No. ____

IN THE

Supreme Court of the United States

JULIET YACKEL ,

Petitioner,

v.

STATE OF SOUTH DAKOTA, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, & DENNY KAEMINGK, SECRETARY, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS,

Respondents.

APPLICATION FOR STAY OF EXECUTION

CAPITAL CASE: IMMINENT EXECUTION

2:30 p.m. ET on October 29, 2018

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INTRODUCTION

To the Honorable Justice Neil Gorsuch, Circuit Justice for the Eighth Circuit:

Petitioner Juliet Yackel respectfully requests a stay of Mr. Rodney Berget's execution, presently scheduled for 2:30 p.m. ET on October 29, 2018. This stay is requested pending this Court's resolution of his petition for writ of certiorari.

According to two of the nation's leading experts on intellectual disability, Mr. Berget is intellectually disabled under current medical definitions and as demonstrated by a wealth of evidence, including childhood placement in special education courses and IQ tests as well as Mr. Berget's participation in the Special Olympics. Nonetheless, a South Dakota hearing court found he was, in fact, eligible for execution. In so holding, that court relied on screening tests that are not properly considered for diagnosing (or ruling out) intellectual disability, court-derived factors akin to those rejected by this Court in *Moore v. Texas*, 137 S. Ct. 1039 (2017), as well as testimony from a state's expert who was not familiar with the legal standards regarding intellectual disability in death penalty cases articulated by this Court in *Moore v. Texas* and *Hall v. Florida*.

His attorneys apparently continue to believe Mr. Berget is ineligible for execution. Yet at Mr. Berget's insistence (and on the advice of a spiritual advisor), post-conviction counsel refused to enter a notice of appeal from this unlawful ruling. Though Mr. Berget's counsel believes that the lower court's disposi-

tion of the claim of intellectual disability is wrong, he did not appeal it because he believes Mr. Berget should be able to obtain what will – if he is correct that Mr. Berget is intellectually disabled – be an unconstitutional execution.

As a result, Ms. Yackel petitioned the South Dakota Supreme Court, requesting that court to appoint her as a guardian ad litem to protect Mr. Berget's interests. The South Dakota Supreme Court denied the petition solely on the basis of an intellectual disabilities proceeding that failed to comply with *Atkins v. Virginia*, *Hall v. Florida*, and *Moore v. Texas* and Mr. Berget's present representation counsel who are conflicted and have abandoned him.

That decision gives rise to the questions presented:

> Was Rodney Berget arbitrarily deprived of his entitlement to conflict free counsel in violation of the Fourteenth Amendment when his counsel determined not to file an otherwise meritorious appeal because he decided that doing so would be contrary to his spiritual duties?

As discussed in the simultaneously filed Petition, this question implicates a substantial split of authority. And this Court should stay Mr. Berget's execution to resolve the question.

PROCEDURAL AND FACTUAL BACKGROUND

Mr. Berget continues to be saddled with conflicted counsel. As recently as Saturday, his trial counsel filed an affidavit from Mr. Berget in support of his own execution.

As a child, Mr. Berget was in enrolled in special education programs and the Special Olympics. His

IQ tests placed him in the intellectually disabled range. The State of South Dakota assigned him a caseworker who specialized in intellectual disabilities. Although trial counsel possessed all of this information, he presented none of it at trial. Less than six weeks before Mr. Berget faced a hearing about whether he would live or die, his counsel was very publicly fired from is position in the public defender's office. *See Defender Dismissed Amid Murder Cases*, Argus Leader A1 (Jan. 22, 2012). Despite being cut off from his former office's resources, trial counsel collected his belongings from the curb, literally, and insisted on representing Mr. Berget without even so much as asking for a continuance. Even the paralegal acting as his investigator was unavailable to assist, or even testify, absent a subpoena. Mr. Berget ultimately pleaded guilty and his counsel presented four witnesses at his capital sentencing proceedings, most of whom offered *aggravating* evidence about his ongoing incarceration.

In state post-conviction proceedings, Mr. Berget was represented by the same attorney who represented him at trial. At the insistence of the state and over trial counsel's objection, the court appointed Independent Review Counsel. That attorney retained Petitioner to investigate whether trial counsel was ineffective for failing to investigate Mr. Berget's mental health.

Before Independent Review Counsel had a chance to present the product of Petitioner's investigation, Mr. Berget presented the court with a letter expressing a desire to dismiss his state habeas proceedings and be executed. At the request of Mr. Berget's counsel, the state habeas court agreed to hear evi-

dence on whether Mr. Berget was intellectually disabled.

Petitioner secured the involvement of Dr. Greg Olley, a national expert in the diagnosis of intellectual disability. Dr. Olley reviewed prior IQ tests administered to Mr. Berget prior to the age of 18 that revealed raw scores of 70, 72, 74, and 83. Adjusting for the standard error of measurement and the Flynn Effect, Dr. Olley testified that he had normed the scores to 63, 66 or 67, 66 and 75.

Dr. Olley also testified that, based on his record review and witness interviews, Mr. Berget displayed deficits in adaptive functioning. PCR Tr. 148-52. Dr. Olley found that former teachers confirmed that Mr. Berget was properly placed in special education. PCR Tr. 168-69. One teacher remembered Mr. Berget—after over 30 years—as lost and confused, withdrawn and isolated, and not able to learn or progress socially. *Id*. Dr. Olley also found that Mr. Berget's junior high school friends spoke of his impulsivity, difficulty in planning and social limitations. PCR Tr. 170. Mr. Berget's former wife discussed his social limitations and inability to maintain finances.[1] PCR Tr. at 173. Former employers confirmed that Mr. Berget's jobs were low-skilled and did not require decision making.

