

SOUTH DAKOTA SUPREME COURT

<p>JULIET YACKEL ON BEHALF OF RODNEY BERGET,</p> <p style="text-align: center;">Petitioner,</p> <p style="text-align: center;">v.</p> <p>STATE OF SOUTH DAKOTA, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS and DENNY KAEMINGK, SECRETARY, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS,</p> <p style="text-align: center;">Defendants.</p>	<p>Cause No. _____</p> <p style="text-align: center;"><b>PETITION FOR WRIT OF PROHIBITION OR FOR ANY OTHER APPROPRIATE RELIEF</b></p>
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COMES NOW Juliet Yackel, by and through counsel, and hereby respectfully petitions this Court for a writ of prohibition halting the execution of Mr. Rodney Berget and an order appointing her guardian ad litem for Mr. Berget, a prisoner whom the State intends to execute this Monday, October 29, 2018. A writ of prohibition “may only be issued where the person seeking the writ is without other plain, speedy, and adequate remedy in the ordinary course of law.” *Sorenson v. Rickman*, 486 N.W.2d 259, 261 (S.D. 1992) (citing S.D.C.L. § 21-30-2). This writ is being sought to prohibit the State from executing Mr. Berget because he has an intellectual disability and otherwise incompetent, rendering him ineligible to be executed.<sup>1</sup>

In the alternative, Petitioner seeks a writ of coram nobis<sup>2</sup> or any other such remedy<sup>3</sup> this Court may deem appropriate. As Petitioner’s affidavit (Exhibit 1) clearly demonstrates, Mr.

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<sup>1</sup> S.D.C.L. § 23A-27A-24 is not an available remedy because Mr. Berget has long since been sentenced. To the extent it is available, Petitioner requests that this court stay Mr. Berget’s execution so that she can pursue relief before that court and so that this Court can maintain its jurisdiction to review any such finding by that court.

<sup>2</sup> The writ of coram nobis may be granted to “achieve justice.” *State v. Davis*, 515 N.W.2d 205, 207 (S.D. 1994) (internal quotations and citations omitted). “Generally, this extraordinary writ is

Berget is intellectually disabled and suicidal. He is not able to protect his own interests and the attorneys assigned to do so have refused. It would be difficult to think of a clearer case of intellectual disability: IQ testing administered at a very young age reveals multiple scores under 70, Ex. 1 at 3, participation in special education and the Special Olympics at an early age, *id.* at 4, and intensive state involvement along with a profound inability to live outside of institutions, *id.* at 9. Moreover, Mr. Berget has a long history of suicidal gestures and ideation, completely undermining his rational understanding of the execution to come. *Id.* at 6-7. Yet, Mr. Berget's lawyers refused to protect his rights, instead allowing an incompetent and incapacitated man to make serious and complex legal decisions. *Id.* at 13. This Court should halt his execution<sup>4</sup> and appoint Petitioner as guardian ad litem so that she can pursue the readily available forms of relief that have been unjustly and needlessly foreclosed to Mr. Berget.

### **I. PETITIONER IS AN APPROPRIATE GUARDIAN AD LITEM**

Petitioner seeks appointment as guardian ad litem for Rodney Berget. A guardian ad litem should be appointed where it is "proper for the protection of the [protected person]." *In re Guardianship of Petrik*, 1996 SD 24, ¶15, N.W.2d 388, 391). S.D.C.L. § 15-6-17(c) provides for appointment of a guardian ad litem for an "incompetent person not otherwise represented in an action" and, barring such an appointment, "shall make such other order as it deems proper for the protection of the . . . incompetent person."

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only available to attack convictions involving legal disadvantages which survive the satisfaction of the sentence." *Petition of Brockmueller*, 374 N.W.2d 135, 137 (S.D. 1985) (citations omitted). As with the writ of prohibition, "statutory remedies must be unavailable or inadequate before a petition for coram nobis relief can be granted." *Id.*

<sup>3</sup> The writ of mandamus is available to compel performance of an act. *See Anderson v. Sioux Falls*, 384 N.W.2d 666, 668 (S.D. 1986).

<sup>4</sup> Petitioner seeks this Court's intervention in particular because it is the only state judicial authority that can halt his execution. S.D.C.L. § 23A-27A-21.

