DEPARTMENT OF PUBLIC ADVOCACY
PUBLIC DEFENDERS
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December 2, 2025

Sen. Stephen West, Co-Chair
Rep. Derek Lewis, Co-Chair
Administrative Regulations Review Subcommittee
702 Capital Ave
Annex Room 228 & 416
Frankfort, Kentucky 40601

Re: Proposed amended capital punishment/death penalty regulation:
Title 501, Chapter 16: 501 KAR 16:310.

Dear Co-Chairs West and Lewis,

I appreciate the time, consideration, and thoroughness the Administrative Regulations Review Subcommittee puts into evaluating proposed amended regulations. I write you regarding proposed amended regulation 501 KAR 16:310, which the Committee is scheduled to consider at its December 8, 2025 meeting.

As background, I have spent my entire legal career (more than the past twenty-two years) representing death-sentenced inmates in post-conviction proceedings through the conclusion of the case by the conviction/death sentence being overturned, by death through natural causes, or death by execution. I have lost three clients to execution but have prevailed in numerous death penalty cases. I have also continuously litigated execution procedures, including the current execution procedures litigation before the Franklin Circuit Court regarding Kentucky's execution regulations (protocol) and the argument that led that court to declare 501 KAR 16:310 void that resulted in the Department of Corrections undergoing the regulatory process to propose the amended regulation that you are now considering. This provides me with a unique perspective and experience regarding the regulation now being considered and is the background for me to speak to you on behalf of my death-sentenced clients about the concerns and problems with the proposed amended regulation that I will discuss within this letter.

Before doing so, I take a moment to express my sympathies towards victim family members, not all of whom support the death penalty but all of whom have suffered immense pain and suffering and who will continue to suffer regardless of whether an execution is carried out. If executions are going to proceed, they deserve to know that all matters the Department of Corrections is responsible for - from the time an execution warrant is signed until an execution is carried out - are performed in a constitutional manner. The public also deserves to know this before an execution is carried out in the Commonwealth's name. That is what the Franklin Circuit Court is working towards deciding and is something the Administrative Regulations Review Subcommittee should also consider as part of its duty to determine whether the regulation is deficient.

There are numerous aspects of 501 KAR 16:310 that pose constitutional and other legal issues that provide reason to request the Department of Corrections to further amend the regulation and for

the Administrative Regulations Review Subcommittee to find the proposed amended regulation deficient if the Department of Corrections does not agree to put the regulation on hold while the Department of Corrections further amends the regulation. All these issues are part of the pending Franklin Circuit Court litigation over the execution regulations, except for two issues that arise from language added to the proposed amended regulation. All these matters were also brought to the Department of Corrections' attention with it being informed of the exact changes that would resolve the matters. *See, e.g.*, my submitted written comments on 2025 proposed amended regulation 501 KAR 16:310 (attached). Yet, the Department of Corrections decided to not make simple regulation amendments to rectify these issues that remain pending before the Franklin Circuit Court, taking the position instead that it will only attempt to address the basis the Franklin Circuit Court declared 501 KAR 16:310 unconstitutional and thus void in April 2025. Even those proposed changes fail to resolve the reason the court struck down the regulation. That is reason to find the regulation deficient, as are the additional legal issues with the content of the regulation.

There is no question as to whether potential intellectual disability or insanity at the time of execution should impact whether a death-sentenced individual is executed or even if the execution regulations must take sufficient steps to eliminate an unnecessary risk that a person who may fall within either category is not executed. The Supreme Court of the United States has held that neither those who are intellectually disabled nor insane at the time of execution can be executed, and the Franklin Circuit Court has ruled that the execution regulations must contain provisions that ensure the Department of Corrections will take sufficient steps to eliminate an unnecessary risk that a person in either category is executed. The question before the Committee is therefore whether proposed amended regulation 501 KAR 16:310 takes sufficient steps in that regard, and whether the proposed amended regulation complies with all other constitutional and state law. It does not.

