

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. _____

JULIET YACKEL on behalf of Rodney
Berget,

Petitioner,

v.

**SOUTH DAKOTA DEPARTMENT
OF CORRECTIONS and DENNY
KAEMINGK, SECRETARY, SOUTH
DAKOTA DEPARTMENT OF
CORRECTIONS,**

Defendants.

RESPONSE TO PETITION FOR WRIT OF PROHIBITION OR OTHER RELIEF

Defendants South Dakota Department of Corrections and Denny Kaemingk, Secretary, through their counsel, Paul S. Swedlund, Assistant Attorney General, hereby file this response in opposition to petitioner's motion for a writ of prohibition or other relief. Berget's competency and intellectual capacity were fully litigated in an *Atkins* trial in January of this year. The court found Berget competent and not intellectually disabled. YACKEL PETITION, Exhibit 3. For the reasons stated herein, this court should find that Yackel lacks standing to file pleadings as a guardian *ad litem* and should deny her petition because she cannot demonstrate Berget's incompetency or incapacity.

The standard applied to Berget's competence is found in *Rees v. Peyton*, 384 U.S. 312, 86 S.Ct. 1505 (1966). *Rees* defined a competent person as someone who "has capacity to appreciate his position and make a rational

choice with respect to continuing or abandoning further litigation.” *Rees*, 384 U.S. at 314, 86 S.Ct. at 1506. Conversely, an incompetent person is someone who “is suffering from a mental disease, disorder or defect which may substantially affect his capacity in the premises.” *Rees*, 384 U.S. at 314, 86 S.Ct. at 1506.

But before determining the *Rees* standard’s application to Berget, it is first important to point out that “[e]vincing a decision to waive the presentation of mitigating evidence, (and thereby invite a death sentence), does not by itself call the defendant’s competency into question.” *Cowans v. Bagley*, 624 F.Supp.2d 709, 753 (S.D. Ohio 2008). Indeed, in *Whitmore v. Arkansas*, 495 U.S. 149, 165, 100 S.Ct. 1717 (1990), the court declined to find that “a hearing on mental competency is required by the United States Constitution whenever a capital defendant desires to terminate further proceedings.” Even when a capital crime defendant waives constitutional rights designed to protect him from a death sentence, “a competency determination is necessary only when a court has reason to doubt the defendant’s competence.” *Godinez v. Moran*, 509 U.S. 389, 402, 113 S.Ct. 2680, 2688, n. 13 (1993).

After *Rees*, the Supreme Court again addressed the question of a death row inmate’s competency to waive further appeals in *Gilmore v. Utah*, 429 U.S. 1012, 97 S.Ct. 436 (1976). Gilmore was seen by psychiatrists who determined (1) that “Gilmore fully understood his right to appeal and the consequences of a decision not to appeal,” (2) that “Gilmore’s decision to waive appeal was the ‘product of an organized thought process,’” and (3) that Gilmore “presently has

the mental capacity and the emotional stability to make the necessary decision concerning his sentence and to understand the consequences.” *Gilmore*, 429 U.S. at 1015, 97 S.Ct. at 438, n. 4, n. 5. While not addressing these findings specifically to the *Rees* decision or standard, the court determined that these findings were sufficient to establish *Gilmore*’s competency, and, therefore, his family’s lack of standing to prosecute the appeals *Gilmore* wished to abandon.

However, the *Godinez* court did revisit the *Rees* standard to resolve the question of “whether the competency standard for pleading guilty or waiving the right to counsel [in a death penalty case] is higher than the competency standard for standing trial.” *Godinez*, 509 U.S. at 391, 113 S.Ct. at 2682. After comparing the *Rees* standard to standards for determining competency to stand trial propounded in other cases, *Godinez* “reject[ed] the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the [competency to stand trial] standard.” *Godinez*, 509 U.S. at 398, 113 S.Ct. at 2686. The foregoing authorities inform us that *Berget*’s decision to waive further appeals, standing alone, does not call his competency or capacity into question.

