COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 06-CI-574

RALPH BAZE, et al. **PLAINTIFFS**

v. **ORDER GRANTING PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS**

KENTUCKY DEPARTMENT OF CORRECTIONS, and COMMONWEALTH OF KENTUCKY **DEFENDANTS**

This matter is before the Court on the Plaintiffs' Motion for Judgment on the Pleadings on Claims Regarding Intellectual Disability Provisions of the Execution Regulations. On October 5, 2018, the Court granted Plaintiffs' Motion for Leave to File Fifth Amended Petition for Declaratory Judgment. Claim G in the Fifth Amended Petition alleges that the execution regulations fail to expressly prohibit the execution of an intellectually disabled person, that they fail to prevent such a person from being executed, and that they are accordingly invalid for failing to comply with state and federal law. The parties appeared before the Court for Oral Argument on April 1, 2019, at which David Barron, Daniel Goyette, Leo Smith, and Josh Reho appeared on behalf of Plaintiffs and Jason Moor and Robert Long Jr. appeared on behalf of Defendants. Having reviewed the filings and arguments of the parties, and being otherwise sufficiently advised, the Court **GRANTS** Plaintiffs' Motion for Judgment on the Pleadings as to Claim G in the Fifth Amended Petition for Declaratory Judgment; 501 KAR 16:310 Section 1(4) is unconstitutional and invalid because it does not automatically suspend an execution when DOC's internal review shows that the condemned person is intellectually disabled.

BACKGROUND

I. 2006 THROUGH 2018: THE OUTSET OF THE CASE THROUGH DOC'S ATTEMPTS TO AMEND THE EXECUTION REGULATIONS.

In 2006, Plaintiffs filed a complaint for declaratory judgment and injunctive relief. Plaintiffs argued that the Department of Corrections' ("DOC") execution procedures were invalid because they were not promulgated in accord with KRS Chapter 13A (hereafter the "Administrative Procedures Act" or "APA") and requested that the Court enjoin all executions until the procedures were corrected. In 2009, the Kentucky Supreme Court ruled that DOC was required to promulgate its death penalty protocols by enacting administrative regulations. *Bowling v. Kentucky Dep't of Corr.*, 301 S.W.3d 478, 491-92 (Ky. 2009), as corrected (Jan. 4, 2010). DOC initiated a formal rulemaking process, and the ensuing execution regulations went into effect May 7, 2010.

Upon the effective date of the 2010 execution regulations, Plaintiffs Bowling, Baze, and Moore filed a motion to enforce the Kentucky Supreme Court's opinion in *Bowling* and to declare the regulations invalid for failure to comply with *Bowling* and the APA. By its Order entered May 21, 2010 this Court granted Plaintiffs' CR 60.02 Motion to reopen the case in light of the changed circumstances arising from issuance of the execution regulations and permitting Plaintiffs to file an amended petition. Upon learning that Mr. Gregory Wilson was scheduled for execution on September 16, 2010, Plaintiffs Bowling, Baze, and Moore filed a motion seeking to enjoin all executions until issues raised in their amended petition could be addressed. Mr. Gregory Wilson then sought to intervene in this matter, as did the Commonwealth of Kentucky through the Attorney General's Office. At a hearing held September 8, 2010 three distinct aspects of the execution regulations were discussed:

1. The administrative regulations fail to provide for a single drug means of lethal injection;
2. The administrative regulations fail to ensure that intellectually disabled persons are not executed, which is prohibited by state statutory law and federal constitutional law;
3. The failure of the administrative regulation to provide procedures to adequately ensure that a person who is insane is not executed.

Following the hearing, the Court entered a written Order, entitled "Temporary Injunction Under CR 65.04," which granted Wilson's motion for injunctive relief and a stay of "any implementation of the death warrant signed in his case by the Governor." The Order also restrained and enjoined the Commonwealth "from taking any steps to implement the administrative regulations at issue in this action, or to otherwise execute the Governor's death warrant, until the entry of a final judgment in this action, or until further orders of this Court entered after adequate notice and a hearing."