Petitioner has been involved in Mr. Berget's case for several years. Ex. 1 at 2. She is an attorney (barred in Illinois and Indiana) and the only member of his legal team (dating at least to his capital sentencing trial) who has training and experience investigating and presenting evidence of intellectual disability and mental illness. *Id.* at 12. In Mr. Berget's case, she was tasked with investigating Mr. Berget's social history, both as it related to his intellectual disability and in support of a potential claim of ineffective assistance of trial counsel. In the course of her investigation, she uncovered substantial evidence of Mr. Berget's psychiatric and cognitive impairments. She learned that Mr. Berget has a history of suicidality and suicide attempts that long predates his present effort to have the state do what he has to date been unable to complete. *Id.* at 6-7. She also learned about his need, historically, for substantial supports in conducting activities of daily living. *Id.* at 9.

Petitioner has met repeatedly with Mr. Berget, witnessing firsthand his substantial cognitive and psychiatric impairments. He has repeatedly demonstrated to her his inability to understand and participate in the proceedings against him as well as his intense desire to mask his profound impairments. *Id.* at 13. Petitioner has also been a witness to Mr. Berget's prior counsels' decisions to hamstring the investigation they were required by court order to undertake. *Id.* Her experiences contradicted those of counsel: though counsel insisted that Mr. Berget wanted to stop the appeals, during Ms. Yackel's visits with Rodney, he continued to give her information and even signed releases to facilitate her investigation. *Id.* at 4, 10, 13. For these reasons, Petitioner is uniquely situated to explicate the need for appointment of a guardian and to serve in that capacity. Appointing Petitioner would be well within the letter and spirit of the statute which is designed to protect the interests of persons such as Mr. Berget.

## II. MR. BERGET IS INCAPABLE OF REPRESENTING HIMSELF OR PROTECTING HIS INTERESTS

Mr. Berget's cognitive limitations and suicidality together with his prior lawyers' abdication of their ethical and professional responsibilities have rendered Mr. Berget unable to protect his most basic interest: avoiding an execution that is contrary to state and federal law. Mr. Berget is unable to understand the proceedings against him, including the significance of his imminent execution. *Id.* at 13. His expressed desire to die can only be understood in the context of his lengthy history of self-harm and suicidality, cognitive impairment, and representation by lawyers ill-equipped to represent a person with his limitations. Execution should be an expression of retribution for a crime, not a special right to state assisted suicide for members of death row.

Mr. Berget's history of suicidality and self-harm also requires appointment of someone to protect his interests. An expression of a desire to kill oneself normally raises concerns about whether a person may suffer from mental illness. This is especially so where the person has a history of self-harm and suicidal ideation. Ex. 2. Here, Mr. Berget has a history of self-harm and suicidal gestures dating back to his teenage years. Ex. 1 at 6. Mr. Berget's history of "suicidal ideation alone raises red flags requiring further analysis and evaluation, including a review of his mental health and trauma history as well as his family history, in order to assess his competence to assert a waiver of his rights" and be executed. Ex. 2 at 1.

Mr. Berget also has profound intellectual impairments that further undermine his ability to act in his own interest. As a child, he was in the Special Olympics and special education classes. Ex. 1 at 4. He has repeatedly tested in the intellectually disabled range and has exhibited behavior demonstrating his intellectual disability throughout his life. *Id.* at 2-6. While the nation's leading experts have concluded that Mr. Berget meets the clinical criteria for intellectual

disability, Ex. 4 at 1, the post-conviction court concluded the opposite. Ex. 3. The court's conclusion and Mr. Berget's scheduled execution are plainly erroneous for two reasons.

First, the court below relied on standards wholly at odds with the current professional consensus on the assessment of intellectual disability, sharply calling into question the legality of its decision. *See Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017) (relying on "medical community's consensus" to conclude that reliance on judicial, rather than medical factors "create an unacceptable risk that persons with intellectual disability will be executed" (quotations omitted)); *Hall v. Florida*, 134 S. Ct. 1987, 2000 (2014) (quoting brief of American Psychological Association). Indeed, according to a national expert on intellectual disability (the primary contributor to the DSM-5's definition of intellectual disability), the proceedings related to Mr. Berget's intellectual disability are

[T]he most egregious case I have knowledge of, in terms of: (a) the gross incompetence of the defense attorneys (at trial and subsequently), (b) the complete misstatement of (and failure to follow) relevant diagnostic guidelines by the prosecution and its expert, and (c) the action of the court in giving much credence to the misstatements of a minimally qualified prosecution expert (who demonstrated a dramatic absence of understanding of ID and how to diagnose it) and failing to give much if any weight to the opinions of the main defense expert, Dr. Greg Olley, who I know to be one of the most competent, distinguished, and ethical, forensic ID experts in the country.

