

May 13, 2020

The Honorable Michael Parson
Governor of Missouri
Missouri State Capitol
Rm. 216
Jefferson City, MO 65101

Re: Execution of Walter Barton scheduled for May 19, 2020

Dear Governor Parson:

As President of the American Bar Association, I write to express my concern regarding the execution of Walter Barton scheduled for May 19, 2020. **Given the unprecedented limitations on effective representation the COVID-19 crisis has created, we urge you to exercise your power under the Missouri Constitution, Article IV, Section 7, to reprove Mr. Barton's May 19 execution date.** Additionally, in light of the troubling history of this case, the lingering doubts around guilt, and the procedural bars limiting the courts' ability to review important evidence, we urge you to consider commissioning a Board of Inquiry to review Mr. Barton's conviction and sentence, as provided for in Missouri law.¹

The ABA does not take a position on the constitutionality of the death penalty itself. Instead, it is committed to ensuring that no death sentence is carried out without due process of law or zealous representation by counsel throughout every stage of the legal proceedings, including in applications for executive clemency.² For more than 30 years, the ABA's Death Penalty Representation Project (the "Project") has worked to ensure that every person facing a death sentence has access to effective representation, and it has long served as an expert resource to

¹ MO Rev. Stat. § 552.070. As you know, there is precedent for such action. In 2017, former Governor Eric Greitens lawfully stayed Marcellus Williams' execution and appointed a Board of Inquiry to review evidence of innocence that the courts could no longer consider. *See* Executive Order 17-20, available at <https://www.sos.mo.gov/library/reference/orders/2017/eo20>.

² *See* Guideline 1.1(B), ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereinafter "ABA Guidelines" or "Guidelines"), 31 Hofstra L. Rev. 913 (2003), available at <http://ambar.org/2003guidelines> ("These Guidelines apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, postconviction review, clemency proceedings and any connected litigation.").

² Declaration of Emily Olson-Gault, April 3, 2020, enclosed.

judges, legislatures, and others seeking to ensure due process in our most serious criminal cases. On April 3, 2020, in light of the COVID-19 pandemic and its widespread impact on legal proceedings, Project Director and Chief Counsel Emily Olson-Gault, executed a Declaration detailing the ways in the pandemic may prevent attorneys from fulfilling their constitutional and ethical obligations in capital representation—especially when an execution date has been set.³ Ms. Olson-Gault’s Declaration observes:

[C]ases with an active execution warrant require additional urgent, time-consuming tasks that cannot be completed prior to the issuance of the warrant, such as the preparation of petitions for executive clemency, seeking stays of execution, and arranging for expert evaluations regarding the clients’ competency to be executed.⁴

The ABA’s nationally recognized guidelines for capital defense representation outline in detail the multitude of tasks counsel is required to undertake when an execution date has been set—including, in preparation for clemency proceedings, the need to thoroughly reinvestigate the case. Ms. Olson-Gault’s declaration also notes,

[t]he norms of practice reflected in the ABA Guidelines[...] represent the minimum requirements for adequate representation. If counsel lacks adequate time to prepare their case, or if defense counsel, mental health experts, investigators and mitigation specialists are unable to conduct in-person meetings and interviews to discharge the duties...[enumerated], fundamental fairness and accuracy are put at risk.⁵

Questions of fundamental fairness and accuracy are of paramount importance in death penalty cases. Should questions arise about guilt or the appropriateness of sentence in the days and weeks preceding the scheduled execution, it is vital that counsel not be limited from exploring those questions and presenting those issues in support of clemency or to the courts. Indeed, multiple states recently have stayed scheduled executions in response to the public risks inherent in carrying out an execution during the pandemic, as well as the serious limitations the pandemic has imposed upon representation.⁶ In Mr. Barton’s case, the ABA has been made aware of several ways in

³ Declaration of Emily Olson-Gault, April 3, 2020, enclosed.

⁴ *Id.* at ¶ 31.

⁵ *Id.* at ¶32.

