

Supreme Court of Kentucky

2026-SC-0053-OA

COMMONWEALTH OF KENTUCKY

PETITIONER

IN SUPREME COURT

V.

HONORABLE PHILLIP J. SHEPHERD,
JUDGE, FRANKLIN CIRCUIT COURT

RESPONDENT

AND

BENNY HODGE; BRIAN KEITH
MOORE; DAVID MATTHEWS; DAVID
SANDERS; DONALD JOHNSON; KARU
GENE WHITE; KENTUCKY
DEPARTMENT OF CORRECTIONS;
MITCHELL WILLOUGHBY; RALPH
BAZE; ROBERT FOLEY; ROGER
WHEELER; RONNIE BOWLING;
VICTOR TAYLOR; VIRGINIA CAUDILL;
AND WILLIAM THOMPSON

REAL PARTIES IN INTEREST/
APPELLEES

OPINION OF THE COURT BY JUSTICE KELLER

DENYING PETITION FOR WRIT OF MANDAMUS

The plaintiffs in the underlying lawsuit have received death penalty convictions; however, litigation concerning Kentucky's procedures for implementation of the death sentence has been ongoing for two decades. The Commonwealth petitions this Court for a second-class writ ordering the circuit court to clarify that a temporary injunction that has been in place since 2010,

does not bar the Governor from issuing a death warrant for inmate Ralph Baze. For the reasons stated herein, the petition is denied.

I. FACTS AND PROCEDURAL BACKGROUND

In 2006, numerous inmates filed the underlying lawsuit seeking declaratory and injunctive relief concerning Kentucky's execution procedures. The inmates alleged that the Kentucky Department of Corrections ("DOC") had implemented execution protocols without promulgating them as administrative regulations in accordance with KRS¹ Chapter 13A, Kentucky's Administrative Procedures Act. The inmates sought to enjoin executions until lawful procedures were adopted and lawfully reviewed. After initially granting summary judgment to the inmates, the circuit court reversed course, vacated its order, and granted DOC's motion to dismiss. The inmates appealed. This Court, in *Bowling v. Kentucky Department of Corrections*, 301 S.W.3d 478 (Ky. 2009), held that "[DOC] is required by Kentucky law to promulgate a regulation as to all portions of the lethal injection protocol except those limited issues of internal management that are purely of concern to Department personnel." *Id.* at 492.

Following our decision in *Bowling*, DOC promulgated new administrative regulations that became effective in 2010. The circuit court permitted the inmates to reopen their case and amend their declaratory judgment petition to incorporate the argument that the new regulations did not comply with KRS

¹ Kentucky Revised Statutes.

Chapter 13A. The circuit court also allowed inmate Gregory Wilson to intervene in the lawsuit. At the time, Wilson had an active death warrant signed by the Governor that provided for his execution by lethal injection on September 16, 2010. On September 10, 2010, the circuit court entered a temporary injunction that prevented the regulations from taking effect. The circuit court not only found discrepancies between the new regulations and applicable statutes with regard to the drugs used in lethal injections, but also found the regulations did not prohibit execution of insane or mentally disabled inmates, which was potentially in conflict with various statutes and the 8th Amendment to the U.S. Constitution. The temporary injunction provided, in relevant part,

the Court restrains and enjoins the Commonwealth and its officers, and [DOC], its agents, employees and others acting in concert with [DOC], 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.**

(Emphasis added.)

Following entry of the temporary injunction, the Attorney General and DOC sought a writ from this Court, in relevant part only, to dismiss the underlying declaratory judgment action and dissolve the temporary injunction. *Commonwealth ex rel. Conway v. Shepherd*, 336 S.W.3d 98 (Ky. 2011). We declined to issue a writ, explaining, in relevant part, that

given the magnitude of the issues presented here concerning not only whether particular individuals might be properly executed by the state **but also the**

validity of our state protocol for execution and the inherent difficulties in determining the merits of such issues upon the limited record in a writ case, we will not exercise our discretion to issue a writ here[.]

