IN THE SUPREME COURT
OF THE STATE OF MISSOURI

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No. SC 89571

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**JOHN C. MIDDLETON, ET AL.,**
**APPELLANTS,**

**vs.**

**STATE OF MISSOURI ,**
**RESPONDENTS.**

**On Appeal from the Circuit Court of Cole County, Missouri**
**19th Judicial Circuit**
**Circuit Court No. 08AC-CC00595**
**The Honorable Jon E. Beetem, Presiding**

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# BRIEF OF AMICUS CURIAE THE MISSOURI PRESS ASSOCIATION

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## JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the Cole County Circuit Court. While the appeal does not present any issues within the exclusive appellate jurisdiction of the Supreme Court and therefore the appeal would normally lie within the general appellate jurisdiction of the Missouri Court of Appeals, Western District. Mo. Const., Art. V, Section 3.[1] However, this appeal has been transferred by order of the Supreme Court of Missouri to that Court for further proceedings. Mo. Const. Art. V, Section 10.

[1]All references to the Missouri Constitution hereinafter refer to the Constitution of 1945 of the State of Missouri.

## INTRODUCTORY STATEMENT

## INTEREST OF AMICUS CURIAE

This brief is filed, with the consent of both appellant and respondent, on behalf of The Missouri Press Association, which has a special and real interest in this matter as amicus curiae. The brief filed by the appellant in its Argument focuses on an issue which is of primary concern to this amicus curiae, which the amicus would restate as follows:

> **The trial court erred in ruling that the execution protocol of the Department of Corrections is excluded from the statutory definition of a rule, because the creation of the execution protocol is clearly within the scope of the agency's rulemaking authority in that the openness of the process of selecting the execution method is an issue of broad public interest and policy and should not be related to simply a matter of Department of Corrections internal management policymaking.**

Due to the far-reaching effect this issue will have on reporters and editors of the state's newspapers, it is appropriate that newspaper publishers in Missouri be given the opportunity to respond to the lower court's decision and the position that it is anticipated will be taken by the respondent before this Court.

This Missouri Press Association is a state-wide association having as members

approximately 350 newspapers in the state of Missouri. The membership includes both daily and weekly newspapers, publications which are rural in nature as well as urban publications. The association was incorporated in 1922 as a not-for-profit corporation in the State of Missouri. It was incorporated for the purpose of furthering efficiency and morality in the newspaper field, promoting and improving the profession of journalism, and to make the profession of journalism more beneficial to the people of the State of Missouri.

Prior to incorporation, it existed as an association which was originally formed in 1867. Since its inception, the association has served as a spokesman on journalism activities for the people in the newspaper field in Missouri.

The Missouri Press Association has established an office adjacent to the School of Journalism located on the University of Missouri campus in Columbia, Missouri, and maintains a full-time staff who work for the newspapers in the State.

The current officers and directors of the Missouri Press Association are: Jack Whitaker, *The Hannibal Courier-Post*, President; Vicki Russell, *Columbia Daily Tribune*, First Vice President; Sandy Nelson, *Cass County Democrat-Missourian*, Second Vice President; Brad Gentry, *Houston Herald*, Secretary; Kate Martin, *Perry County Republic-Monitor*, Treasurer; and Directors David Bradley, *The St. Joseph News-Press*, Joe May, *Mexico Ledger*, Dan Wehmer, *Webster County Citizen*, Kevin Jones, *St. Louis American*,

Jon Rust, *Southeast Missourian*, Dennis Warden, *Gasconade County Republican*, and Mark Maassen, *The Kansas City Star*. Executive director is R. Douglas Crews.

As part of its program, the association has long had a keen interest in preserving the right of the public to receive the news. Clearly, access to public information, particularly information regarding the operation of state agencies and in particular, the rule-making process of state agencies, is a key factor in the ability of the public to understand the operation of state agencies in the state. When rulemaking is conducted internally, the media, and the public, loses its access to that process and its ability to contribute to the process, understand the process and thereby validate the actions taken by state agencies acting in the public interest and on the public's behalf. As discussed in the Argument section of this brief, the amicus curiae is convinced that the position taken by the respondent in this case is not supported by law and by previous decisions of this Court and other courts in this state.

