April 11, 2017

The Honorable Asa Hutchinson
Governor of Arkansas
State Capitol Room 250
500 Woodlane Street
Little Rock, AR 72201

Dear Governor Hutchinson:

As President of the American Bar Association, I write to express the concern of the ABA regarding the eight executions scheduled to take place between April 17 and April 27, 2017. Our concern arises from the various ways that this unprecedented execution schedule undermines due process and impedes adequate legal representation in the individual cases. While the ABA takes no position on the death penalty itself, it has long been Association policy that executions should only be carried out when a state has ensured sufficient procedural safeguards to decrease the risks of injustice. This can happen only when decision makers—including judges, parole boards, and governors—are all provided with adequate time to assess claims for relief and when prisoners are represented by qualified, resourced, and conflict-free counsel able to present these claims.

We are troubled that this current execution schedule appears not to allow for these necessary safeguards and prioritizes expediency above due process. Because neither Arkansas decision-makers nor defense counsel currently have adequate time to ensure that these executions are carried out with due process of law, we simply ask that you modify the current execution schedule to allow for adequate time between executions.

The ABA, with over 400,000 members, is the leading organization of the legal profession in the United States. Our members include prosecutors, public defenders, judges, private lawyers, solo practitioners, and law enforcement and corrections personnel in addition to legislators, law students, law professors, and others in related fields. The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, first adopted in 1989, were revised and updated in 2003 so that they would accurately reflect current death penalty law and practice. The 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.”). Thus, the Guidelines “are not aspirational. Instead, they embody the current consensus about what is minimally required to provide
effective defense representation in capital cases.” See Guideline 1.1, History of the Guideline, at 920. 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 or convicted of a capital crime. The ABA Guidelines have been relied upon to determine what constitutes reasonable counsel performance in more than 350 state and federal capital appellate decisions, including the United States Supreme Court and the United States Court of Appeals for the Eighth Circuit. See, e.g., Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); Ortiz v. United States, 664 F.3d 1151 (8th Cir. 2011).

The Guidelines recognize the extraordinary time and effort that is required from defense counsel in the days and weeks immediately preceding a scheduled execution. In addition to developing and presenting persuasive and individualized petitions for clemency, which require that counsel conduct a full and independent investigation into both guilt and penalty phase issues, the Guidelines provide that when an execution date is set, counsel must “immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available fora.” (Guideline 10.15.1.) These avenues might include raising claims that the client is not competent for execution, litigating issues related to method of execution, or challenging the clemency process where it is not “substantively or procedurally just.” (Guideline 10.15.2.) Importantly, raising these claims in the weeks leading up to an execution is not a matter of choice. These types of claims are typically not ripe until an execution date is set, so they cannot be brought earlier in the process. And the Guidelines recognize that counsel has a paramount duty to assert all viable legal claims and present them as forcefully as possible. (Guideline 10.8.)

These duties can easily consume all of the available time and resources of an attorney representing just one client with an approaching execution date; here, several of the men facing execution are represented by the same attorneys. It simply is not possible for an attorney to do all that is minimally required for multiple clients scheduled for execution only days apart. Under such extraordinary constraints, any time and resources spent on behalf of one client facing death will necessarily be at the expense of another. This conflict of interest is simply untenable in matters of life and death. Unlike in other areas of the law, these lawyers cannot explain their scheduling conflicts to a judge, who can take that into account when setting hearings or trial dates. Here, execution dates have been set without regard to these lawyers’ ethical duties; more important, the arbitrary acceleration of execution dates poses unfair and irreversible consequences for defendants who may still be in the process of asserting their legal rights. This can be remedied simply by modifying the execution schedule to allow adequate time between executions. That would permit counsel and Arkansas decision-makers to act thoughtfully and deliberately and fulfill their legal and ethical obligations.

Additionally, this execution schedule has forced Arkansas to accelerate its own clemency process, decreasing the likelihood that each prisoner will get the same level of comprehensive review as is both typical and legally required and curtailing the public notice regarding each stage of the process. This compressed clemency timetable has
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added yet another layer of burden on the over-stretched lawyers. Clemency is supposed to serve as the “fail safe” in our judicial system, but it is being rushed here because these eight execution dates were set so rapidly and so close together.

Finally, the American Bar Association is concerned by allegations by counsel that at least two of the prisoners scheduled for execution suffer from severe mental illness. Jack Jones and Bruce Earl Ward have been diagnosed with bipolar disorder and paranoid schizophrenia, respectively, and are being treated with strong antipsychotic medications while on death row. The ABA has a longstanding policy urging states not to execute individuals with such significant mental disorders. (ABA Resolution 122A, Aug. 2006.) The presence of severe mental illness among the men scheduled for execution compounds the difficulties for counsel representing these prisoners, who must invest significant additional time working with these clients, examining their competency to be executed, and raising additional relevant legal claims.

We are not in a position to comment on the merits of any evidence regarding individual prisoners’ competency. That is a role for officials in your state. But through our years of studying the requirements for capital defense representation, we do know that carrying out the executions on this tight timetable will not allow counsel to develop or adequately present claims regarding their clients’ current mental states to the courts or in their clemency applications. As a result, attempting to proceed with the executions on this rushed schedule is inconsistent with our long-established recommendations, which are rooted in the principles of fundamental fairness and due process.

Your administration has stated that the execution of these eight men in a two-week period is necessary in light of the state’s current execution protocol and drug availability. Practically, however, regardless of whether these men are put to death this month or on a more measured schedule, the state will need either to locate new drugs or to develop an alternative execution protocol for the remaining men on Arkansas’ death row. Given that these policy decisions will need to be made soon, expediency need not, and should not, be placed above the Constitution’s due process protections.

Allowing time for each case to receive sufficient and individualized review prior to imposing death—the most serious action that our governments can take—will not preclude the administration of justice in Arkansas from going forward. It is critical, however, to ensuring our collective confidence in the fairness and accuracy of our justice system.

Thank you for your consideration.

Respectfully yours,

Linda Klein