Id. at 103 (emphasis added) (footnote omitted). We also “recognize[d] that the temporary injunction essentially forbids the Commonwealth from performing any more executions until the Franklin Circuit Court enters final judgment in the declaratory judgment action[.]” *Id.* at 104. Further, we discerned “no clear abuse of discretion in the Franklin Circuit Court’s granting of the temporary injunction.” *Id.*

In the years since, DOC has promulgated various regulations related to execution protocols. In response, the inmates have dropped claims, the circuit court has dismissed claims, and the inmates have been permitted to file amended complaints to add claims pertaining to new regulations.² The litigation has remained ongoing as DOC promulgates new regulations, sometimes taking years to do so. In 2024, the Commonwealth attempted to dissolve the temporary injunction after new regulations went into effect, but the circuit court reserved ruling on the matter. The Commonwealth sought relief in this Court pursuant to RAP³ 20(B), which was denied. *See Dep’t of Corr. v. Baze*, 701 S.W.3d 549 (Ky. 2024).

In 2025, the Commonwealth again sought to dissolve the temporary injunction. The circuit court denied relief, ruling, in part, that questions

² Wilson’s death sentence was commuted in 2019 by then-Governor Matt Bevin, and he is no longer a party to the underlying action.

³ Rule of Appellate Procedure.

remained regarding execution of inmates with intellectual disabilities. The circuit court also ruled that

if the Governor or DOC seek to proceed to implement the new regulations by issuing a death warrant, they are authorized under the prior injunction to file a motion to modify the injunction if necessary, or to authorize additional actions they deem necessary to implement the death penalty in any given case. Only upon filing of such a motion, and a hearing thereon, can the Court determine if such action gives rise to irreparable injury, if it presents a substantial legal issue, determine the public interest and balance the equities, as required in ruling on injunctive relief under *Maupin v. Stansbury*, 575 S.W.2d 695 (Ky. App. 1978). The Court cannot decide such issues in the abstract, as the Attorney General urges here. In effect, the Attorney General seeks an advisory opinion as to whether undefined or speculative actions in the future would run afoul of the 2010 injunction... However, at the present time, there is no action that the Commonwealth has taken to implement the new regulations and accordingly, any controversy regarding implementation of the new regulations is not ripe for consideration.

April 21, 2025 Order at 4.

Subsequently, the Commonwealth decided to move forward with execution of Baze. Baze was identified by the Commonwealth as an inmate who had exhausted all appeals and post-conviction remedies and presented no other legal impediment to execution. In June 2025, the Attorney General sent a letter to the Governor explaining that he believed the 2010 injunction did not apply to Baze and recommended the Governor issue a death warrant. The Governor ultimately declined to act on the Attorney General's recommendation, citing 1) ongoing changes to applicable administrative regulations; 2) the fact that DOC does not possess the necessary drugs and had received

correspondence from numerous drug companies indicating they will not provide drugs for use in executions; and 3) his understanding that the 2010 injunction prevented DOC from executing any inmates. The Commonwealth returned to the circuit court and, on November 6, 2025, filed a motion asking the court to “clarify the scope of the court’s 2010 temporary injunction.” Specifically, the Commonwealth asked for an order stating that the 2010 injunction does not prevent the Governor from issuing a death warrant for Baze. In an order entered on December 30, 2025, the circuit court denied the motion, ruling that the order requested by the Commonwealth would violate separation of powers and constitute an advisory opinion. This petition for a writ of mandamus followed.

II. STANDARD OF REVIEW

A writ is an extraordinary remedy. *Ridgeway Nursing & Rehab. Facility, LLC v. Lane*, 415 S.W.3d 635, 639 (Ky. 2013). Courts are reluctant to issue writs because they “necessitate an abbreviated record which magnifies the chance of incorrect rulings that would prematurely and improperly cut off the rights of litigants.” *Interactive Media Ent. & Gaming Ass’n v. Wingate*, 320 S.W.3d 692, 695 (Ky. 2010) (citation omitted). Accordingly, this Court has held that writs are appropriate in limited circumstances:

A writ of prohibition *may* be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or

otherwise and great injustice and irreparable injury will result if the petition is not granted.

Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004) (emphasis original).

We confine our analysis to the second class of writs. Our jurisprudence recognizes a subcategory under the second class of writs:

[I]n certain special cases this Court will entertain a petition for prohibition in the absence of a showing of specific great and irreparable injury to the petitioner, provided a substantial miscarriage of justice will result if the lower court is proceeding erroneously, and correction of the error is necessary and appropriate in the interest of orderly judicial administration. It may be observed that in such a situation the court is recognizing that if it fails to act the administration of justice generally will suffer the great and irreparable injury.