The Court stated that the injunction should be granted for the following reasons: 1) because the administrative regulations prohibited the use of a single drug in a manner inconsistent with the lethal injection statute, the administrative regulations were in conflict with their authorizing statute in violation of KRS Chapter 13A; 2) the failure of the administrative regulations to prohibit the execution of insane inmates may illegally conflict with KRS 431.213 *et seq.*; and 3) the failure of the administrative regulations to prohibit the execution of intellectually disabled inmates may illegally conflict with KRS 532.135 *et seq*. The first two grounds above have been resolved by DOC's amendments to the execution regulations.

As to the third ground, however, the regulations only provide for review of the inmate's potential intellectual disability and require that notice be sent to various parties if proof of

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intellectual disability is discovered in the condemned person's record. The administrative regulations do not automatically stay execution of a condemned person who is discovered to be intellectually disabled, and it is accordingly possible for such a person to be executed if none of the notified parties seek judicial intervention, as in the case of a death row inmate who declines further appeals. On its face, KRS 532.140(1) only precludes execution of a person who has been previously determined by a Court to be intellectually disabled under KRS 532.135. However, recent United States Supreme Court and Kentucky Supreme Court decisions, discussed below, cast doubt on the constitutionality of this scheme.

Following this Court's entry of the injunction, Defendants petitioned the Kentucky Supreme Court for a writ of prohibition. *See Commonwealth ex rel. Conway v. Shepherd*, 336 S.W.3d 98 (Ky. 2011). The Kentucky Supreme Court found that issuing such a writ would not have been in the public interest and that this Court's grant of a temporary injunction prohibiting the state from executing the death penalty did not constitute an abuse of discretion. *Id.*

On April 25, 2012, this Court entered an Order granting DOC ninety (90) days to reconsider provisions of its death penalty administrative regulations and the opportunity to amend those regulations. DOC again initiated formal rulemaking under KRS Chapter 13A to amend its death penalty protocol regulation, proposing amended execution regulations for 501 KAR 16:330, 501 KAR 16:290, and 501 KAR 16:310. Public comment was invited, and a public hearing was held September 25, 2012. DOC issued a "Statement of Consideration" and simultaneously made minor amendments to 501 KAR 16:330. The Administrative Regulations Review Subcommittee held a public hearing on proposed amendments on December 17, 2012. This subcommittee ruled by a 7-1 vote that the regulations were not deficient. No further legislative committee hearings on the regulations were held and the amended regulations became effective February 1, 2013.

On February 6, 2013, Plaintiffs filed a Motion for Leave to File a Second Amended Petition for Declaratory Judgment. The Motion asserted that the amended regulations fail to comply with the federal constitution, state constitution, various state and federal statutes, and/or the rulemaking procedures as adopted in KRS Chapter 13A. DOC filed responses to Plaintiffs' Motion to Amend, as well as a Motion for Judgment and to Dissolve Injunction; in doing so, DOC asked that the Court dissolve the injunction barring the state from proceeding with executions because the issues giving rise to the temporary injunction entered September 10, 2010 are resolved. Defendants contended that Plaintiffs' claims are not meritorious, have been adjudicated in other cases, are moot, and/or are not ripe for adjudication. On December 5, 2013, the Court issued an Order granting Plaintiffs' Motion for Leave to File a Third Amended Petition and denied Defendants' Motion to Dissolve the 2010 Injunction.

On February 6, 2014, the Court granted extensive discovery and indicated that it would set a trial date at the final pretrial conference to be held after the completion of discovery. Shortly thereafter, Plaintiffs sought to amend their Petition for a fourth time in response to news of multiple botched executions in other States using the same two-drug protocol as Kentucky. The Court granted Plaintiffs' motion to amend and authorized additional discovery on September 3, 2014. On Nov. 13, 2014, while discovery was underway but not yet complete, DOC agreed to remove midazolam and hydromorphone from its execution protocol. Specifically, DOC informed the Court that it "intends to make changes to the administrative regulations that include, but are not limited to, the elimination of the current two-drug execution protocol as adopted in 2012." On November 18, 2014, the Court Ordered this case held in abeyance while DOC worked on the new regulations.