Ex. 4 at 2. Second, the lower court's conclusion on intellectual disability does not mean Mr. Berget's ability to understand the proceedings against him (including his imminent execution) is not compromised. To the contrary, even if the impairments at issue below do not establish that Mr. Berget is intellectually disabled, it does not follow that his ability to understand his case is untouched by those impairments. And Mr. Berget's impairments are substantial. He has low IQ, a limited ability to comprehend language, and a lifelong inability to protect his own interests. Ex.

1 at 2-6, 10-11. Indeed, his agreement to join Eric Robert in the very offense that landed him on death row may be a prime example of his gullibility and lack of adaptive skills. However, because the crime that led to his sentence has never been subjected to adversarial testing (and defense investigation), this area of inquiry is unexplored. *Id.* at 14.

Appointment of a guardian ad litem is also required because Mr. Berget's representation to date has undermined his fundamental interest in preserving his life and the fundamental guarantees that state and federal must provide those facing society's ultimate sanction. Despite being *ordered* by the court to put on evidence of Mr. Berget's intellectual disability, Mr. Berget's counsel in post-conviction elected not to present evidence that Mr. Berget was in the Special Olympics, instead deferring to their client's wishes about what evidence to present regarding his intellectual disability. Likewise, counsel for Mr. Berget refused to pursue evidence highly probative of the origin of Mr. Berget's intellectual disability. Despite knowing that Mr. Berget's mother was an alcoholic and a recommendation from Petitioner, counsel for Mr. Berget declined to pursue investigation into fetal alcohol syndrome, either as a source of improperly unexplored mitigating evidence or as the likely etiology of Mr. Berget's intellectual disability. *Id.* at 8.

The most serious dereliction of counsel's ethical obligations came when they failed to give notice of appeal challenging the substantially flawed findings of the circuit court. Ex. 4 at 5-10. That failure short circuited this Court's review and, in light of Mr. Berget's cognitive and psychiatric impairments, gave rise to the need for this Petition.

### **III. APPOINTMENT OF A GUARDIAN IS NECESSARY TO PROTECT MR. BERGET'S LEGAL AND CONSTITUTIONAL RIGHTS**

Unless the Court exercises its authority to appoint Mr. Berget a guardian, he will forfeit his constitutional and legal rights.

**A. Mr. Berget's is incompetent to be executed under *Ford v. Wainwright* and *Panetti v. Quarterman*.**

Mr. Berget has a history of suicidal ideation, including over a dozen documented suicide attempts, beginning when he was just 16 years old. Ex. 1 at 6-7. Both Mr. Berget and his brother Roger were institutionalized throughout their childhoods. *Id.* at 6, 8. Mental illness also runs in the family, as both his mother and brother have histories of mental illness. *Id.* at 4, 8, 11.

By virtue of his mental illness and history of suicidality, Mr. Berget is “unaware of the punishment [he is] about to suffer and why [he is] to suffer it.” *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986); *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007). Due to his mental illness, Mr. Berget is not competent to understand the nature and reasons for his execution. He has no rational understanding of the punishment he is about to suffer and why he is going to suffer it. Mr. Berget's forthcoming execution is instead part of his longstanding interest in committing suicide. In light of this history, Mr. Berget's purported desire to die is not “the product of rational thinking.” Ex. 2 at 1. Therefore, he is incompetent to be executed under the Eighth and Fourteenth Amendments to the United States Constitution and under South Dakota law.

Mr. Berget is entitled to an order enjoining his execution because he has made a sufficient “threshold” showing of incompetence, and he is entitled to a hearing to determine the ultimate question of whether he is competent to be executed. *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007), *Ford*, 477 U.S. at 426. Were this Court to appoint Petitioner as guardian ad litem, she would work with counsel to ensure that Mr. Berget's rights pursuant to *Ford* and *Wainwright* were adequately protected.

**B. Mr. Berget's execution violates *Atkins v. Virginia* and *Moore v. Texas*.**

Mr. Berget is also ineligible to be executed under *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), which recognized the national consensus against the death penalty for those suffering

from, as the condition was then known, mental retardation. *Hall*, 134 S. Ct. at 1990. Executing someone who is “*Atkins* ineligible” for execution does not serve any legitimate goals of capital punishment. In *Atkins*, the Court highlighted that specific “characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.” 536 U.S. at 317. The intellectually disabled “have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.” *Id.* at 318. These impairments make the intellectually disabled less deserving of death.

