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

THOMAS CLYDE BOWLING
RALPH BAZE
BRIAN KEITH MOORE — **PLAINTIFFS**
GREGORY WILSON — **INTERVENING PLAINTIFF**

v. **TEMPORARY INJUNCTION UNDER CR 65.04**

KENTUCKY DEPARTMENT OF CORRECTIONS — **DEFENDANT**
COMMONWEALTH OF KENTUCKY — **INTERVENING DEFENDANT**

This matter is before the Court on the motion of intervening plaintiff Gregory Wilson for injunctive relief, seeking to stay or enjoin the implementation of the death warrant signed by the Governor which provides for Wilson's execution by lethal injection on September 16, 2010. The Kentucky Supreme Court in Bowling v. Ky. Department of Corrections, 301 S.W.3d 478 (Ky. 2010), held that the "death penalty protocols" of the Department must be promulgated by administrative regulation, in compliance with all substantive and procedural requirements of the law governing enactment of administrative regulations. The petitioners are all death row inmates who allege that the Department's newly promulgated death penalty administrative regulations violate various provisions of the Kentucky Administrative Procedure Act, codified in KRS Chapter 13A.

The Court finds that there are at least two substantial questions of law regarding the validity of the administrative regulations that require the Court to issue an injunction to preserve the *status quo* until the entry of a final judgment. First, the administrative regulations prohibit the use of a single drug for lethal injection under 501 KAR 16:330, while the lethal injection

statute explicitly allows the use of a single drug. KRS 431.220(1)(a). This discrepancy between the administrative regulation and the governing statute raises a substantial issue as to the whether the administrative regulation conflicts with the authorizing statute in violation of KRS Chapter 13A (including KRS 13A.120 and KRS 13A.130). Second, this Court finds that the failure of the administrative regulations to prohibit the execution of insane or mentally retarded inmates, or to provide adequate safeguards to prevent such an outcome, raises a substantial issue as to whether the administrative regulations illegally conflict with KRS 431.213 *et seq.*[1] and KRS 532.135[2]. Likewise, the lack of adequate safeguards or requirements to establish the mental health issues that may apply to condemned inmates raises serious questions as to whether the regulations are consistent with the 8th Amendment to the U.S. Constitution as applied in Ford v. Wainwright, 477 U.S. 399 (1986) (insanity) and Atkins v. Virginia, 526 U.S. 304 (1992) (mental retardation).

Because the movant has demonstrated that there are substantial legal questions regarding the validity of the challenged administrative regulations, and has met the other requirements of law for injunctive relief, the Court hereby GRANTS Wilson's motion for injunctive relief under CR 65.04. For the reasons stated below, the Court restrains and enjoins the Commonwealth and its officers, and the Department of Corrections, its agents, employees and others acting in concert with the Department, from implementing the Governor's execution warrant for Wilson, or otherwise implementing the administrative regulations under challenge in this action until a final judgment has been rendered in this case.

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[1] Statutory prohibition against execution of insane inmates.
[2] Statutory prohibition against execution of mentally retarded inmates.

Factual Background and Findings

Following the Supreme Court's ruling in *Bowling* that the Department of Corrections was required to promulgate its policies and procedures governing the implementation of the death penalty as an administrative regulation, the Department of Corrections formally initiated a rulemaking process under KRS Chapter 13A. After publication of the proposed administrative regulations, the Department undertook the required public notice and comment period, responded to the public comments, and held a public hearing on the proposed administrative regulations. The legislative oversight committees of jurisdiction likewise held public hearings, and the proposed regulations became effective in May, 2010.

The plaintiffs here, who were the original petitioners in the case in which the Supreme Court ruled that administrative regulations governing the death penalty are required, petitioned this Court to re-open this case, and challenged the newly enacted administrative regulations on a number of grounds, both substantive and procedural. This Court granted the petitioners' motion to re-open the case under CR 60.04 on May 20, 2010. The Court allowed the plaintiffs to amend their petition for declaratory and injunctive relief, and provided for an expedited response time and briefing schedule. The parties have briefed those issues, which are ripe for decision by this Court.

Thereafter, Governor Beshear signed an execution warrant for intervening plaintiff Wilson on August 25, 2010. Wilson promptly moved to intervene in this case on August 31, 2010, and the Attorney General likewise moved to intervene to argue in support of the Department of Corrections and in opposition to any delay in Wilson's execution. The Court held a hearing on all pending motions on September 8, 2010, and granted the motions of both Wilson and the Attorney General to intervene.