The Abeyance ultimately lasted from November 2014 through October 2018. DOC finally submitted proposed amended execution regulations to the Legislative Research Commission

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("LRC") in January 2018. Corrections sought to amend five (5) of its seven (7) execution regulations. The public comment period took place in February 2018, including a public hearing. At a status conference on March 19, 2018, Plaintiffs stated that some discovery remained outstanding and had been put on hold while Corrections further amended its execution regulations; Plaintiffs also stated that, once the regulations go into effect, Plaintiffs plan to file an amended Petition and supporting memorandum of law that supersedes all prior Petitions.

DOC tendered its "Statement of Consideration" and further amended the regulations, in part to respond to feedback it received during the public comment period. It did not replace the two-drug protocol of midazolam and hydromorphone with another multi-drug protocol, opting instead to eliminate a multi-drug protocol entirely. DOC's regulation amendment process would not be completed until July 2018. In the interim, the Kentucky Supreme Court decided a landmark case addressing the constitutionality of the death penalty.

II. 2018 TO THE PRESENT: JURISPRUDENTIAL DEVELOPMENTS REGARDING THE CONSTITUTIONALITY OF THE DEATH PENALTY.

On June 14, 2018, the Kentucky Supreme Court issued its holding in *Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018), reh'g denied (Dec. 13, 2018). In that case, a condemned inmate challenged the denial of his post-conviction motion seeking a determination that he was intellectually disabled; the trial court had denied his motion based on KRS 532.130(2), which required an inmate to have an IQ lower than seventy (70) to qualify as intellectually disabled. *Id.* at 2. The Kentucky Supreme Court cited recent United States Supreme Court jurisprudence to the effect that 1) the Eighth Amendment of the United States Constitution prohibits the execution of a person who has an intellectual disability; 2) the use of a bright-line IQ test, without more, cannot be used to conclusively determine that a person is not intellectually disabled and thus subject to the death penalty. *Id.* at 2-3; *Hall v. Florida*, 572 U.S. 701, 701, 707-708, 723-24 (2014); *Atkins*

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v. Virginia, 536 U.S. 304, 321 (2002); *Moore v. Texas*, 137 S. Ct. 1039, 1048-49 (2017). The holding in *Woodall* will be discussed in greater detail below.

Following *Woodall*, Plaintiffs identified a number of faults with the new regulations, including that the amended regulations do not adequately protect against the execution of the insane and the intellectually disabled. Nonetheless, the Administrative Regulations Review Subcommittee approved the execution regulations on May 8, 2018. The amended execution regulations became effective on July 6, 2018.

On August 3, 2018, Plaintiffs tendered their Motion for Leave to File Fifth Amended Petition for Declaratory Judgment; this amendment predominantly reorganized and restated formerly asserted claims, and the Court granted the Motion on October 17, 2018. On October 16, 2018, Plaintiffs filed their "Motion for Judgment on the Pleadings on Claims Regarding Intellectual Disability Provisions of Regulations." This Motion focuses on Claim G in the Fifth Amended Petition, namely: "the execution regulations' failure to expressly prohibit the execution of the intellectually disabled, and its failure to take adequate steps to prevent an intellectually disabled person from being executed, does not comply with state and federal law; thereby rendering the regulations invalid." In support, Plaintiff argues that provisions of 5:01 KAR 16:310 codify an outdated definition of intellectual disability that is inconsistent with the holding in *Woodall*, and that 5:01 KAR 16:310 is invalid because it relies upon and incorporates a statute deemed unconstitutional in *Woodall*. Defendants filed their response, and Plaintiffs filed a reply. Most of the parties' arguments since the filing of the Fifth Amended Petition concern Claim G.

