The record supplies no rational basis for Brazeal to be given such a generous offer by the state when it had determined that Stokley deserved the death penalty for the *same crimes*.

The County Attorney's explanation for his sudden, lenient treatment of Brazeal was specious. The County Attorney claimed that it was necessary to plead Brazeal (in light of his refusal to admit any guilt), because of the lack of DNA

[4]Notwithstanding the mooted Fifth Amendment implications, and even though he was threatened with contempt by the trial court, Brazeal refused to answer any questions when he was called by the defense at trial. (A-274.)

evidence. However, DNA testing was already underway and would soon yield results demonstrating Brazeal's guilt. Brazeal was *not* pressing his rights to a speedy trial – in fact, just days earlier he had filed a motion to continue the trial. (A-304.)

Next, the County Attorney made the unsupported assertion that it was unlikely that DNA evidence would be admissible in the case. (A-269 through A-172.) But after receiving the DNA results, the same County Attorney introduced Brazeal's DNA results against Stokley to establish Brazeal's guilt of the murder of Mary Snyder, and to hold Stokley guilty, as an accomplice, for Mary's murder. (A-276 through A-280.)

Stokley was offered no opportunity to be spared the death penalty. After his offer to plead guilty and spend his natural life in prison was rejected, he went to trial. He was convicted of two counts of first-degree murder, two counts of kidnapping, and one count of sexual conduct with a minor. The jury acquitted Stokley of two counts of sexual assault and one count of sexual conduct with a minor, Mary Snyder. (A-283 through A-290; A-281.) Following a sentencing hearing, the trial court imposed two sentences of death on Stokley, even though it found beyond a reasonable doubt that Brazeal had actually killed one of the victims. (A-117.)

Brazeal lied and covered up his participation in the murders. Unlike Stokley, he presented with no disabling, mitigating psychological or organic disorders, and

he murdered Mary Snyder. Despite those actions, he earned light punishment and escaped a death sentence. Stokley, who fully admitted his wrongdoing; cooperated with the authorities in locating the bodies of the victims; provided critical evidence (later corroborated by physical evidence) of the guilt of Brazeal; and was acknowledged to have significant mental impairments and brain damage, was sentenced to death. This is how a purely arbitrary death penalty system operates in the State of Arizona.[5]

Brazeal was released from prison on July 2, 2011, after serving a twenty-year sentence for two counts of murder. He currently resides near his hometown in Arkansas. In March 2012, Brazeal got married. (A-291.) In July, he received a fishing license. (A-292.) Nothing in Brazeal's record suggests that he has been rehabilitated, or that he is the sort of person who should plainly be treated with lenity while Stokley suffers the ultimate penalty. In fact, an examination of Brazeal's disciplinary history while in prison demonstrates an escalation in violations relating to use of drugs and alcohol as he neared his release, a disturbing pattern given the significant role that alcohol played in the crimes. Stokley, by contrast, received no disciplinary reports in twenty years of imprisonment.

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[5]The unfairness in Stokley's death-penalty proceedings do not stop here. His appointed state post-conviction attorney abandoned him in the midst of those proceedings. (A-18 (assuming without deciding that Stokley had been abandoned).) *See also Stokley v. Ryan*, No. 12-7517, Pet. for Cert. at 2-8 (filed Nov. 29, 2012), and Letter written by Richard Dale Stokley at A-294.

In a recent opinion dissenting from denial of rehearing en banc, seven judges on the Ninth Circuit Court of Appeals specifically called attention to the peculiar sentencing disparity in this case that would free a co-defendant after a term of years for the same conduct for which it seeks to execute Stokley: "That this risk [of executing a man whose background calls for lenity] exists is particularly likely in light of the fact that Stokley's co-perpetrator -- who actually instigated the crime -- received a sentence of only 20 years, and has already been released from prison." [6] (A-90 through A-91.)

REASONS FOR GRANTING THE WRIT

In *Furman v. Georgia,* 408 U.S. 238 (1972), the Court held that the death penalty was unconstitutionally cruel and unusual punishment, and immutably

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[6]Arizona follows a pattern of executing defendants in cases when co-defendants with equal or greater culpability reside as free men outside of prison. Should Stokley be executed, he will follow Daniel Cook and Robert Towery to become the third man to be executed by Arizona in 2012 whose equally-culpable co-defendant was already enjoying life outside of prison.

Robert Towery was executed on March 8, 2012, for a felony murder while his equally-culpable co-defendant Randy Barker received a sentence of ten years. Barker had motive for the robbery, and was an equal partner in planning and carrying out the robbery and murder. Despite Barker's significant participation in the crimes, he was permitted to plead guilty to second-degree murder in exchange for his testimony against Towery. Robert Towery was executed while Randy Barker is a free man.

Daniel Cook was executed on August 8, 2012, for two murders in which John Matzke was equally culpable. Matzke, described by the police as "a participant from the word 'go,'" admitted to personally torturing the victims and to killing one of them. In exchange for his testimony against Cook, Matzke agreed to plead guilty to one count of second-degree murder and received a twenty-year prison sentence. Daniel Cook was executed while John Matzke is a free man.

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, a clear and undisputed record demonstrates that Stokley's co-defendant Randy Brazeal planned and instigated the subject offenses. Inexplicably, however, and without any benefit to the state required in exchange for leniency, Brazeal was allowed to plead guilty to second-degree murder, received an extremely light sentence, and is now a free man. In contrast, Stokley is only a matter of days away from his scheduled execution. 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 co-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) (noting 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 it is impossible 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 the defendant with less culpability to receive the death penalty when the co-defendant with greater culpability receives a lesser sentence.

CONCLUSION

Stokley respectfully requests that this Court transfer for hearing and determination his application for habeas corpus to the district court in accordance with its authority under 28 U.S.C. § 2241(b).

Respectfully submitted: November 30, 2012.

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