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March 6, 2015

Bill Thompson, Clerk
Supreme Court of Missouri
Post Office Box 150
Jefferson City, MO 65102

Dear Mr. Thompson:

We are writing to request that the Supreme Court adopt the attached amendments to Missouri Rule 30.30. On July 1, 2014, the court adopted amendments to that rule, limiting the number of executions the department of corrections could be required to undertake to one per month. The proposed amendments limit the number of clients under death warrant any one attorney could be required to represent in a six-month timeframe. These amendments are necessary because the capital defense bar is in crisis because of its recent workload.

Since November 2013, Missouri has executed thirteen men. Only a handful of attorneys represented most of those men and still represent the other defendants currently facing execution in Missouri. One attorney has represented five of the nine men recently executed, and currently represents two other clients with an imminent risk of execution. Mark Christeson's execution, for example, was initially scheduled by this Court for October 29, 2014, despite the fact that his attorneys at the time, Eric Butts and Phil Horwitz, also represented William Rousan, who was executed in Missouri on April 23, 2014.¹ Leon Taylor, who was executed last November, initially received a stay of execution after his counsel notified the Court of a hearing in another capital case in the weeks leading up to the execution. His attorney represents Cecil Clayton, whose execution is scheduled for March 17. His attorney has two other clients who have received show cause orders who are likely to receive execution dates in the near future. Ten men have had show cause orders issued as to why a date of execution should not be set.

As members of the American Bar Association's Death Penalty Assessment Team here in Missouri, we know that there is no more serious undertaking than representing a client facing a death sentence – and this undertaking is most significant when the client is under a death warrant. Competent representation in the face of a death warrant requires pursuing an array of issues. This often includes litigating issues not legally available until an execution is imminent,²

¹ The U.S. Supreme Court issued a stay in Mr. Christeson's case on October 28, 2014, and subsequently remanded the matter for further proceedings.

² See, e.g., *Panetti v. Quarterman*, 551 U.S. 930, 942-48 (2007) (claims regarding competency to be executed not ripe until after an execution has been scheduled).



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applying for clemency, and ensuring that any such process is fair and just.³ A clemency application alone is a substantial undertaking, requiring a “complete and persuasive” presentation, “utilizing all appropriate resources in support (e.g., relevant outside organizations, the trial judge, prominent citizens), and discussing explicitly why the clemency-dispenser should act favorably notwithstanding the repeated affirmation of the client’s conviction and sentence by the judicial system.”⁴ Meeting this challenge requires investigation of both the circumstances of the offense and the adequacy of the prior proceedings.⁵

Competently taking on these substantial obligations takes significant time. The legal proceedings in death penalty cases are notoriously lengthy and complex. Establishing a detailed understanding of those proceedings is a time consuming task and a basic prerequisite to competent performance. Moreover, competent representation requires the attorney to learn as much about the inmate as possible. This effort is necessary to enable the relevant decision makers to see the inmate as something more than the crime he is charged with committing. Competent representation of inmates under an execution warrant takes substantial time.

It also takes substantial emotional resources. Competent representation in capital cases requires establishing a relationship of trust with the client. In the context of this relationship, the client will often share the most sensitive details of his life. No matter how professional the relationship between a death-sentenced client and his counsel, having a client executed is a uniquely taxing professional experience.

The current pace of executions is preventing counsel for the condemned from performing competently. It is professionally and emotionally impossible to mount the defense required for a client, month after month, only to see each client executed. Even if competent represent for a single client was possible in this short timeframe, the emotional toll of losing client after client prevents competent representation of subsequent clients. For these reasons, we are requesting that the Court adopt the attached amendments, effective immediately.

We believe a long-term solution is required to prevent an inmate from ever being placed in the position Mr. Clayton and others face: a fast approaching execution date with attorneys who cannot competently represent both him and their other clients with pending executions. The attached proposed amendments provide that solution. The proposed amendments address the current crisis in representation in three ways. First, the proposed amendments limit the number of clients under warrant of execution which any one attorney can be tasked with representing. Second, they provide a minimum of 180 days’ notice before an execution can take place. Third, they require attorneys to prioritize representation of clients who are under execution warrants. These are common-sense solutions to a serious problem affecting virtually every scheduled execution.