STANDARD OF REVIEW

CR 12.03 allows a party to move for judgment on the pleadings after the pleadings are closed. "The purpose of the rule is to expedite the termination of a controversy where the ultimate and controlling facts are not in dispute. It is designed to provide a method of disposing of cases where the allegations of the pleadings are admitted and only a question of law is to be decided." *City of Pioneer Vill. v. Bullitt Fiscal Court*, 104 S.W.3d 757, 760 (Ky. 2003). A judgment on the pleadings can be granted only if, on the admitted material facts, the movant is clearly entitled to judgment. *Archer v. Citizens Fidelity Bank & Trust Co*., 365 S.W. 2d 727, 729 (Ky. App. 1983). When a party moves for judgment on the pleadings, he admits the truth of all opposing counsel's arguments and concedes the untruth of all his own allegations that have been denied by his adversary. *Id*.

DISCUSSION

I. RELATIONSHIP BETWEEN DOC'S REGULATORY SCHEME AND SUPREME COURT JURISPRUDENCE.

The United States Supreme Court has held that the Eighth Amendment to the United States Constitution, which applies to the conduct of the States under the Fourteenth Amendment, categorically prohibits the execution of intellectually disabled persons. *Hall*, 572 U.S. at 707-708 (citing *Atkins*, 536 U.S. at 321). As the Court reflected in *Moore*:

> In *Atkins v. Virginia*, the United States Supreme Court held that the Constitution "restrict[s] ... the State's power to take the life of" any intellectually disabled individual…. Executing intellectually disabled individuals, we concluded in Atkins, serves no penological purpose…; runs up against a national consensus against the practice…; and creates a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."

Moore, 137 S. Ct. at 1048 (internal citations omitted). Moreover, intellectually disabled persons face "a special risk of wrongful execution" because they are more likely to give false

confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel. *Hall*, 572 U.S. at 709 (citing *Atkins*, 536 U.S. at 321).

In *Woodall v. Commonwealth*, the Kentucky Supreme Court found KRS 532.130 unconstitutional because it defines "intellectual disability" in such a way that a condemned person could be found not intellectually disabled through the use of a bright-line IQ test. *Woodall v. Commonwealth,* 563 S.W.3d 1, 6 (Ky. 2018), reh'g denied (Dec. 13, 2018). Quoting the Ninth Circuit's commentary on the US Supreme Court's holdings in *Hall v. Florida* and *Atkins v. Virginia*, the Kentucky Supreme Court noted the basis for these rulings is that "the death penalty is the gravest sentence our society may impose" and that imposing this "harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being." *Woodall*, 563 S.W.3d at 6 (citing *Smith v. Ryan*, 813 F.3d 1175, 1181 (9th Cir. 2016)). The *Woodall* Court then provided the following analysis and guidance to Kentucky Courts adjudicating this question:

> Guided by the U.S. Supreme Court's reasoning in *Moore*, we are constrained to conclude that KRS 532.130(2) is simply outdated. And while a mechanical use of this statute's bright-line rule promotes straightforward application and facilitates appellate review, it only provides the appropriate baseline information needed for judging intellectual disability. Lacking the additional consideration of prevailing medical standards, KRS 532.130(2) potentially and unconstitutionally exposes intellectually disabled defendants to execution.
>
> We now conclude and hold that any rule of law that states that a criminal defendant automatically cannot be ruled intellectually disabled and precluded from execution simply because he or she has an IQ of 71 or above, even after adjustment for statistical error, is unconstitutional. Courts in this Commonwealth must follow the guidelines established by the U.S. Supreme Court in *Moore*, which predicate a finding of intellectual disability by applying prevailing medical standards. Because prevailing medical standards change as new medical discoveries are made, routine application of a bright-line test alone to determine death-penalty-disqualifying intellectual disability is an exercise in futility.

> In an attempt to provide guidance to courts confronting this issue, we shall attempt to fashion a rule. The U.S. Supreme Court in *Moore* favorably viewed what appears to be the "generally accepted, uncontroversial intellectual-disability diagnostic definition," akin to a totality of the circumstances test, and what KRS 532.130(2) seemingly reflects, "which identifies three core elements: (1) intellectual-functioning deficits (indicated by an IQ score 'approximately two standard deviations below the mean'—i.e., a score of roughly 70—adjusted for the 'standard error of measurement'; (2) adaptive deficits ('the inability to learn basic skills and adjust behavior to changing circumstances,'); and (3) the onset of these deficits while still a minor." But where KRS 532.130(2) does not go far enough is in recognizing that, in addition to ascertaining intellectual disability using this test, prevailing medical standards should always take precedence in a court's determination.