⁶ *See, e.g., Tennessee Supreme Court delays upcoming execution, citing COVID19, Tennessean.com* (April 17, 2020), available at: <https://www.tennessean.com/story/news/2020/04/17/coronavirus-tennessee-court-delays-execution-citing-covid-19/5138614002/>; *Texas Court Issues Nation’s Seventh Coronavirus Stay of Execution*, Death Penalty Info. Ctr. (April 27, 2020), available at: <https://deathpenaltyinfo.org/news/texas-court-issues-nations-seventh-coronavirus-stay-of-execution>.

which the COVID-19 pandemic has substantially interfered with counsel's ability to advocate for their client in the days before his execution. Critically, attorneys for Mr. Barton have been severely limited in their ability to pursue and fully present evidence that casts serious doubt on Mr. Barton's guilt and that would be vital to the consideration of clemency.

Because an accurate determination of guilt is of critical importance in capital cases, counsel has a continuing obligation to investigate any lingering questions regarding guilt or innocence throughout all appeals, collateral challenges, and clemency proceedings.⁷ In Mr. Barton's case, the State prosecuted Mr. Barton *five times* before obtaining a conviction and death sentence that withstood appellate review.⁸ Earlier attempts to secure a conviction ended, respectively, in a mistrial, a hung jury, a reversal on direct review due to judicial error, and finally a reversal in post-conviction review due to perjured testimony of a State witness. The conviction and death sentence obtained in 2006 at Mr. Barton's fifth and most recent trial relied again on testimony from the same jailhouse informant who was found to have perjured herself during Mr. Barton's fourth trial. A divided Missouri Supreme Court ultimately upheld the result of Mr. Barton's fifth trial by a vote of 4-3, with the dissent writing that it "[could not] imagine...why the Court would approve the death sentence on this sorry record."⁹

Although divided on the sufficiency of the evidence, the Missouri Supreme Court was in agreement that the only physical evidence tying Mr. Barton to the crime came from the presence of small amounts of the victim's blood on his shirt, together with testimony from a blood spatter expert that these drops were "impact spatter" deposited in the course of carrying out the brutal attack.¹⁰ Mr. Barton provided an alternative explanation for the presence of the blood, telling police that he, along with the victim's neighbor and granddaughter, found the victim's body in her blood-soaked trailer, and he slipped trying to keep the victim's granddaughter from touching the body.¹¹ During Mr. Barton's most recent federal habeas proceedings, counsel asked a blood spatter expert to review the physical evidence. The expert, Mr. Renner, concluded that Mr. Barton's clothing with the small drops of blood could not have been the clothing worn by the perpetrator of this crime, due to the extensive nature of the victims' injuries.¹²

⁷ See Guideline 10.7(a) ("Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.").

⁸ *State v. Barton*, 240 S.W.3d 693, 696 (Mo 2007).

⁹ *Id.* at 719 (Wolff, J. dissenting).

¹⁰ *Id.* at 700 (describing evidence against Mr. Barton in the light that most supported a conviction and identifying blood evidence as the only physical evidence linking the defendant to the murder); *Id.* at 714 (Wolff, J. dissenting) ("The bloodstain on Barton's shirt is the only physical evidence in any way connecting him to this crime, and that evidence is highly suspect at best.").

¹¹ *Id.* ("Barton provided an explanation for the blood on his shirt. He told investigative officers that he had gotten blood on his shirt when he bent down to pull Ms. Selvidge away from the victim's body.").

¹² Lawrence Renner Affidavit. See also *State v. Barton*, 240 S.W.3d. at 713 (Wolff, J. dissenting) ("There was no testimony at trial that Barton changed clothing or discarded the clothing he had worn to go and visit Ms. Kuehler. How could Barton have perpetrated the kind of violent, forceful attack that killed Ms. Kuehler and walked away quite unstained by the effort?").

To this point, strict procedural rules regarding newly discovered evidence and what sorts of issues can be raised on appeal have prevented the courts from reviewing the merits of Mr. Renner's affidavit and the impact it would have had on the jury's determination of guilt. Although procedural rules serve an important purpose to keep the criminal justice system functioning efficiently, the ABA has long been concerned about procedural rules that interfere with the court's ability to consider a substantial claim of innocence, especially in capital cases.¹³ Where courts are unable or unwilling to set aside such procedural bars, a robust and thorough consideration of the case in clemency is all the more important. Unfortunately, in Mr. Barton's case, it is precisely these efforts that the COVID-19 pandemic has made both extremely difficult and dangerous to carry out.