First, proposed regulation 501 KAR 16:310 is being amended to provide, as the Franklin Circuit Court required, a mechanism for information regarding potential intellectual disability to be submitted and considered by the Department of Corrections to determine whether to suspend an execution. The proposed amended regulation contains a provision requiring any documentation the condemned person submits concerning intellectual disability be provided to the psychologist who will review that documentation for information concerning intellectual disability. Oddly, the proposed amended regulation does not contain the same requirement if the documentation is submitted by the condemned person's counsel or by anyone else, and it contains no requirement to confirm receipt of the submitted information. Resultingly, the regulation fails to contain a provision that confirms both that submitted information has been received and then provided to the psychologist for consideration, even though the Franklin Circuit Court has ruled the regulation must contain provisions to ensure the submission of, and consideration of, such information.

Second, the proposed amended regulation takes a step backwards by failing to ensure the required record review for information of potential intellectual disability is conducted for all Kentucky death-sentenced individuals who have a pending intellectual disability claim that has not completed the entire legal process. Within the proposed amended regulation, the Department of Corrections added a provision to eliminate the intellectual disability review for all condemned persons who received a judicial "final adjudication" on intellectual disability. The problem is that "final adjudication" is not a self-defining term, and the regulation fails to provide a definition. The regulation leaves interpretation of "final adjudication" to attorneys, who may have different

interpretations of what the term means. Not only does this create ambiguity when the Administrative Procedure Act prohibits any ambiguity within the language of a regulation, it means whether records that could contain information of intellectual disability will be reviewed and whether an execution will be suspended can literally depend on which Department of Corrections attorney is consulted and how that attorney interprets the term "final adjudication."

This is not an academic matter that would be fitting of a law school final exam question. Kentucky death-sentenced individuals will be impacted. For example, one of them has lost his intellectual disability claim in the Kentucky courts but has a pending intellectual disability claim before the federal courts in a federal habeas proceeding, which is a routine procedure for review of claims after state court proceedings. Another has an intellectual disability claim pending because of a change in law that took place after he had lost the claim. Will the Department of Corrections interpret their losses in state court to mean a "final adjudication" took place and thus the Department of Corrections will do nothing regarding intellectual disability even though their intellectual disability claims remain pending before courts? We do not know. We do know, though, that the Department of Corrections' failure to conduct its intellectual disability review under these circumstances poses significant constitutional concerns. We also know there is a simple solution that was presented to the Department of Corrections. That is, "final adjudication" should be changed to allow the Department of Corrections to not conduct records review for information concerning intellectual disability only if the condemned person's intellectual disability claim has lost in court with the claim no longer pending before any other court and there having been no intervening change in intellectual disability law (case law or statutory law) and no change in the clinical definition of, or clinical criteria for, diagnosing intellectual disability. Regardless of how the matter is framed, the regulation must be changed to make clear that the Department of Corrections will review its own records, and any records submitted to it, for information that falls within the two defined categories of information that would result in suspension of execution not just for those who have yet to receive a ruling on intellectual disability from any court but also for (a) all death-sentenced individuals who have not presented an intellectual disability claim in court, (b) all death-sentenced individuals whose intellectual disability claim is pending before a court, and (c) all death-sentenced individuals whose intellectual disability claim is no longer pending before any court but whose claim could be impacted by a change in the definition of intellectual disability or a change to the clinical criteria for determining intellectual disability.

Third, the proposed amended regulation looks for any document that contains a diagnosis of intellectual disability but not for any document that indicates the death-sentenced individual is likely intellectually disabled, may be intellectually disabled, or has exhibited actions that are consistent with intellectual disability.[1] These descriptions are significantly more likely to be mentioned within records the prison will review than would be a diagnosis of intellectual disability, particularly because most of the records the Department of Corrections will review were not generated for the purpose of diagnosing intellectual disability or ruling out intellectual disability.

[1] The regulation also requires review of documents for an IQ score of 75 or below after the applicable standard error of measurement is applied and will suspend an execution if a document containing such an IQ score is identified, except where the death-sentenced individual's intellectual disability has already been adjudicated by a court even if further litigation is ongoing.

Consequently, the regulation is underinclusive and thus creates an unacceptable risk that intellectual disability will not be identified.