## STATEMENT OF FACTS

The amicus curiae hereby adopts the statement of facts submitted by the Appellants.

## POINT RELIED ON

**The trial court erred in ruling that the execution protocol of the Department of Corrections is excluded from the statutory definition of a rule, because the creation of the execution protocol is clearly within the scope of the agency's rulemaking authority in that the openness of the process of selecting the execution method is an issue of broad public interest and policy and should not be related to simply a matter of Department of Corrections internal management policymaking.**

*Baugus v. Director of Revenue*, 878 S.W.2d 39 (Mo. banc, 1994)

*Herrera v. Collins*, 506 S.W. 390, 113 St. Ct. 853, 122 L.Ed. 203 (U.S., 1993)

*Missouri Soybean Association v. The Missouri Clean Water Commission*, 102 S.W.3d 10 (Mo. banc, 2003)

*Spradlin v. City of Fulton*, 982 S.W.2d 255 (Mo., 1999)

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## ARGUMENT

**The trial court erred in ruling that the execution protocol of the Department of Corrections is excluded from the statutory definition of a rule, because the creation of the execution protocol is clearly within the scope of the agency's rulemaking authority in that the openness of the process of selecting the execution method is an issue of broad public interest and policy and should not be related to simply a matter of Department of Corrections internal management policymaking.**

> *"Missouri law properly recognizes the public interest in an open government." Librach v. Cooper,* 778 S.W.2d 351, 356 (Mo. App. 1989).

This court is presented with the determination of the process required by the state Department of Corrections in performing its mandate under Section 546.720, R.S.Mo., as to performing executions under the death penalty in the state.

This statute provides that the department create an "execution protocol" but does not define the term in order to determine the specific agency process to be used to create that "protocol."

Section 536.021, R.S.Mo., details the process to be used by state agencies for general rule-making and establishes a system whereby public notice is given and input

into the process by interested members of the public is permitted. But rather than engage in this process, the Department of Corrections has concluded its process falls within the exclusions contained within 536.010 (6), which carves from this process a number of matters, specifically including (for purposes of this matter) rules relating to "internal management of an agency ... which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof...." (a) and rules relating to "inmates of an institution ..." under the department's control (k).

The respondents argue that both of these exceptions permit the department to create these rules through the internal rule-making process only and to avoid engaging in the formal rule-making process. This amicus, however, urges this Court to adopt the argument of the appellants, however, and to find that the rules in question fall outside these exceptions and that the formal rule-making process required by Section 536.021, R.S.Mo. must be used.

## A. ACTIONS OF STATE ENTITIES TO BE OPEN TO THE PUBLIC

The Department of Corrections is without question a "public governmental body" as that term is defined by Section 610.010, R.S.Mo., in that it is an entity created by state statute. As such, the provisions of Section 610.011, R.S.Mo., apply to that entity and it is the mandate of the state legislature pursuant to that law that the actions and deliberations

of the department "be open to the public unless otherwise provided by law." Further, that statute dictates that the law creating that presumption is to be "liberally construed" and the exceptions "strictly construed to promote this public policy."

Indeed, this Court has previously set out certain perimeters regarding the rule-making process. "Rulemaking 'involves the formulation of a policy or interpretation which the agency will apply in the future to all persons engaged in the regulated activity.' Arthur Earl Bonfield, State Administrative Rule Making, sec. 3.3.1 at 76 (1986) *quoting* E. Gellhorn, Administrative Law and Process in a Nutshell 121-122 (1972); *see also* 73 C.J.S. Public Administrative Law and Procedure sec. 87 (1983)." *Missouri Soybean Association v. The Missouri Clean Water Commission*,102 S.W.3d 10, at 23 (Mo. banc, 2003). "Stated more simply, as explained by one federal court, 'a properly adopted substantive rule establishes a standard of conduct which has the force of law.' *Pacific Gas & Electric Company v. Federal Power Commission*, 506 F.2d 33, 38 (D.C.Cir.1974)." *Missouri Soybean Association, id.*