The plaintiffs have argued that the Supreme Court decision in Bowling v. Department of Corrections constitutes a self-executing injunctive order prohibiting any executions until the administrative regulations of the Department have been upheld by a court of law. While this Court rejects that legal analysis, it finds that the plaintiffs have presented substantial legal questions about the validity of the administrative regulations, that Wilson will suffer irreparable harm in the absence of injunctive relief, and that public interest favors maintenance of the *status quo* (including a stay on any further executions) until there has been a final decision on the merits of this case.

Neither Bowling nor Baze is currently the subject of an active death warrant signed by the Governor, and accordingly, in deciding the merits of the motion for injunctive relief, the Court will confine itself to the factual issues surrounding Wilson's request for injunctive relief. The record establishes a long history of both direct appeals and collateral attacks on Wilson's conviction and death sentence. *See* Wilson v. Commonwealth, 836 S.W.2d 872 (Ky. 1992) (direct appeal), Wilson v. Commonwealth, 975 S.W.2d 901 (Ky. 1998) (state post-conviction review under RCr 11.42); and Wilson v. Parker, 515 F.3d 682 (6th Cir. 2008) (federal post-conviction review under 28 U.S.C. Sec. 2254). The U.S. Supreme Court denied petitions for review in all three cases.[3]

Wilson, along with his co-defendant Brenda Humphrey[4], was convicted of brutal and horrific crimes of robbery, rape and murder of Deborah Pooley in 1987 in Northern Kentucky. Humphrey received a sentence of life without parole for 25 years, while Wilson was sentenced to death. The sordid tale of the gruesome crime is extensively documented in the appellate

[3] *See* 507 U.S. 1034 (1993), 510 U.S. 1857 (1993), 526 U.S. 1023 (1999), 130 S.Ct. 113 (2009) and 130 S.Ct. 786 (2009).

[4] Humphrey's convictions for facilitation of murder, first degree robbery, facilitation of rape, and criminal conspiracy, were affirmed on direct appeal. Humphrey v. Commonwealth, 836 S.W.2d 865 (Ky. 1992).

decisions cited above. Also documented in those decisions is a remarkable course of events with regard to Wilson's being required to represent himself at the jury trial of these death penalty charges because of a dispute with the trial judge over the judge's appointment as his counsel of a volunteer attorney with no death penalty trial or appellate experience. As a result, Mr. Wilson appears to be the only inmate on death row in Kentucky who had no lawyer at trial (although Wilson received limited assistance from his appointed counsel, who the court record indicates was physically absent from the courtroom during long stretches of the trial).

During the post-conviction proceedings of his co-defendant, Brenda Humphrey, it was disclosed that Humphrey had a long running sexual affair, which continued before, during and after the Wilson and Humphrey's trial, with Judge Gilliece, another trial judge in the Kenton Circuit Court, who was a colleague and close friend of the presiding judge over this prosecution. *See* Humphrey v. Commonwealth, 2005 WL 924188 (Ky. Supreme Court, April 21, 2005). Although the Commonwealth's Attorney had knowledge of this affair, it was not disclosed to Wilson or his counsel.

The facts related to Wilson's prosecution are not directly relevant to the validity of the plaintiffs' challenge to the administrative regulations at issue here, but are noted because they are relevant for purposes of balancing the equities in considering his motion for injunctive relief. In light of the irregularities in Wilson's trial, and the question of whether he had the mental capacity to waive his constitutional right to counsel and other constitutional rights, the Court believes the equities weigh heavily in favor of requiring that issue to be fully and fairly resolved prior to the execution of the death warrant. Moreover, the issue of Wilson's mental capacity is unresolved at this point. The question of whether the Department's death penalty administrative regulations are required under KRS Chapter 13A to include any safeguards to ensure that mentally ill or

mentally retarded inmates are not executed in violation of both Kentucky law and 8th Amendment to the U.S. Constitution as applied by the U.S. Supreme Court, is a question that cannot be adequately answered unless it is decided in the context of an individual, like Wilson, whose case demonstrates the complexity and perils of these issues in the real world of criminal trials and appeals.

At the hearing on September 8, 2010, this Court asked counsel for the Department of Corrections, and counsel for the Commonwealth, if there has ever been any determination by any court of law that Wilson is eligible for the death penalty under KRS 532.135. Although counsel for the Commonwealth, and the Department, indicated that 22 years of post-conviction litigation have been endured, no such decision by any court (or, for that matter, by the Department itself) was produced or cited to the Court. In other words, it appears that Wilson's execution has been scheduled before there has been any determination of his mental capacity under KRS 532.135, as required by the U.S. Supreme Court in Atkins v. Virginia, *supra* and by the Kentucky Supreme Court in Bowling v. Commonwealth of Kentucky, 163 S.W.3d 361, 377 (Ky. 2005). Counsel for Wilson has represented to the Court that the only known test of Wilson's intelligence quotient (IQ) was administered when he was 14 years old (during his developmental period), and that it demonstrated an IQ of 62, well below the threshold set by KRS 532.130. The Court finds there is a good faith basis to believe that Wilson may be ineligible for the death penalty under KRS 532.140.