The State presented a teacher and a former spouse of Mr. Berget's, each of whom testified to

[1] On Dr. Olley's third meeting with Ms. Kousman, however, she reported that she had spoken with the prosecutor and the state's psychiatrist and that she would help Mr. Berget die because "I know that that's what Rodney wants and that's what I want to support." *Id*. at 166.

their belief that Mr. Berget was not intellectually disabled. It also presented evidence of a psychologist who relied on group IQ screening tests, phone conversations, and letters from Mr. Berget, along with the averment of Mr. Berget's trial counsel, to conclude that Mr. Berget was not intellectually disabled.

The state habeas court uncritically accepted the testimony of the state's expert's opinion. Reviewing the presentation and resolution of the evidence of Mr. Berget's intellectual disability, one of the nation's foremost experts on intellectual disability observed that this is:

> [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.

App. 457a. Having concluded that Mr. Berget's *Atkins* claim lacked merit, the state habeas court dismissed his case.

Counsel for Mr. Berget abandoned him. In part relying on the advice of a spiritual advisor, he declined to file a Notice of Appeal, a document neces-

sary to obtain review of the lower court's flawed decision.

Petitioner sought to intervene on Mr. Berget's behalf when she saw that the person whose life she had thoroughly investigating was on the brink of execution. She knew that Mr. Berget had a dozen documented suicide attempts, that major depression and mental illness ran in his family, and that he was almost certainly intellectually disabled. She believed that it was her ethical obligation in light of both Mr. Berget's cognitive and psychiatric impairments as well as his counsel's inability to offer conflict-free representation to intervene.

Attorney Schulte acknowledged throughout the representation that he was "conflicted" about putting on evidence of Mr. Berget's intellectual disability. She had also met with Mr. Berget only weeks earlier, a meeting in which Mr. Berget "did not understand what had transpired in his case and that his desire was to commit suicide, as he had attempted repeatedly throughout his life." His impairments were apparent in that, "[h]e could not explain the process that could lie ahead of him if he continued to appeal, or the prospect of a life other than on death row." App. 112a.

On Friday, October 26, 2018, Ms. Yackel petitioned the South Dakota Supreme Court to stop Mr. Berget's execution and to appoint her as guardian ad litem. The next day, the very lawyer who the state insisted was conflicted and should be removed, filed an affidavit signed by Mr. Berget dated October 26, 2018. App. 506a-08a. The affidavit demonstrated Mr. Berget's ongoing reliance on an indisputably conflicted lawyer who is taking extraordinary steps to assist

Mr. Berget proceed with an execution that is unconstitutional. App. 506a-08a.

Because Ms. Yackel did not believe Mr. Berget could act in his own interests and because she had witnessed his trial and post-conviction counsel's failures to protect those interests, she sought the involvement of the South Dakota Supreme Court.

REASONS TO STAY THE EXECUTION

A stay of execution is warranted where there is a "presence of substantial grounds upon which relief might be granted." *See Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). To decide whether a stay is warranted, the federal courts consider the petitioner's likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner has delayed his or her claims. *See Hill v. McDonough*, 547 U.S. 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). This standard requires a petitioner in this Court to show a reasonable probability that four members of the Court would consider the underlying case worthy of the grant of certiorari, that there is a significant likelihood of reversal of the lower court's decision, and a likelihood of irreparable harm absent a grant of certiorari. *See Barefoot*, 463 U.S. at 895.

There is no question that Mr. Berget will suffer irreparable harm absent this Court entering a stay of execution. *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J. concurring) (irreparable harm "is necessarily present in capital cases."). The remaining questions weigh heavily in favor of review. Petitioner addresses them each in turn.

I. COUNSEL ABANDONED MR. BERGET BY FAILING TO NOTICE MR. BERGET'S APPEAL, CAUSING A FUNDAMENTAL BREAKDOWN IN THE ADMINISTRATION OF JUSTICE.

There is no greater punishment than execution. Before such an extreme sanction can be imposed, this Court insists that the highest procedural protections be provided. Yet, here, counsel for Mr. Berget abandoned him, declining to file a notice of appeal on the advice of a spiritual advisor.

They did so despite believing that he is intellectually disabled and despite believing that he is, in fact, intellectually disabled. They did so knowing that the lower court's ruling flagrantly disregarded this Court's decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2016). Allowing counsel's failure to notice an appeal to defeat Mr. Berget's *Atkins* claim of ineligible runs directly contrary to the precept that in capital cases, the greatest procedural protections will be provided to avoid an arbitrary execution.

II. INTELLECTUAL DISABILITY BARS EXECUTION

Beyond the decision below contravening this Court's precedents, Petitioner is likely to prevail, both in obtain certiorari and a favorable resolution of the questions, because intellectual disability marks a categorical bar to punishment. As outlined in the Petition for Writ of Certiorari, there is a substantial split of authority on whether someone who is intellectually disabled can waive the constitutional bar to their execution.

Just as we would not countenance the execution of a juvenile, whatever the defendant's views on the matter, so too should we flatly bar execution of the intellectually disabled.

It is against this backdrop that Petitioner reached out to present counsel, seeking to protect Mr. Berget's life. She had recently met with Mr. Berget, and it was apparent to her that his impairments, including his lifetime of suicidal gestures, called sharply into question the reliability of the process that was leading to his execution.

This Application comes shortly after that meeting and only after it was clear to Petitioner that counsel for Mr. Berget would take no action on his behalf to stop his execution despite his intellectual disability.

CONCLUSION

The Court should stay Mr. Berget's execution.

Respectfully,

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