Woodall, 563 S.W.3d at 6 (citing *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017)). In short, the *Woodall* Court concluded that the recent Supreme Court rulings rendered the sole reliance on a bright-line IQ test like that given at KRS 532.130(2) unconstitutional because it could disqualify a person from being designated an intellectually disabled person, without consideration of prevailing medical standards; the proper approach is to consider a number of factors rooted in prevailing medical standards. *Id.* at 6. Furthermore, both the *Moore* and *Woodall* Courts clearly identified that the primary danger of intellectual disability determination schemes that fail to consider modern medical standards is their potential to be overinclusive; the unconstitutional result to be avoided is the potential exposure of intellectually disabled persons to execution. *Id.*; *Moore*, 137 S. Ct at 1044.

A brief analysis of the administrative regulation and *Woodall* is necessary to understand the parties' arguments regarding Claim G. The execution regulations currently incorporate a bright-line IQ test. 501 KAR 16:310 reads as follows:

501 KAR 16:310. Section 1. Pre-execution Medical Actions after Receipt of Execution Order

(1) For the fourteen (14) days prior to an execution, or for the remaining days if an execution order is received less than fourteen (14) days prior to an execution:

(a) All medical documentation shall be made in special notes in the condemned person's medical record.

(b) The department shall arrange for nurse visits for the condemned person during each shift daily. The contacts and observations from these nurse visits shall be recorded in the special notes of the medical record referenced in paragraph (a) of this subsection. The nurse notes shall state the presence or absence of signs of physical or emotional distress observed.

(c) A licensed psychologist shall:

1. Personally observe and evaluate the condemned person five (5) days per week on Monday through Friday;

2. Document his observations and evaluations in the condemned person's medical record immediately after personal contact with the condemned person;

3. Review the department medical records for the condemned person for:

a. A diagnosis of an intellectual disability as:

(i) Indicated by the criteria in the Diagnostic and Statistical Manual (DSM); or

(ii) Defined by the American Association on Intellectual and Developmental Disabilities (AAIDD); or

b. An IQ test score of seventy-five (75) or lower; and

4. If any record is located that meets the criteria in subparagraph 3 of this paragraph, the psychologist shall notify the warden. . . .

The regulation continues to provide that the psychologist must notify the warden that the records contain a diagnosis of intellectual disability; the warden must then notify the commissioner, who notifies the attorney general's office, counsel for the condemned, and the condemned himself. 501 KAR 16:310 Section 1(4); 501 KAR 16:310 Section 4. Unlike the automatic stay of execution that the regulations provide for insanity, an execution is not automatically stayed on the psychologist's discovery of proof of intellectual disability. *See* 501 KAR 16:310 Section 3 (4)(b) (automatically suspending the execution of a person exhibiting signs or symptoms of insanity).

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It is important to note that the use of an archaic intellectual disability scheme appears to only violate the constitution if it is overinclusive; using archaic rules to *disqualify* a person from execution, conversely, does not threaten to expose an intellectually disabled person to an unconstitutional execution. As shown below, this distinction is critical for the present dispute.

II. THE PARTIES' ARGUMENTS REGARDING CLAIM G.

A. The Regulations are not Invalid Simply because they Reference KRS 532.130.

Plaintiffs claim that DOC's execution regulations are invalid because they rely upon KRS 532.130, which was rendered unconstitutional in *Woodall*. However, there is no explicit reference in 501 KAR 16:310 to KRS 532.130, and the definition of "intellectual disability" is considerably broader in the regulations. Although DOC's Statement of Consideration references KRS 532.130, consideration of a statute later rendered unconstitutional is no reason to invalidate 501 KAR 16:310 since it is not based on the invalidated statute, nor does it require the application of KRS 532.130 to operate.