In March 2020, after Mr. Barton's execution date was set, but before the Missouri Supreme Court denied his successive petition for habeas relief, Mr. Barton's counsel along with an attorney and an investigator with the Missouri Office of the State Public Defender ("MSPD") made plans to interview jurors from Mr. Barton's fifth trial to obtain critical evidence that could demonstrate how Mr. Renner's testimony could have altered the outcome of trial. Such outreach is a critical component of clemency investigations and has supported favorable clemency decisions in various cases, such as former Ohio Governor John Kasich's decision to commute Raymond Tibbetts' death sentence in 2018,¹⁴ and the Georgia Board of Pardons and Paroles' decision to commute Jimmy Meders' death sentence earlier this year.¹⁵

Unfortunately, exactly as this critical investigation got underway in Mr. Barton's case, the COVID-19 crisis accelerated. MSPD Attorney Amy Bartholow executed an affidavit about the ways that the pandemic prevented her and her colleagues from conducting the necessary investigation:

[A]s of March 14, we had met with two jurors and we were planning on contacting and meeting with as many of the remaining seven living jurors that we could. [...] [But] after meeting with the first two jurors, the COVID-19 pandemic hit with full

¹³ See Am. Bar Ass'n Resolution 1990 MY 115E ("Federal courts should not rely on state procedural bar rules to preclude consideration of the merits of a claim . . . if the failure to consider such a claim would result in a miscarriage of justice.") (1990), available at https://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/1990_my_115e.pdf; Am. Bar Ass'n Resolution 2011 MY 104(B) (urging equitable tolling of statute of limitations when prisoner shows good cause for not bringing the claims sooner) (2011), available at https://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/2011_my_104b.pdf.

¹⁴ See John Kasich Commutes Death Sentence for Raymond Tibbetts, Cleveland Scene (July 20, 2018), available at <https://www.clevescene.com/scene-and-heard/archives/2018/07/20/john-kasich-commutes-death-sentence-for-raymond-tibbetts>.

¹⁵ See Georgia Parole Board Spares Life of Condemned Prisoner, AJC.com (Jan. 16, 2020), available at <https://www.ajc.com/news/crime--law/breaking-georgia-parole-board-s pares-the-condemned-prisoner/3mWrCC4CknbzgKBYNUbTqM/>.

force....[O]n April 29, 2020, Ms. Malone was able to reach two additional jurors who agreed to meet with us. Although travel was not recommended, Ms. Malone and I felt that we had no choice but to put ourselves at risk to travel to talk to these jurors in person, given the time constraints of an outstanding warrant.

However, due to social distancing requirements, there were no open facilities to meet for private conversation with jurors. They agreed to meet in parking lots where we could maintain a six foot distance....[O]n May 1, 2020, Ms. Malone and I drove 2 hours from Columbia, MO, to Belton and Harrisonville, MO, wearing masks and gloves so as not to inadvertently contaminate one another...It was an extremely windy day, and we were required to shout over the wind to be heard by these jurors. We also handed them documents wearing face masks and latex gloves, in an effort not to inadvertently contaminate them.¹⁶

The ABA Guidelines recognize that critical evidence, including evidence of innocence, tends to emerge “at a relatively late stage of capital proceedings.”¹⁷ For that reason, it is absolutely essential to ensure that the prisoner is effectively represented by counsel at every stage of a capital case, including in the days leading up to the execution. Often, concerns about the quality of defense counsel are tied to qualifications or funding, but the threat to justice is no less real if something external to the legal system such as a natural disaster or public health emergency prevents counsel from performing essential aspects of representation. The ABA is deeply concerned that plans for Mr. Barton’s execution are moving forward even though his attorneys have not been able to perform essential tasks connected with any capital representation, and doubly so because of the significant questions that remain about Mr. Barton’s guilt and the inability of the courts to review the merits of what evidence has been developed due to procedural technicalities.