Mr. Berget clearly meets the criteria for intellectual disability as articulated in *Atkins*, *Hall*, and *Moore*. Ex. 4 at 11. Multiple IQ tests administered prior to the age of 18 reveal scores below 75. Ex. 1 at 3. In addition, Mr. Berget was classified as intellectually disabled as a child, assigned to a caseworker who specialized in working with intellectually disabled children, attended special education, and even participated in the Special Olympics. *Id.* at 4-5. Contemporaneous records prior to age 18 reflect that social workers who diagnosed him as intellectually disabled also observed that he was “immature,” “shy and self conscious,” and his “interests seem to be limited.” *Id.* at 5-6.

By virtue of his intellectual disability, Mr. Berget is constitutionally ineligible to be executed. Were Petitioner appointed guardian ad litem, she could adequately safeguard his constitutional rights under *Atkins*, *Hall*, and *Moore*.

**C. Mr. Berget is entitled to reinstatement of his post-conviction proceedings.**

Mr. Berget pled guilty to capital murder and waived a jury. At sentencing, trial counsel had concrete evidence in his file of Mr. Berget’s intellectual disability, including IQ testing spanning years prior to Mr. Berget’s incarceration, special education school records, and documents establishing Mr. Berget’s participation in the Special Olympics. And yet, none of this

evidence establishing Mr. Berget's ineligibility to be executed was presented. Instead, trial counsel, Jeff Larson, called a mere four witnesses, none of whom spoke to Mr. Berget's intellectual disability.

Counsel remained on the case through the direct appeal and in state post-conviction until, at the request of the Attorney General, the lower court appointed independent counsel to represent Mr. Berget for available claims of ineffective assistance of counsel. Independent counsel thereafter filed an amended petition asserting that Mr. Berget was intellectually disabled and that trial counsel was ineffective, among other reasons, for failing to pursue a claim pursuant to *Atkins v. Virginia* and its progeny. After holding a hearing on the issue, the lower court found that Mr. Berget was not intellectually disabled. As discussed *supra*, the court's opinion is contrary to the Supreme Court's decisions in *Hall* and, *Moore*. Ex. 4 at 5-11. At the advice of his personal spiritual advisor, Ex. 1 at 13, counsel disregarded the clear need for appellate review and refused to file a Notice of Appeal. This effectively waived Mr. Berget's right to appeal and short-circuited the state post-conviction process, violating their fiduciary obligations to their cognitively impaired, incompetent client. Model Rules of Prof'l Conduct R. 1.14, 1.6; ABA Formal Ethics Op. 96-404 (1996).

Nevertheless, there are multiple extraordinary and equitable remedies available to Mr. Berget through state and federal court. Because of his intellectual disability, Mr. Berget lacked the requisite capacity to waive his appeals. In following his client's wishes post-conviction counsel effectively abandoned his client, and Mr. Berget's case should be reopened and the appeal reinstated.

Additionally, there are a number of claims of ineffective assistance of counsel that could be pursued. No guilt phase investigation has ever been conducted in this case. Having

disregarded the evidence of intellectual disability in his file, counsel failed to cross-examine any of the state's witnesses about Mr. Berget's vulnerability, gullibility, or status as a follower in the prison. Nor did counsel conduct an adequate penalty phase investigation. Though counsel self-servingly asserted on direct appeal that Mr. Berget "forbade defense counsel from engaging in a complete mitigation investigation," he did not cite to the record for any waiver or related colloquy. *See State v. Berget*, 2012 WL 8145202 (S.D.) (Appellate Brief). Nor did he point to any evidence in support of such a claim. In fact, the assertion is contradicted by counsel's (albeit scant) presentation of information relating to Mr. Berget's family background and history. Ms. Petitioner's observations of Mr. Berget's vacillations are relevant here and further indication of his inability to understand the finality of this decision. *See Ex. 1 at 10.*

These claims are available for *de novo* review in federal habeas corpus proceedings. In light of counsels' lapses, the state proceedings have been insufficient to protect Mr. Berget's rights and, therefore, are not entitled to any deference. 28 U.S.C. § 2254(b)(B)(ii). Upon appointment as guardian ad litem, Petitioner will work with counsel to identify those claims that are cognizable in light of the wholesale breakdown in the state court proceedings. Appointing Petitioner as guardian ad litem will not be for naught. Mr. Berget has substantial unaddressed claims for relief that Petitioner could ensure are protected.

**IV. CONCLUSION**

Petitioner respectfully requests that this Court stay Mr. Berget's execution, appoint her guardian, and provide any other relief as may be just.

DATED: October 26, 2018

/s/ Lisa M. Agrimonti

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## CERTIFICATE OF SERVICE

The undersigned counsel certifies that a true and correct copy of the foregoing document was served upon the persons below on today, October 26, 2018, and that two copies were sent postage prepaid to the following addresses:

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