B. The Proscription in *Woodall* applies to the Execution Regulations.

Defendants argue that *Woodall* has no impact on the regulation because it only applies to the standards used by a trial court in determining whether an individual has an intellectual disability. In the alternative, Defendants argue that the offending portions of 501 KAR 16:310 should be severed and the remainder of the regulation should stand. Accordingly, the two primary issues presented by Defendants with respect to *Woodall* and 501 KAR 16:310 are 1) whether the proscription in *Woodall* only applies to a Court deciding whether a Defendant is intellectually disabled, and 2) whether the use of a bright-line IQ test is unconstitutional even when it is used to prevent execution of the condemned.

As to the first issue, while the language of the foregoing opinion is often directed at judicial determinations, the holding unequivocally states that "**any rule of law** that states that a criminal defendant automatically cannot be ruled intellectually disabled and precluded from execution simply because he or she has an IQ of 71 or above, even after adjustment for statistical error, is unconstitutional." *Woodall*, 563 S.W.3d at 6 (emphasis added). Accordingly, the proscription applies to administrative regulations and statutes as well as judicial determinations.

On the second point, the *Woodall* ruling does not appear to invalidate a rule containing a bright-line IQ test that could only *prevent* an execution from occurring. The *Woodall* holding finds presumptively unconstitutional any rule of law that uses a bright line IQ test to rule a person automatically *not* intellectually disabled and *not* precluded from execution. *Id.* The danger to be avoided is the potential exposure of such persons to execution, as noted in *Moore* wherein the challenged rule was found to "creat[e] an unacceptable risk that persons with intellectual disability will be executed," and that the Court found such rules may not be used "to *restrict* qualification of an individual as intellectually disabled." *Moore v. Texas*, 137 S.Ct. 1039, 1044 (2017) (quoting *Hall v. Florida*, 572 U.S. 701, 704 (2014)) (emphasis added). In short, the holdings in *Woodall* and *Moore* show that any rule of law containing a bright-line IQ test is presumptively unconstitutional only when the test is used to find a criminal defendant not intellectually disabled and thus subject to execution. 501 KAR 16:310 Section 1(c)(3)(b) is not unconstitutional or invalid under *Woodall* or *Moore* since the bright-line IQ test used therein could only expand rather than restrict the condemned person's qualification as intellectually disabled. Furthermore, the bright-line IQ test is not the only test to be considered in the regulations; the regulations also provide two independently sufficient criteria that could define a condemned person is intellectually disabled, and these criteria are rooted in prevailing medical standards. 501 KAR 16:310 Section 1(c)(3)(a).

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C. The Current Regulations Create an Unacceptable Risk that Intellectually Disabled Persons will be Executed.

The true problem with 501 KAR 16:310 is not the use of a bright-line IQ test; it is that the regulations do not automatically stay the execution of a condemned person if the review at 501 KAR 16:310 Section 1(c) reveals evidence that he or she is intellectually disabled. As noted above, the execution of intellectually disabled persons is categorically prohibited by the Eighth Amendment. When DOC independently discovers evidence that a condemned person is intellectually disabled, the execution must be suspended, even if there has not yet been a formal adjudication of that issue. Any rule permitting an execution to take place after such a finding creates an unacceptable risk that an intellectually disabled person will be executed.

i. Even if DOC's Interpretation of the Kentucky Revised Statutes is Correct, the Constitution Independently Prohibits DOC from Executing an Intellectually Disabled Person.

At oral argument, DOC protested vigorously that any responsibility it owes to the constitution or the condemned is satisfied by 501 KAR 16:310 as written. DOC also argued at length that both the burden to prove intellectual disability and the responsibility to seek a stay of execution falls on the condemned person. While these statements are true, it is also true that DOC has an independent legal duty to comply with the constitution. DOC's administrative regulations require independent verification that each condemned person is not intellectually disabled before the execution can take place. If this review reveals that the condemned person is intellectually disabled, DOC has at that moment received notice that it is preparing to execute an intellectually disabled person in violation of the Eighth Amendment.