Conclusions of Law

1. The administrative regulations promulgated by the Department prohibit the use of a single drug in the execution of a death sentence. 501 KAR 16:330 (Lethal Injection Protocol, requiring the use of a three drug "cocktail.").

2. The statute governing execution of a death sentence provides that "except as provided in subparagraph (b) of this section [applying to condemned inmates sentenced prior to 1998 who opt to be executed by electrocution], every death sentence shall be executed by continuous intravenous injection of a substance or combination of substances sufficient to cause death. The lethal injection shall continue until the prisoner is dead." KRS 431.220(1)(a). Thus, the statute explicitly allows the use of a single drug.

3. In the administrative regulation promulgation process, public commentors, including some of the petitioners and their counsel, urged the Department to allow the use of a single drug, but the Department's only response was that the use of the three drug cocktail had been approved in Baze v. Rees, 553 U.S. 35, 128 S.Ct. 1520 (2008). Neither in its responses to public comment, nor any filing in this Court, has the Department provided any explanation or rationale for eliminating the "single substance" option provided by the statute. This failure to provide any explanation or rationale raises serious questions as to whether the elimination of the single drug option is arbitrary and capricious in violation of Sections 2 and 3 of the Kentucky Constitution.

4. The elimination of the single drug option that is explicitly authorized in KRS 431.220 raises a substantial issue of law as to whether the administrative regulation is in conflict with the statute, in violation of KRS 13A.120 and KRS 13A.140.

5. The execution of an insane person violates the 8th Amendment to the U.S. Constitution. Ford v. Wainwright, 477 U.S. 399 (1986).

6. The execution of an insane person violates KRS 431.240(2).

7. The execution of a mentally retarded person violates the 8th Amendment to the U.S. Constitution. Atkins v. Virginia, 526 U.S. 304 (1992).

8. The execution of a mentally retarded person violates KRS 532.140, which was enacted in 1990. *See* 1990 Ky. Acts., ch. 488, sec. 3, effective July 13, 1990. The prohibition against executing mentally retarded offenders also has a provision requiring the mental capacity of the defendant must be determined prior to trial. KRS 532.135.

9. The Kentucky Supreme Court has held that the requirement for a pretrial determination of mental capacity "would be unconstitutional if applied to a defendant who was tried and sentenced to death prior to July 13, 1990, and thus who had never been afforded an opportunity to assert and prove entitlement to the exemption." Bowling v. Commonwealth, 163 S.W.3d 361, 377 (Ky. 2005). Intervening Plaintiff Wilson is a defendant who "was tried and sentenced to death prior to July 13, 1990", and thus is entitled to retroactive application of the protection of KRS 532.140.

10. Both the Commonwealth and the Department of Corrections argue that Wilson has waived his right to assert mental health issues related to his execution. However, this Court takes judicial notice that the Commonwealth previously has taken the position that mental capacity issues for condemned inmates do not become ripe until a death warrant has been signed by the Governor. *See* Baze v. Commonwealth, Franklin Circuit Court, Division 1, No. 09-CI-216 (Opinion and Order, March 19, 2009), aff'd Baze v. Thompson, 302 S.W.3d 57 (Ky. 2010).

11. The administrative regulations, as promulgated, contain no means of determining if a condemned inmate is mentally retarded as defined in KRS 532.140 and Atkins v. Virginia, *supra.*

12. The administrative regulations, as promulgated, contain a limited provision for the review of whether a condemned inmate is legally insane. 501 KAR 16:310, Section 3. This provision of the regulations makes reference to KRS 431.213(2), but it appears to provide a

different procedure than the procedure set forth in KRS 431.2135, which the Commonwealth and the Department have both asserted as the exclusive means of determining mental health issues related to an imminent execution.

13. The standard set forth in KRS 532.140 for ineligibility of mentally retarded inmates is tied to the following statutory definition: "A defendant with significant subaverage intellectual functioning existing with substantial deficits in adaptive behavior and manifested during the developmental period is referred to in KRS 532.135 and 532.140 as a seriously mentally retarded defendant. 'Significantly subaverage general intellectual functioning' is defined as an intelligence quotient (I.Q.) of seventy or below." KRS 532.130(2).

14. Counsel for Wilson has asserted to the Court that Wilson the only known IQ test for Wilson was administered when he was age 14 (during the developmental period) and that he scored 62 on that IQ test. Papers filed with the Court support a finding that there is a good faith basis for this assertion. Wilson has never been given a hearing on the question of whether he is ineligible for the death penalty under the definition set forth in KRS 532.130 and the prohibition set forth in KRS 532.140 as interpreted by the Kentucky Supreme Court in Bowling v. Commonwealth, 163 S.W.3d at 377.