Bender v. Eaton, 343 S.W.2d 799, 801 (Ky. 1961). However, “these ‘certain special cases’ are exactly that—rare exceptions that tend to be limited to situations where the action for which the writ is sought would violate the law, *e.g.*, by breaching a tightly guarded privilege or by contradicting the requirements of a civil rule.” *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 808 (Ky. 2004) (footnotes omitted).

With these standards in mind, we proceed with our review.

III. ANALYSIS

We begin by reiterating that the Commonwealth is seeking a writ of mandamus to compel the circuit court to issue an order clarifying that the 2010 injunction does not prevent the Governor from issuing a death warrant. The Commonwealth argues it has no adequate remedy by appeal; that it will suffer great and irreparable injury in the absence of a writ; and, alternatively,

that if we do not agree the Commonwealth can demonstrate the requisite harm, a writ is still appropriate “in the interest of orderly judicial administration.”

Bender, 343 S.W.2d at 801.

This Court recently rendered an opinion denying the Commonwealth’s petition for a writ of prohibition in the underlying litigation. See 2025-SC-0310-OA, opinion rendered on August 20, 2026, and designated to be published. Therein, the Commonwealth argued the circuit court lacked subject matter jurisdiction to hear the underlying action because the inmates failed to exhaust administrative remedies. The instant petition, filed just six months after 2025-SC-0310-OA, and well before an opinion was rendered, argues, in part, that the circuit court misapplied doctrines about subject matter jurisdiction to the 2010 injunction and, because the circuit court assumed jurisdiction and acted within its “inherent power” in issuing the injunction, it has retained jurisdiction to bring its orders into compliance with the Civil Rules. In any event, we have now held in our August 2026 Opinion that Franklin Circuit Court has subject matter jurisdiction to consider the inmates’ challenges.

We also note that, just days before our decision was rendered in 2025-SC-0310-OA, the inmates filed a “notice of ruling in underlying action” containing an order from the circuit court entered on August 14, 2026. The Court takes judicial notice of the order, which concerns new administrative regulations promulgated by DOC that went into effect in April 2026. As a result of the newest regulations, the circuit court dismissed five of the inmates’

remaining claims and allowed four to survive: 1) Claim D concerns whether use of compounded lethal injection drugs violates the 8th Amendment to the U.S. Constitution, and whether failure to specify that compounded drugs will not be used renders the regulation invalid; 2) Claims F and G relate to whether the new regulations provide adequate protection against execution of insane and mentally disabled individuals, respectively; and 3) Claim I relates to intravenous (“IV”) insertion for the purpose of administering the lethal injection. The new regulation permits DOC to attempt to insert an IV for up to two hours, which the inmates argue will cause a substantial risk of pain and suffering. In addition to disposing of five claims, the circuit court denied the inmates’ motion for leave to amend their sixth amended petition for declaratory judgment.

We now turn to the elements necessary for a writ of mandamus. The Commonwealth must demonstrate that it lacks adequate remedy by appeal or otherwise. It has failed to do so. Although this litigation has been extremely prolonged, the August 14, 2026 Order indicates that it is nearing final adjudication. The inmates point to an agreed scheduling order that was entered on June 24, 2025, and argue the parties remain on track and discovery is set to be complete by April 29, 2027. Part of the overall delay has been that new regulations have been promulgated by DOC in piecemeal fashion, sometimes taking years. The newest regulations became effective in April 2026; however, as stated *supra*, the circuit court did not allow the inmates to further amend their petition for declaratory judgment in response and

dismissed five of nine remaining claims. In other words, it appears from the limited record before us that the final versions of the regulations are now in effect and the associated claims have been narrowed in response. At least two of the remaining claims (*i.e.*, whether a compounded drug can be used in lethal injection and whether DOC can attempt to insert an IV for up to two hours) are applicable to *all* inmates facing execution.⁴ Once the circuit court enters a final adjudication on the inmates' remaining claims, the aggrieved party may appeal the final judgment. This accordingly means the Commonwealth has an adequate remedy by appeal.

Even if the Governor issued a death warrant for Baze right now, the underlying constitutional issues regarding implementation of the death penalty remain unresolved. This would result in Baze making the same claims he is making now, but on the eve of execution, and the parties would end up at the same place they are right now in the litigation. This is neither efficient nor logical. Moreover, the temporary injunction will terminate upon entry of a final appealable judgment. CR 65.04(4). The Commonwealth argues that entry of a final judgment cannot undo the harm caused by the Governor's interpretation of the 2010 injunction. However, the Governor's interpretation of the injunction, and the Attorney General's disagreement with it, is a non-justiciable claim.