³ See *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998); *ABA Guidelines*.

⁴ *ABA Guidelines* 10.15.2 cmt. (“Duties of Clemency Counsel”).

⁵ *ABA Guidelines* 10.7 (“Investigation”).

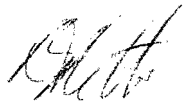


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Given the gravity of capital punishment and the present crisis in capital representation, this Court should adopt the proposed amendments.

Sincerely,



Paul Litton

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Stephen C. Thaman

Professor of Law
St. Louis University
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St. Louis, MO

Hon. Hal Lowenstein

Missouri Court of Appeals (Retired)
Kansas City, MO

Douglas Copeland

Partner
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Attachment: Proposed Revision to Rule 30.30



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New text is underlined text.

~~Deleted text is in stricken through text.~~

30.30. Sentence of Death - Setting Execution Dates

(a) The time for execution of any death sentence shall be set by order of this Court. The initial date of execution shall be set following the review of the sentence required by statute and the affirmance thereof. If no timely motion for rehearing is filed, the execution shall be set not fewer than 95 days from the date of the opinion affirming the sentence. If a timely motion for rehearing is filed, the execution shall be set not fewer than 95 days from the date the motion is overruled.

(b) A date of execution set pursuant to Rule 30.30(a) shall be stayed upon the receipt in this Court of proof of filing of a timely appeal or petition for writ of certiorari in the Supreme Court of the United States. No other filing in this or any other Court shall operate to stay an execution date without further order of this Court or other competent authority.

(c) If an execution is stayed, the Court shall set a new date of execution upon motion of the state or upon its own motion. No such motion shall be considered prior to exhaustion of the defendant's right to seek relief in the Supreme Court of the United States following review of the defendant's direct appeal, state post-conviction motion, and federal habeas corpus decision unless the defendant fails to pursue such remedy.

(d) Upon the filing of a motion to set execution date, defendant shall have 30 days to file a response unless otherwise ordered by the Court. If the motion to set execution date is on the Court's own motion, it shall issue an order to show cause to the defendant requiring a response in not fewer than 30 days.

(e) Consistent with the provisions of Rule 30.30(f), the Court shall rule on the motion to set execution date promptly after receipt of defendant's response or failure to file a response within the time allowed. Any such determination shall be without prejudice to the defendant seeking a stay of execution after an execution date is set or the state seeking a new date if the Court overrules the state's motion to set an execution date.



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(f) The Court shall set dates of execution after consultation with the director of the department of corrections. Any date of execution shall be at least ~~30~~ 180 days but not more than ~~60~~ 240 days after the date the order setting the date is entered. The department of corrections shall not be required to execute more than one warrant of execution per month.

(g) No attorney shall be expected to represent more than one defendant who has an execution date scheduled within 180 days of any other client of that attorney. Upon a showing that a defendant under warrant for execution is represented by an attorney who has represented or is representing another defendant in his or her post-conviction or clemency proceedings with an execution date within the 180 days prior to the defendant scheduled date of execution, this Court shall grant an application for stay of the execution date for that defendant. Any new execution date for that defendant shall be outside of the 180 day period.

(~~g~~h) When setting an execution date other than the original date set pursuant to Rule 30.03(a), the Court shall issue a warrant of execution to the director of the department of corrections for the execution of the defendant at the time therein specified. The director shall obey the warrant accordingly and be directed to file a return thereto with the Court.

(~~h~~i) Notice of any date of execution set by this Court shall be given to the defendant, the defendant's counsel, the governor, the attorney general, and the director of the department of corrections.

(j) Counsel for a defendant under warrant for execution shall prioritize the representation of that client over all other cases or matters in which that attorney is counsel of record. Absent extraordinary circumstances, the courts of this state shall accommodate requests from the defendant's counsel to continue or stay other scheduled discovery or pleading deadlines, hearings, trials, or other proceedings in unrelated cases where that attorney is counsel of record until after the scheduled date of execution. Absent extraordinary circumstances, attorneys licensed in this state shall not oppose a motion to continue or stay any deadlines or proceedings made by counsel for a defendant under a stay of execution. Any such opposition shall specifically state the basis



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for the extraordinary circumstance and a copy of the opposition shall be filed with this Court.



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