Clemency has repeatedly been identified by the U.S. Supreme Court as the “fail-safe” in the criminal justice system, and under circumstances such as these, use of that fail-safe is needed to avoid a serious injustice.¹⁸ I urge you to use your clemency powers to grant a reprieve of execution, allowing sufficient time for Mr. Barton’s counsel to complete their work safely and effectively, and also to consider creating a Board of Inquiry once it is safe to do so, which can thoroughly evaluate the evidence of guilt and innocence, free from the procedural limitations imposed on courts.

Sincerely,



Judy Perry Martinez

¹⁶ Affidavit of Amy Bartholow, May 7, 2020.

¹⁷ Guideline 1.1, commentary, at 929-30.

¹⁸ *Herrera v. Collins*, 506 U.S. 390 (1993).

DECLARATION OF EMILY OLSON-GAULT, ESQ.

1. I, the undersigned declarant, Emily Olson-Gault, am over eighteen years of age and competent to testify to the statements contained in this Declaration. I am an attorney licensed to practice law in the State of New York and the U.S. Supreme Court. I am the Director and Chief Counsel of the American Bar Association Death Penalty Representation Project, which is based in Washington, D.C.
2. The American Bar Association (“ABA”) created the Death Penalty Representation Project (the “Project”) in 1986 to address the lack of qualified counsel available to those facing a death sentence.
3. The ABA and the Project do not take a position on the death penalty itself. The Project is committed to ensuring that basic constitutional protections have been provided to all individuals who are charged with a capital crime or sentenced to death. To this end, the Project promotes policies and procedures that will guarantee that all those facing execution are represented at every stage of the proceedings.
4. The ABA has promulgated Guidelines that govern the appointment and performance of defense counsel in death penalty cases. The Project is sometimes asked to provide affidavits in death penalty cases about the ABA Guidelines and standards for representation, and it does so not to advantage a particular litigant but to ensure that basic constitutional protections and due process have been provided to all individuals under a death sentence.
5. The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereinafter “ABA Guidelines” or “Guidelines”), first adopted in 1989, were revised and updated in 2003 so that they would accurately reflect current death penalty law and practice. 31 HOFSTRA L. REV. 913 (2003), *available at* <http://ambar.org/2003guidelines>. The Death Penalty Representation Project led the effort to revise and update the Guidelines. The ABA House of Delegates approved the revised ABA Guidelines in February 2003.
6. After the revision of the ABA Guidelines in 2003, the Project and other organizations developed the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (hereinafter “Supplementary Guidelines”) to address the urgent need to help defense counsel understand how to supervise the development of mitigation evidence and direct a key member of the defense team, the mitigation specialist. The Supplementary Guidelines are a complementary extension of the ABA Guidelines. They serve to spell out important features of the existing standards of practice that enable mitigation specialists and defense attorneys to work together effectively to uncover and develop evidence that humanizes the client. *See* Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV. 679 (2008).
7. The ABA Guidelines and Supplementary Guidelines have been cited favorably in nearly 400 state and federal capital appellate decisions, including the United States Supreme Court.

See, e.g., Padilla v. Kentucky, 559 U.S. 356, 366-67 (2010) (“We long have recognized that ‘[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable ...’” (citing *Bobby v. Van Hook*, 558 U.S. 4 (2009) (per curiam)); *Florida v. Nixon*, 543 U.S. 175, 191, 191 n.6 (2004); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). *See also* ABA Death Penalty Representation Project, *List of Cases Citing the Guidelines* (Mar. 27, 2020), available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/allcites.pdf.