An intellectually disabled person may not have, even at this late point, been formally determined to be intellectually disabled for a number of reasons, including: 1) the condemned was formally adjudged not intellectually disabled using the former, unconstitutional bright-line IQ test;

2) the condemned was formally adjudged not intellectually disabled using older medical standards, but would qualify as intellectually disabled under current medical standards; or 3) for any number of reasons ranging from the negligence of counsel to the pitfalls of *pro se* representation, the condemned person may never have alleged they were intellectually disabled. DOC argues that the required provision of notice practically guarantees that an intellectually disabled, condemned person will seek a stay of execution. But the categorical prohibition against executing disabled persons, as established by Supreme Court precedent, requires that the administrative regulations governing implementation of the death penalty must also contain an absolute prohibition against execution of an intellectually disabled person. Under Kentucky's regulation, the DOC continues to proceed with its execution protocol even after it has notice of the intellectual disability.

ii. DOC has the Authority to determine whether a person is Intellectually Disabled.

DOC also argues that it cannot make a formal determination that a condemned person is intellectually disabled because KRS 532.135 and KRS 532.140 assign the formal adjudication of intellectual disability to the Court. Further, the statutory prohibition against executing an intellectually disabled person only explicitly attaches to a person formally determined to be intellectually disabled by a Court via the procedure at KRS 532.135. However, as noted above, the Eighth Amendment independently prohibits DOC from proceeding with the execution of a person who is intellectually disabled, whether or not they have been formally adjudged as such by a Court. There are no provisions in these statutes that prohibit DOC from performing its own intellectual disability review to ensure compliance with the constitution; if DOC's own review has disclosed evidence that the condemned is intellectually disabled, that execution cannot be carried out.

The independent review and the criteria for intellectual disability given at 501 KAR 16:310 Section 1(1)-(3) are constitutionally sound and admirably designed to prevent the unconstitutional

execution of an intellectually disabled person. However, the following notice provisions at 501 KAR 16:310 Section 1(4) are unconstitutional because they do not automatically suspend the execution of a person whom DOC knows to be intellectually disabled. While KRS 532.135 and KRS 532.140 provide the formal court procedure for determining whether a person is intellectually disabled, these statutes neither prohibit DOC from conducting an independent review of the condemned person's records or from suspending an execution upon discovery that the condemned appears to be intellectually disabled. Because the regulations allow an intellectually disabled person to be executed even after DOC determines that the person is intellectually disabled, 501 KAR 16:310 Section 1(4) is invalid because it creates an unacceptable risk that an intellectually disabled person will be executed in violation the Eighth Amendment of the United States Constitution.

CONCLUSION

The discovery that a condemned person is intellectually disabled under the criteria at 501 KAR 16:310 Section 1(1)-(3) must result in an automatic stay of execution. Until DOC promulgates a regulation to this effect, 501 KAR 16:310 Section 1(4), as written, is unconstitutional to the extent that it fails to provide for an automatic stay of the death penalty when the DOC review has disclosed reasonable grounds to believe the condemned inmate is intellectually disabled. When such evidence is disclosed by the DOC review, the DOC has a constitutional duty to suspend implementation of the death penalty until there has been a judicial determination of the condemned inmate's intellectual disability. The failure to provide for an automatic stay of execution in these circumstances creates an unacceptable risk that an intellectually disabled person will be executed in violation of the Eighth Amendment of the United States Constitution. In order to comply with binding decisions of the U.S. Supreme Court, and the

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Kentucky Supreme Court, the administrative regulations governing the death penalty must contain a clear and certain prohibition against proceeding to an execution in any case in which DOC's review of the issue of intellectual disability has raised a legitimate question as to the intellectual disability of the person who is subject of the death warrant. Accordingly, the Court **GRANTS** Plaintiffs' Motion for Judgment on the Pleadings as to Claim G in the Fifth Amended Petition for Declaratory Judgment. This is a final and appealable Order, and there is no just cause for delay.

SO ORDERED this the 2nd day of July, 2019.

/s/ HON. PHILLIP J. SHEPHERD
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PHILLIP J. SHEPHERD, JUDGE
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