⁴ Per KRS 431.220(1)(a), lethal injection is the only approved method of execution for those sentenced to death after March 31, 1998. Those sentenced to death prior to March 31, 1998, may choose between lethal injection and the electric chair. KRS 431.220(1)(b).

Neither the circuit court, through an order in the underlying action, nor this Court, through a writ, can require the Governor to issue a death warrant. First, the Governor is not a party to the underlying action. Second, the Governor cited additional reasons outside of the injunction for not issuing a death warrant, including lack of available approved drugs. Third, although the Attorney General can and has advised the Governor of his legal interpretation of the injunction, the Governor is not required to accept that interpretation or act upon it. Section 69 of the Kentucky Constitution provides that “[t]he supreme executive power of the Commonwealth shall be vested in a Chief Magistrate, who shall be styled the ‘Governor of the Commonwealth of Kentucky.’” Section 81 provides that the Governor “shall take care that the laws be faithfully executed.”

As such, the governor’s policy concerning the signing of death warrants is strictly an executive function. The Kentucky Constitution expressly addresses the separation of powers within the branches of government. Ky Const §§ 27, 28. Moreover, the separation of powers doctrine “is fundamental to Kentucky’s tripartite system of government.” *Legislative Research Commission v. Brown*, Ky., 664 S.W.2d 907, 912 (1984).

This Court does not have the power to interfere with the Governor’s policy concerning the signing of death warrants.

Bowling v. Commonwealth, 926 S.W.2d 667, 669 (Ky. 1996) (emphasis added).

Further, entry of an order by the circuit court instructing the Governor that he *may* sign a death warrant for Baze would constitute an advisory opinion. “Our courts do not function to give advisory opinions, even on

important public issues, unless there is an actual case in controversy.” *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992). As this Court recently explained,

[u]nder the separation of powers enshrined in our Kentucky Constitution, the courts of this Commonwealth consider only “justiciable causes.” Ky. Const. § 112(5) (“The Circuit Court shall have original jurisdiction of all *justiciable causes* not vested in some other court.”) (emphasis added); *Commonwealth, Cabinet for Health & Fam. Servs., Dep’t for Medicaid Servs. v. Sexton*, 566 S.W.3d 185, 197 (Ky. 2018) (“[T]he *justiciable cause* requirement applies to cases at all levels of judicial relief.”). That is, we consider only claims the adjudication of which falls properly within our judicial function. Examples of *non-justiciable* claims beyond the purview of our judicial function include those seeking an advisory opinion, requesting adjudication of a claim that is moot or not ripe, or presenting a political question inappropriate for judicial determination. *Sexton*, 566 S.W.3d at 193.

Graham v. Adams, 684 S.W.3d 663, 676 (Ky. 2023).

The disagreement between the Attorney General and the Governor over interpretation of the injunction is a non-justiciable claim. Any action by the circuit court or this Court to intervene would constitute an advisory opinion.

The Commonwealth has also failed to demonstrate that great injustice and irreparable injury will result unless a writ is issued. The injunction has been in place for approximately 16 years, and this is the first time the Commonwealth has argued the injunction applied only to Wilson. This Court has interpreted the injunction as applicable to all executions (*see, e.g., Shepherd*, 336 S.W.3d 98; *Baze*, 701 S.W.3d 549). Further, the circuit court has consistently interpreted the injunction as applicable to all executions, not just Wilson’s. *See, e.g.,* circuit court orders entered April 25, 2012, and

December 5, 2013. An appellate court generally gives deference to the circuit court's interpretation of its own orders unless that interpretation is manifestly unreasonable. *VP Louisville, LLC v. NBH Bank, N.A.*, 578 S.W.3d 753, 757 (Ky. App. 2019) (citation omitted). *See also Kendrick v. Bland*, 931 F.2d 421, 423 (6th Cir. 1991) ("The District Court's interpretation of its own order is certainly entitled to great deference."). More to the point, the Commonwealth cannot show that the circuit court's interpretation of its own order and its subsequent refusal to "clarify" it in a manner acceptable to the Commonwealth some 16 years after entry, amounts to great injustice and irreparable injury. Indeed, the Commonwealth's petition focuses on injuries it is allegedly suffering due to the Governor's failure to issue a death warrant since June 2025, when first contacted by the Attorney General, *not* due to the temporary injunction being in place since 2010. Again, even if the Commonwealth received the relief it is seeking (*i.e.*, "clarification" of the injunction), the litigants and the courts would be in the exact position as they are right now. Accordingly, great injustice and irreparable injury have not been demonstrated.