8. The Guidelines have been adopted in substantive part or officially acknowledged as an accurate description of the standard of care for defense representation in death penalty cases by organizations such as the State Bar of Texas, the Department for Public Advocacy for the Commonwealth of Kentucky, the Idaho Public Defender Commission, the Georgia Public Defender Standards Council, and numerous others. The ABA Guidelines have also been adopted in substantive part by state legislative action or court rule in Louisiana, Nevada, and Arizona. *See* ABA Death Penalty Representation Project, *Implementation Fact Sheet* (Jul. 2018), available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/ImplementationFactSheetJul2018.pdf.
9. The ABA Guidelines did not themselves create the national standard of care for capital representation; rather they simply codified long-standing norms of capital defense practice in the United States. *See Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir. 2003) (“the [ABA Guidelines] merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases.”).
10. They are intended to provide guidance to judges and capital defense counsel regarding the skills and training death penalty counsel must possess when representing a person charged with a capital crime or sentenced to death.
11. The professional norms encapsulated by the ABA Guidelines govern every stage of capital proceedings. *See* Guideline 1.1(B) (“These Guidelines apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, postconviction review, clemency proceedings and any connected litigation.”). In a capital case, “every stage” includes litigation in the context of an issued execution warrant, *see* Guideline 10.15.1, “Duties of Post-Conviction Counsel,” Commentary, at 1081 n.335, as well as “advocacy outside the confines of the capital case itself,” such as systemic and administrative challenges. Guideline 1.1, Commentary, at 923-24.
12. Underlying much of the ABA Guidelines is the recognition that defending capital cases requires extraordinary time and effort at every stage of a capital proceeding, including post-conviction, habeas corpus, and once an execution warrant has issued. *See* Guideline 1.1, Commentary (“‘Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution.’ . . . Due to the extraordinary and irrevocable nature of the penalty, at every stage of the

proceedings counsel must make ‘extraordinary efforts on behalf of the accused’” (quoting, first, Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 357-58 (1995) and, second, ABA Standards for Criminal Justice: Defense Function, Standard 4-1.2(C), (3d ed. 1993)). The need for time and resources to prepare the defense is due in part to the tremendous amount of investigation that the capital team must complete to adequately represent a person under a death sentence.

13. In my position as Director of the Project, I am in frequent contact with capital defenders and pro bono attorneys to discuss and assist with issues related to capital representation.
14. During the month of March 2020, I have spoken with capital defenders and pro bono attorneys all over the United States as they attempt to cope with the unprecedented situation created by the COVID-19 global pandemic. My understanding from these conversations is that most capital defense teams are unable to conduct the large majority of the investigation and expert work required in capital representation (*see* ¶¶18-31, *infra*). This is due to restrictions set in place by state and local governments, as well as departments of corrections and institutional defender offices and law firms, out of a concern for public health and the welfare of employees. As a result, the already extremely limited time available to capital teams has been truncated significantly because of health concerns related to COVID-19.
15. Time is a scarce resource in all capital representation, and never more so than at the post-conviction or habeas corpus stages, or when an execution warrant has issued. *See* Guideline 1.1, Commentary (“Post-judgment proceedings demand a high degree of technical proficiency, and the skills essential to effective representation differ in significant ways from those necessary to succeed at trial. In addition, death penalty cases at the post-conviction stage may be subject to rules that provide less time for preparation than is available in noncapital cases. Substantive pleadings may have to be prepared simultaneously with, or even be delayed for, pleadings to stay the client’s execution.”); Guideline 10.15.1, Commentary, n.335 (“When a capital case enters a phase of being ‘under warrant’—i.e., when a death warrant has been signed—time commitments for counsel increase, “due in large part to the necessary duplication of effort in the preparation of several petitions which might have to be filed simultaneously in different courts.””).
16. When the already limited time is further truncated, whether by operation of the legal system or by something wholly external like a natural disaster, counsel will not have adequate time to prepare their case and this, in turn, jeopardizes due process and fairness in capital cases. *See* Guideline 6.1, Commentary (“Regardless of the context, no system that involves burdening attorneys with more cases than they can reasonably handle can provide high quality legal representation. In the capital context, no such system is acceptable.”).
17. The Guidelines’ description of the nature of investigation required at every stage of a capital proceeding provides insight into the extraordinary need for time in all capital proceedings.