15. The Commonwealth vigorously asserted that the Court's concerns with Wilson's mental capacity should be disregarded because he has had ample opportunity to raise and litigate those questions in "22 years of post-conviction litigation." However, as noted above, the Commonwealth in other cases in this Court has argued to the contrary, that a condemned inmate is prohibited from raising mental health issues until a death warrant is signed by the Governor, and that this issue is not ripe for decision until the time the warrant becomes effective.

16. The Court specifically inquired of counsel for the Commonwealth and counsel for the Department if there had been any determination by any Court of the eligibility of Wilson for the death penalty under KRS 532.140 and KRS 431.213 *et seq.* No such determination was produced or identified, although the Commonwealth pointed out that Wilson had been determined to be competent to stand trial, and that he has recently asserted an Atkins v. Virginia argument as to mental retardation in the Kenton Circuit Court, and that motion was summarily denied without a hearing. Counsel for the Commonwealth further indicated that Wilson had not filed a proper motion under KRS 431.2135(1).

17. The Court inquired as to whether there was any legal authority to support a ruling that a mentally incompetent person can waive their constitutional or statutory rights, and the Commonwealth asserted that the attorneys for Wilson waived those rights in the post-conviction litigation. No legal authority has been provided to support that argument. The U.S. Supreme Court has held that an incompetent person cannot knowingly and intelligently waive a constitutional right. Pate v. Robinson, 383 U.S. 375 (1966). Likewise, it has been held that "it is contradictory to argue that a defendant who may be incompetent should be presumed to possess sufficient intelligence that he will be able to adduce evidence of his incompetence which might otherwise be within his grasp." United States v. DiGilio, 538 F.2d 972 988 (3rd Cir. 1976), cert. denied, 429 U.S. 1038 (1977).

18. The Court's determination of Wilson's entitlement to injunctive relief is governed by CR 65.04, as applied in Maupin v. Stansbury, 578 S.W.2d 695 (Ky. App. 1978). In order to obtain a temporary injunction to maintain the *status quo* until a final judgment can be rendered, a party must demonstrate irreparable injury, the presence of a substantial legal issues, and that a balancing of the competing equities, including the public interest, supports injunctive relief.

The Civil Rule specifically provides for the granting of an injunction when the "movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual." CR 65.04. The Court finds that Wilson meets all of these criteria.

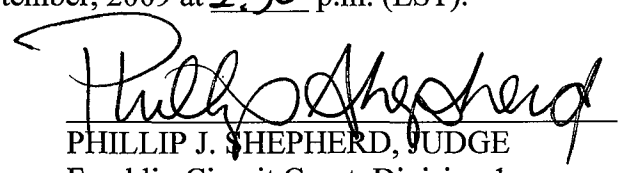
19. The Court has identified as least two substantial legal issues that justify injunctive relief: 1) the validity of the exclusion from the administrative regulations of the one drug option that is provided for in statute; and 2) whether the administrative regulations comply with the statutory and constitutional requirements for determining whether a condemned inmate is ineligible for execution by virtue of insanity or mental retardation.

20. In balancing the equities, the Court recognizes that Wilson's death penalty, as imposed by the trial court, has already been delayed 22 years by virtue of the post-conviction litigation. The hardship imposed by this delay on the family and friends of Deborah Pooley is significant. However, the hardship imposed on the Commonwealth and the Department of Corrections, the only adverse parties in this case, is not of that magnitude. Moreover, the Commonwealth and the Department both have a legal obligation to ensure that all statutory and constitutional requirements have been fully complied with prior to any execution. The public has a preeminent interest in ensuring that all public officials comply with the law. The Court has found serious questions about whether all statutory and constitutional requirements have been met in the challenged administrative regulations at issue here. Accordingly, this Court is duty bound to resolve those questions before allowing those administrative regulations to be implemented in such a final and irremediable fashion as the execution of the death penalty.

Conclusion

For the reasons stated above, this Court GRANTS Wilson's motion for injunctive relief and a STAY of any implementation of the death warrant signed in his case by the Governor. Accordingly, the Commonwealth of Kentucky, the Department of Corrections, the Secretary of the Justice and Public Safety Cabinet, the Commissioner of Corrections, the Warden of the Kentucky State Penitentiary, and all state employees, agents, or persons acting in concert with them, are RESTRAINED and ENJOINED from taking any steps to implement the administrative regulations at issue in this action (501 KAR Chapter 16), 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.

SO ORDERED this the 10th day of September, 2009 at 2:30 p.m. (EST).



PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division 1

Bond: $100.00 (CR 65.05).

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