Fourth, the regulation limits documents indicating intellectual disability that will result in suspension of execution to those that indicate intellectual disability under the criteria within the DSM, AAIDD, or similar medical standards and clinical guidelines. The Department of Corrections is unlikely to find such a document, not because of a lack of evidence of intellectual disability. Rather, such documents are unlikely to specify intellectual disability pursuant to any of these criteria because those with expertise in intellectual disability rely on those criteria to govern their assessments and thus do not usually say they have made the conclusions and diagnosis pursuant to the criteria that govern their profession. It is also because other documents concerning potential intellectual disability are often school records or other various documents noting results of testing or noting other intellectual deficits for the purpose of providing the person much needed assistance that is given based on the results without the necessity of an actual diagnosis. The end-result is that most documents will not specify the criteria that was utilized. Thus most, perhaps all, documents the Department of Corrections will review that contain information of potential intellectual disability will not be specific enough under the regulation to result in suspension of the execution, and a potentially intellectually disabled person could be executed despite the law prohibiting his/her execution.

Fifth, turning to the insanity provisions of the proposed amended regulation, as the Department of Corrections was informed through the ongoing litigation before the Franklin Circuit Court and during the written comment period, the proposed amended regulation contains only one of the two United States Supreme Court definitions of insanity at the time of execution. It fails to include as insanity, when the death-sentenced individual lacks a rational understanding that execution means death. One who lacks this rational understanding is constitutionally ineligible for execution, even if that person rationally understands that the Commonwealth intends to execute him/her because he/she was convicted of killing a particular person and was sentenced to death for doing so. By failing to even consider whether the death-sentenced individual lacks a rational understanding that execution means death, the Department of Corrections eliminates an entire category of individuals who may be insane at the time of execution, fails to ascertain if the death-sentenced individual is insane under this definition, and thus fails to take reasonable steps to ensure it does not execute an insane person, when the law prohibits the Department of Corrections from doing so.

Finally, the proposed amended regulation contains no provision for the submission of information that could be relevant to both determining whether to perform an evaluation for sanity at the time of execution and whether the death-sentenced individual may be insane at the time of execution, when, per court order, the regulation is being amended to include such a provision as to intellectual disability. The Franklin Circuit Court has not rendered a decision on the insanity provisions and thus has not required the Department of Corrections to add a provision for the submission of records regarding potential insanity. But the writing is on the wall that the court will do so when it decides the remaining insanity provision claims in the Franklin Circuit Court action. The Department of Corrections is required to take reasonable steps to ensure it does not execute a person who is either intellectually disabled or insane at the time of execution. Allowing the submission of information for consideration regarding potential insanity and requiring consideration of that information is crucially important to a reliable assessment of insanity. There

is no rational basis to avoid allowing submission of, and to avoid requiring consideration of, information counsel or interested third parties desire to submit concerning the death-sentenced individual's potential insanity when the Department of Corrections must do so for intellectual disability. The Department of Corrections could easily fix this matter now. If it does not, and if the regulation is not first found deficient, the Franklin Circuit Court is likely to declare the regulation invalid for this reason (along with the rest of the reasons presented within the litigation).

All of this, and more, is discussed within the written comments on the proposed amended regulation that I submitted to the Department of Corrections/Justice & Public Safety Cabinet on September 19, 2025 and that I attach to this letter. *Each is a basis for the Committee to find the regulation deficient*. But before potentially doing so, I ask you to request the Department of Corrections/Justice & Public Safety Cabinet make the requested changes to proposed amended regulation 501 KAR 16:310, and that if it declines to do so, the Committee find the proposed amended regulation deficient.

Please share this letter with the rest of the members of the Administrative Regulations Review Subcommittee. I welcome further discussions regarding the regulation and potential amendments to it. You, the rest of the Committee members, and your staff are welcome to call or email me at any time. I can be reached at my office direct line number of 502-782-3601, by cell phone at 646-279-6902, and by email at: david.barron@ky.gov. This includes before the Committee considers the regulation at its 1 p.m. meeting on December 8, 2025, which is only a few hours after the beginning of the next proceeding in the execution procedures case before the Franklin Circuit Court, where I am counsel for numerous death-sentenced individuals and at which the Attorney General's Office seeks a ruling to allow an execution date to be set for one of my long-standing clients even though the Department of Corrections has taken the position that the Franklin Circuit Court litigation must reach final resolution before an execution could proceed.

I look forward to hearing from you and the rest of the Committee so we can further discuss the important matter of whether proposed amended regulation 501 KAR 16:310 is deficient.

Regards,

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