Further, the evidence before the court at *Berget*’s *Atkins* trial conclusively established that *Berget* is not intellectually disabled or incompetent. YACKEL PETITION, Exhibit 3. Also, nothing in *Berget*’s various conversations with the court concerning his wishes or his courtroom demeanor gave Judge Hoffman “reason to doubt [*Berget*’s] competence.” *Godinez*, 509 U.S. at 402, 113 S.Ct. at 2688, n. 13.

If anything, Berget's conversations with the court evidenced a lucid understanding of the reason for his execution and the consequences of his decision to waive further appeals. Berget understood that he was sentenced to the death for the murder of Ron Johnson, acknowledging that his penalty fit his crime:

All I have to say is that I'm guilty of taking Ronald Johnson's life. I know what I was doing on the day when I went over to the shops, and I continued to do it. I destroyed a family. I took away a father, a husband, a grandpa. They'll never see their father again or husband. He will never walk through that door again. I made sure of that by my actions. I'm not going to beg the Court or ask the Court to spare my life. I believe I deserve the death penalty for what I've done. That's all I have to say.

SENTENCING IV at 37/5-14. As reflected in Judge Hoffman's findings of fact and conclusions of law, Berget understood the ramifications of his waiver.

Berget has also expressed frustration with Yackel's efforts to circumvent his wishes. When she came to visit him at the penitentiary last week, he refused to visit with her. She was sent away by penitentiary staff.

These facts, and others adduced at the *Atkins* trial demonstrate that no further examination of Berget's competency or capacity is required because neither Berget's mental history nor his interactions with the court suggested "reason to doubt" his competency. *Godinez*, 509 U.S. at 402, 113 S.Ct. at 2688, n. 13.

Berget's incompetency is the "prerequisite for 'next friend' standing." *Whitmore*, 495 U.S. at 165, 110 S.Ct. at 1728. In *Whitmore*, a fellow death row inmate sought to prosecute Ronald Gene Simmons' direct appeal. The court

determined that Whitmore lacked standing because Simmons had previously been adjudicated competent. *Whitmore*, 495 U.S. at 165, 110 S.Ct. at 1728.

Whitmore is consistent with the court's earlier *Gilmore* decision, which ruled that Gilmore's mother would have standing to pursue Gilmore's appeals on his behalf only if he were incompetent and "unable to seek relief in his own behalf." *Gilmore*, 429 U.S. at 1015 n. 4, 97 S.Ct. at 438. Like Gilmore, Berget was found competent after examination by Dr. Bean and numerous reviews by other qualified mental health professionals. *Gilmore*, 429 U.S. at 1014, 1017, 97 S.Ct. 438, 439. Like Gilmore, Berget's access to this court is unimpeded in that he is currently represented by Jeff Larson in the criminal case and Eric Schulte in the *habeas corpus* case. *Gilmore*, 429 U.S. at 1014, 97 S.Ct. 437. Because Berget is competent and represented, Yackel has no standing to file anything on his behalf.

CONCLUSION

As observed in *Chapman v. Commonwealth*, 265 S.W.3d 156, 175-76, (Ky. 2008), "[a]dhering to a defendant's choice to seek the death penalty honors the last vestiges of personal dignity available to such a defendant." Berget wants to partially redeem himself in the public eye and in the minds of his family by accepting his punishment. It is not Juliet Yackel's place to thwart

Berget's wishes. Accordingly, Yackel's last-minute petition for a writ of prohibition and other relief should be denied in full.

Dated this 26th day of October 2018.

MARTY J. JACKLEY
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "Paul S. Swedlund", written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26th day of October 2018 a true and correct copy of the foregoing response to petition for writ of prohibition and other relief was served on Lisa Agrimonti at lagrimonti@fredlaw.com.

A handwritten signature in black ink, appearing to read "Paul S. Swedlund", written over a horizontal line.

Paul S. Swedlund
ASSISTANT ATTORNEY GENERAL