Finally, the Commonwealth has failed to convince us that this is a "special case" and that a writ is necessary "in the interest of orderly judicial administration" despite the Commonwealth's failure to show great injustice and irreparable injury. *Bender*, 343 S.W.2d at 801. To be clear, the issues before the circuit court are of great importance and public concern. That the litigation has unfortunately been so prolonged cannot be tied to any one factor or to any particular action or inaction by a particular party. Nevertheless, the

circuit court has kept the case moving forward. Its ability to do so has generally been tied to the timing of promulgation of new regulations by DOC. The most recent set of regulations went into effect in April 2026, and it now appears that the constitutional issues raised by the inmates in their petition for declaratory judgment will be finally adjudicated. In other words, although it has not been happening quickly due to the complex nature of the underlying claims, “orderly judicial administration” has been occurring in the circuit court and continues to occur. To that end, a writ of mandamus from this Court is not necessary.

IV. CONCLUSION

The Commonwealth has failed to demonstrate that it lacks adequate remedy by appeal or that great injustice and irreparable injury will result if a writ is not granted. Moreover, the petition fails to satisfy the requirement of a “special case” exception in the absence of a showing of great injustice and irreparable injury. The Attorney General’s disagreement with the Governor over interpretation of the 2010 injunction is a non-justiciable claim. Any order by the circuit court or this Court instructing the Governor as to what he *may* do regarding issuance of a death warrant would constitute an advisory opinion. Accordingly, the petition for a writ of mandamus is denied.

All sitting. Bisig, Conley, Goodwine and Nickell, JJ., concur. Lambert, C.J., concurs by separate opinion which Conley, J., joins. Thompson, J., dissents by separate opinion.

LAMBERT, C.J., CONCURRING: Just as only the Governor may pardon, only the Governor may sign a death warrant. The Franklin Circuit Court, in its order entered on April 21, 2025, specifically acknowledged that the Governor may issue a death warrant and move the circuit court to lift the injunction so as to permit the execution of any death row inmate. Therefore, I concur with the majority that we have no power to interfere with the Governor's decision whether to sign death warrants. *Bowling v. Commonwealth*, 926 S.W.2d 667, 669 (Ky. 1996). No court can direct his pen in that regard. Therefore, I concur with the majority.

Conley, J., joins.

THOMPSON, J., DISSENTING: Thirty-two years have passed since Ralph Baze was sentenced to death in 1994,⁵ following a jury trial in which he was convicted of the 1992 double murders of Sheriff Steven Bennett and Deputy Arthur Briscoe. Baze's conviction was affirmed on direct appeal in 1997. *Baze v. Commonwealth*, 965 S.W.2d 817, 819-20, 826 (Ky. 1997).

Then Baze challenged, along with fellow death row inmate Thomas Clyde Bowling, Kentucky's lethal injection protocol as violative of the Eighth Amendment prohibition against cruel and unusual punishment. Our Court rejected this argument, and the United States Supreme Court upheld our

⁵ This length of delay, coincidentally, matches the length of delay that a death row inmate in California argued constituted a violation of the Eighth Amendment. The United States Supreme Court denied his request for certiorari. *Boyer v. Davis*, 578 U.S. 965 (2016) (Breyer, J., dissenting).

ruling. *Baze v. Rees*, 217 S.W.3d 207, 212 (Ky. 2006), *aff'd*, 553 U.S. 35, 63 (2008).

The underlying declaratory judgment action underlying this petition for a writ of mandamus was filed twenty years ago in 2006 by Bowling, Baze, and Brian Keith Moore. Since that time, additional death row inmates have been added to the action. The “temporary” injunction at issue here has been in place since 2010.