Therefore, for the department to engage in rule-making outside the perimeters of Section 536.021, R.S.Mo., this Court must find that the acts of the respondent in creating the execution protocol pursuant to Section 536.010 (6), R.S.Mo., can ***only*** be deemed to be governed by the internal rule-making process. "It is a basic rule of statutory construction that words should be given their plain and ordinary meaning whenever

possible. Courts look elsewhere for interpretation only when the meaning is ambiguous or would lead to an illogical result defeating the purpose of the legislature." *Spradlin v. City of Fulton*, 982 S.W.2d 255 at 258 (Mo.,1998), citing *State ex rel. Maryland Heights Fire Protection District v. Campbell*, 736 S.W.2d 383, 387 (Mo. banc 1987). "Resort to statutory construction is necessary. The ultimate guide in construing an ambiguous statute is the intent of the legislature. *Missouri Rural Elec. Co-op. v. City of Hannibal*, 938 S.W.2d 903, 905 n. 4 (Mo. banc 1997); *Connor v. Monkem*, 898 S.W.2d 89, 90 (Mo. banc 1995)," *id.*

B. APPLICATION OF SECTION 536.010 (6)

The underlying circuit court opinion considers the first exception (Section 536.010 (6) (a), R.S.Mo.) and concludes that it cannot apply because it is "obviously an internal management issue," but does not cite any case law supporting that conclusion. Then the circuit court continues to conclude that it would have to find a "legal right or procedure available to the public..." and that the rule enacted had a substantial effect on those rights. The court did not find any legal rights impacted by the execution protocol and therefore concluded that the exception applied.

But, in fact, the standard in Missouri in this regard is that there needs only be "a potential, however slight, of impacting the substantive or procedural rights of some

member of the public." *Baugus v Dir. of Revenue,* 878 S.W.2d 39, at 42 (Mo. banc 1994). Indeed, "[r]ulemaking, by its nature, involves an agency statement that affects the rights of individuals in the abstract." *Baugus,* at 42 (citing Bonfield, State Administrative Rule Making, § 3.3.1 (1986)). If the rule-making process "affects the rights of individuals in the abstract," then is not a condemned prisoner an "individual" whose rights would be affected and therefore entitled to the rule-making due process in the preparation of this protocol? Certainly, his or her family members would fall within this class. And, indeed, the public at large falls within this category.

The respondent's second argument is that the rule-making process is not required pursuant to the exception (k) which excludes "A statement concerning only inmates of an institution...." But if this exception is read narrowly, pursuant to the instructions of Section 610.011, R.S.Mo., then it is difficult to imagine how this statement could be deemed to affect only the inmate of the institution. The protocol used to execute a prisoner certainly affects **more than just the inmate,** inasmuch as family members and members of the public can be substantially affected by the outcome of the execution process. Indeed, the Department of Corrections has become so concerned with the potential for negative publicity from the execution protocol that it supported statutes adopted in 2007 which were incorporated into Section 546.720, R.S.Mo., that now close to the public the identity of members of the execution team, as defined in this same

execution protocol, and all information contained in the protocol except for the section that directly relates to the administration of legal gas or lethal chemicals. It is clear the legislature is a strong believer that the protocol statement affects more than just the inmates in the institution inasmuch as it has mandated that a significant portion of the information contained in this document be closed to the public. That signifies the public interest the department itself acknowledges is generated by the protocol and the records kept pursuant to this rule.

Finally, in a general sense, society has a general interest in the reliable imposition of the death penalty (Dissent of Justice Blackmum in *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed. 203 (U.S., 1993). The acts of the State of Missouri in executing those who have received a death sentence are acts done on behalf of every citizen in the State. The personnel from the Department of Corrections who engage in the protocol are acting on behalf of every citizen in carrying out duties which are necessary due to the judgment of jurors or judges who act on behalf of citizens in the state. Why would it not then be proper to permit those same citizens, whose interests the Department represents in carrying out these acts, to provide input through the rule-making process in determining the protocol that is to be used in taking those actions?

## CONCLUSION

The circuit court's decision should be reversed and the respondent, specifically the Missouri Department of Corrections, should be directed to engage in formal rule-making pursuant to Section 536.010 to create an execution protocol.

Respectfully submitted,

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The undersigned certifies that two copies of the foregoing Amicus Curiae Brief on behalf of the Missouri Press Association were mailed by first class United States mail, postage prepaid, to the following counsel of record this 17th day of September, 2008:

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Appendix to

Brief of the Amicus Curiae

The Missouri Press Association

No. SC 89571

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