18. Capital defense counsel and their teams *at every stage of a capital proceeding* must conduct thorough, independent investigations related to both the guilt and penalty phases of the trial. *See* ABA Guideline 10.7(A); Guideline 10.15.1(E)(4) (post-conviction counsel must “continue an aggressive investigation of all aspects of the case”). Because “the trial record is unlikely to provide either a complete or accurate picture of the facts and issues in the case,” post-conviction investigation must be “thorough” and “independent.” Guideline 10.15.1, Commentary, at 1085-86.
19. Additionally, investigation in post-conviction proceedings poses specific challenges and unique obligations, as it requires a reinvestigation of “the facts underlying the conviction and sentence,” a re-investigation of the client to put together a more thorough and up-to-date social history, and additional investigation into “trial counsel’s performance, judicial bias, or prosecutorial misconduct.” Guideline 10.15.1, Commentary, at 1086. The ABA Guidelines make clear that this obligation – like the other requirements of capital defense counsel – is “on-going” and contemplates all phases of litigation subsequent to the trial. Guideline 10.15.1(E).
20. As part of the requisite investigation, capital cases also require comprehensive, multi-generational psychosocial history construction based on “exhaustive investigation.” ABA Guideline 4.1, “Defense Team and Supporting Services,” Commentary, at 959. These histories must extend back at least three generations in the defendant’s family. *See also* Supplementary Guideline 10.11(E)(2)(a).
21. The areas for investigation include (1) medical history, including “hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage;” (2) family and social history; (3) educational history; (4) military service; (5) employment and training history; and (6) prior juvenile and adult correctional experience. Guideline 10.7, Commentary, at 1022-23. *See also* Supplementary Guideline 10.11(B) (listing the same areas enumerated by the ABA Guidelines and further adding “multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; . . . religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors.”).
22. The areas for investigation listed in ABA Guideline 10.7 are not intended to be exhaustive, and the Guidelines explicitly contemplate additional investigation for other legal issues: “Additional investigation may be required to provide evidentiary support for other legal issues in the case . . . Whether within the criminal case or outside it, counsel has a duty to pursue appropriate remedies if the investigation reveals that such conditions exist.” Guideline 10.7, Commentary, at 1027. *See also* Supplementary Guideline 10.11(B) (“The defense team must conduct an ongoing, exhaustive and independent investigation of every aspect of the client’s character, history, record and any circumstances of the offense, or other factors, which may provide a basis for a sentence less than death.”).
23. The ABA Guidelines outline a dual-track approach to conducting this investigation, requiring both witness interviews and records collection. *See* Guideline 10.7, Commentary,

at 1024 (“It is necessary to locate and interview the client’s family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers and others” and “[r]ecords—from courts, government agencies, the military, employers, etc. . . . should be requested concerning not only the client, but also his parents, grandparents, siblings, cousins, and children.”).

24. Simply locating a single source for this information is often insufficient. The Guidelines recognize that “[t]he collection of corroborating information from multiple sources—a *time-consuming task*—is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence.” Guideline 10.7, Commentary (emphasis added).
25. The Guidelines also make clear that in-person interviews with the client, witnesses, and family members are at the core of any adequate investigation: “Team members must conduct *in-person, face-to-face, one-on-one* interviews with the client, the client’s family, and other witnesses who are familiar with the client’s life, history, or family history or who would support a sentence less than death. Multiple interviews will be necessary to establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation.” Supplementary Guideline 10.11(C) (emphasis added). *See also* ABA Guideline 10.5, Commentary, at 1008 (“Even if counsel manages to ask the right questions, a client will not—with good reason—trust a lawyer who visits only a few times before trial, does not send or reply to correspondence in a timely manner, or refuses to take telephone calls.”). Remote technology options such as video conferencing and phone calls do not provide an adequate alternative for capital defenders, mitigation specialists, experts, or investigators.
26. This time-intensive, in-person contact is essential for establishing a relationship of trust with the client, client’s family, and other witnesses, which is indispensable to effective representation. *See* Supplementary Guideline 10.11(C) (“Team members must endeavor to establish the rapport with the client and witnesses that will be necessary to provide the client with a defense in accordance with constitutional guarantees relevant to a capital sentencing proceeding.”); ABA Guideline 10.5 and Commentary (“Client contact must be ongoing, and *include sufficient time spent at the prison to develop a rapport between attorney and client.*”) (emphasis added); ABA Guideline 10.15.1(E)(1)-(2) (Post-conviction counsel must “maintain close contact with the client” and “monitor the client’s mental, physical, and emotional condition [.]”).
27. In-person visits with the client and client’s family are also a crucial tool in dictating the defense team’s choices regarding necessary mental health screening and experts, which are especially important given the near-ubiquity of mental health issues in capital cases. Defense counsel’s observations of the client’s mental state are a necessary piece of the puzzle, as are the observations of a member of the defense team specifically trained to screen for disorders and recommend follow-up investigation and appropriate experts. *See* ABA Guideline 4.1, Commentary, at 956. In many cases, the results of such observation render a “psychologist or other mental health expert [] a needed member of the defense team.” Guideline 10.4, Commentary, at 1004.