In 2015, Bowling passed away from cancer at age sixty-two. Baze is currently seventy-one. At the rate this case is proceeding, Baze and other petitioners will die of natural causes before this case’s resolution.⁶

I would grant the petition for a writ of mandamus and order the Franklin Circuit Court to rule within sixty days as to whether the temporary injunction that has been in place since 2010 applies to Baze.⁷ It is far from clear that this temporary injunction should apply to him or the other death row inmates where the prior regulations which led to the injunction have been replaced with others. This litigation has lasted far too long, and the hope for an ultimate resolution to it at some indefinite time after discovery has been completed in

⁶ More death row inmates die from natural causes while imprisoned than are executed. Jeffrey Omar Usman, *The Twenty-First Century Death Penalty and Paths Forward*, 37 Miss. C.L. Rev. 80, 82–85 (2019).

⁷ The question of whether the circuit court ought to rule upon whether the temporary injunction should continue to apply to the other death row inmates is not before us. The Commonwealth’s petition for mandamus is worded narrowly as a request that we “issue a second-class writ directing the circuit court to clarify that its 2010 temporary injunction does not bar the Governor from signing a death warrant for Ralph Baze.”

2027 does not excuse the circuit court's failure to make a ruling on whether this temporary injunction is still needed as to Baze. Once such a ruling is made, the parties will have a mechanism to seek further review by our Court.

I. PROCEDURAL HISTORY REGARDING THE TEMPORARY INJUNCTION

In 2010, Gregory Wilson, a death row inmate who was subject to a signed death warrant and had intervened in the underlying declaratory action, filed a motion for a temporary injunction to prevent his execution. He raised arguments that the Department of Corrections' newly promulgated "death penalty protocols" violated various provisions of the Kentucky Administrative Procedures Act.

In granting Wilson's motion and ordering a temporary injunction, the circuit court found:

[T]here 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 [Kentucky Administrative Regulations (KAR)] 16:330, while the lethal injection statute explicitly allow the use of a single drug. [Kentucky Revised Statutes (KRS)] 431.220(1)(a). This discrepancy between the administrative regulation and the governing statute raises a substantial issue as to . . . whether the administrative regulation conflicts with the authorizing statute in violation of KRS Chapter 13A (including 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. and KRS 532.135. 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*, 536 U.S. 304 (2002) (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 . . . 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.

(Footnotes omitted).

Wilson’s strongest ground for an injunction was that the death penalty protocols did not provide a method for determining whether he was ineligible to be executed due to having an intellectual disability, as no determination had been made in his case as to whether he was “death eligible” in accordance with constitutional requirements as implemented by our statutes. KRS 532.135 requires that a determination be made prior to trial as to whether a defendant has a “serious intellectual disability.”⁸ However, that provision was not in effect at the time Wilson was tried.

KRS 532.140 provides that “a defendant who has been determined to be a defendant with a serious intellectual disability . . . shall not be subject to execution.” KRS 532.130(2) clarifies: “A defendant with significant subaverage

⁸ In the intervening years, KRS 532.130, KRS 532.135, and KRS 532.140 have been amended to change the terminology they use to refer to persons with intellectual disabilities. I choose to quote the latest version of these statutes with current terminology rather than quote from the prior versions, as in substance the statutes have not changed significantly.

intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period . . . [has] a serious intellectual disability.” Having a “significant subaverage general intellectual functioning” is defined in KRS 532.130(2) “as an intelligent quotient (I.Q.) of seventy (70) or below.”

The circuit court’s decision to grant the injunction in part hinged upon its finding that “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 United States 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).” The circuit court noted that Wilson took an IQ test “when he was fourteen years old (during his developmental period),” which “demonstrated an IQ of 62, [which] was well below the threshold set by KRS 532.130.” Consequentially, the circuit court found “there is a good faith basis to believe that Wilson may be ineligible for the death penalty under KRS 532.140.”

Among its legal conclusions, the circuit court concluded that “[t]he 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*.”

The circuit court considered the standards for granting a preliminary injunction pursuant to the Kentucky Rules of Civil Procedure (CR) 65.04, found that Wilson met all of the criteria, and, given the two substantial legal issues it

had found that justified injunctive relief, then proceeded to balance the equities before determining that a temporary injunction was appropriate:

[T]he 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 [Wilson’s victim] 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.

The circuit court’s order granting the temporary injunction included broad language: “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.” *Commonwealth ex rel. Conway v. Shepherd*, 336 S.W.3d 98, 105 (Ky. 2011) (quoting from the circuit court’s order).