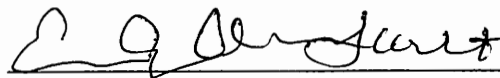
28. The mental health services provided as a result of observations and screenings are also oftentimes necessary to ensure that a client is “cognitively and emotionally competent to make sound decisions concerning his case.” Guideline 4.1, Commentary, at 959. Moving capital proceedings forward while in-person visits cannot take place prevents counsel from ensuring that the client is competent.
29. Additionally, expert evaluations of the client are time-consuming, particularly for issues related to intellectual disability and mental illness or competency. *See* Guideline 4.1, Commentary (“Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process.”). In order to ensure the heightened reliability of such evaluations, a thorough investigation must first be conducted. *Id.* (“Counsel must compile extensive historical data, as well as obtain a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary.”); *see also* Guideline 4.1, Commentary, at 959 (the mitigation specialist “provides social history information to experts to enable them to conduct competent and reliable evaluations”). Judgment calls regarding which expert evaluations are recommended are necessarily the product of in-person visits between the client and the defense team, *see* ¶¶27-28, *supra*, and are informed by a comprehensive and thorough investigation.
30. The investigation is also a necessary precursor to making key strategic decisions and preparing pleadings. *See* ABA Guideline 10.7, Commentary, at 1021 (“Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client’s competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases of the case.”).
31. In addition to the above-described duties and decisions, cases with an active execution warrant require additional urgent, time-consuming tasks that cannot be completed prior to the issuance of the warrant, such as the preparation of petitions for executive clemency, seeking stays of execution, and arranging for expert evaluations regarding the clients’ competency to be executed. *See* Guideline 1.1, Commentary at 937 (“Recent advances in the use of DNA technologies, combined with restrictions on the availability of post-conviction review, have elevated the important role that clemency has played as the “fail-safe” of the criminal justice system, and *increased the demands on counsel*”) (emphasis added); Guideline 10.15.1(B) (“If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available fora.”); Guideline 10.15.2(B)-(D) (detailing duties of clemency counsel, including duty to “conduct an investigation in accordance with Guideline 10.7”).
32. The norms of practice reflected in the ABA Guidelines are not aspirational. *See* Guideline 1.1, “Objective and Scope of Guidelines,” Commentary, at 920. They represent the minimum requirements for adequate representation. If counsel lacks adequate time to prepare their case, or if defense counsel, mental health experts, investigators and mitigation

specialists are unable to conduct in-person meetings and interviews to discharge the duties outlined in ¶¶18-31 above, fundamental fairness and accuracy are put at risk.

33. As the Guidelines have recognized, there is an indispensable need for “effective representation on appeal, in state and federal post-conviction proceedings, and in applications for executive clemency. Because each of those proceedings has a unique role to play in the capital process, because both legal and social norms commonly evolve over the course of a case, and because of ‘the general tendency of evidence of innocence to emerge only at a relatively late stage in capital proceedings,’ jurisdictions that retain capital punishment must provide representation in accordance with the standards of these Guidelines, as outlined in Subsection B, ‘at all stages of the case.’” Guideline 1.1, Commentary at 929-30. The Guidelines “recognize[] the simple truth that any other course has weighty costs—to be paid in money and delay if cases are reversed at later stages or in injustice if they are not.” *Id.* at 930.
34. The ABA Guidelines are the most authoritative and up-to-date articulation of the investigative and other responsibilities of capital defense counsel. The American Bar Association believes that meeting these responsibilities is essential to ensuring justice in capital cases.

I hereby swear under penalty of perjury that the above and foregoing is a true and correct statement.

Dated this 3rd day of April, 2020.



Emily Olson-Gault