In 2011, the Commonwealth filed a petition before our Court for an extraordinary writ.⁹ The Commonwealth requested that our Court act to: (1) dismiss the declaratory judgment action; (2) prohibit the circuit court from

⁹ The type of writ sought was not specified by the Commonwealth.

entering any orders; and (3) supersede and dissolve the temporary injunction. *Id.* at 101.

We made two specific rulings in our opinion on these matters: (1) We declined to “exercise our discretion to issue a writ here, even assuming that the Petitioners have made the required showings to make a writ available” because “we do not believe it would be in the public interest to grant the relief requested by the Petitioners in this writ proceeding[;]” and (2) we determined that the circuit court did not abuse its discretion in issuing the temporary injunction. *Id.* at 103-05. In determining that the circuit court had not abused its discretion, it was appropriate for us to “give considerable deference to the circuit court’s evaluation of the dispute, the issues involved, the weighing of the equities, and whether an injunction is proper under the particular circumstances at hand.” *Boone Creek Props., LLC v. Lexington-Fayette Urb. Cnty. Bd. of Adjustment*, 442 S.W.3d 36, 38 (Ky. 2014).

We made no specific ruling upon the propriety of the circuit court’s decision to apply the temporary injunction broadly to all death row inmates when we summarized our understanding of the reach of the temporary injunction as follows: “We also recognize that the temporary injunction essentially forbids the Commonwealth from performing any more executions until the Franklin Circuit Court enters final judgment in the declaratory judgment action.” *Commonwealth ex rel. Conway*, 336 S.W.3d at 104. *See id.* at 101 n.10. Additionally, our Court did not rule upon the propriety of the circuit court’s underlying findings as to why an injunction was appropriate, stating

“[w]e express no opinion on the merits of the Franklin Circuit Court’s holdings on these issues.” *Id.* at 100 n.8.

Since our ruling in *Commonwealth ex rel. Conway*, the death penalty protocols have changed substantially with repeated amendments to the pertinent KAR provisions. The amendments provide procedures for evaluating condemned inmates for insanity and intellectual disability prior to any execution and clarify the lethal injection protocols.

501 KAR 16:310, which was last amended effective April 7, 2026, provides specific protocols relating to insanity and intellectual disability in Sections 3 and 4. Prior to an execution, an inmate is assessed for signs of insanity, and a report goes to the warden. 501 KAR 16:310 § 1(1)(d). Any information the warden receives from medical or mental health staff that the condemned person may be insane triggers a process in which a medical professional reviews the information and determines whether an additional psychiatric evaluation needs to be performed, and a finding of insanity suspends the execution. 501 KAR 16:310 § 3.

As to intellectual disability, a licensed psychologist reviews all the pertinent records for the condemned person that are in the possession of the department or provided by the condemned person and interested parties to assess documentation of an intellectual disability and an IQ test of seventy-five or lower; if such documentation meets such criteria, this results in the suspension of the execution. 501 KAR 16:310 § 4.

501 KAR 16:001 through 501 KAR 16:340 address capital punishment, with the last amendments to 501 KAR 16:330, which provides the lethal injection protocols, going into effect on June 27, 2025. 501 KAR 16:330 § 3(1) provides for use of a single drug.¹⁰

These changes appear to address all the concerns which prompted the circuit court to grant Wilson’s request for a temporary injunction. However, the inmates have been permitted to amend their petition for declaratory relief multiple times to address new concerns as prompted by the amended administrative regulations.

For the past two years, the Commonwealth has sought to receive a ruling on dissolving the temporary injunction. In March 2024, the Commonwealth filed a motion to dissolve the injunction. The Commonwealth argued that the only remaining ground in 2019 for maintaining the injunction was that a Department of Corrections’ regulation failed to provide an automatic stay of the death penalty when there were reasonable grounds to believe the condemned inmate is intellectually disabled, a matter which was remedied with a new regulation in 2024.

However, rather than rule on this motion, in April 2024, the circuit court reserved ruling on that motion, noting:

¹⁰ At the time *Baze* brought his Eighth Amendment challenge to Kentucky’s lethal injection protocol, Kentucky employed a three-drug cocktail; *Baze* argued administration of a single drug, “sodium thiopental,” would be preferable. *Baze*, 553 U.S. at 51. The current protocol fulfills his previously expressed desire as it permits the use of “pentobarbital” or “thiopental sodium.” 501 KAR 16:330 § 3(1).

The amended regulations may or may not satisfy Constitutional requirements; that issue has yet to be adjudicated. However, because the death warrant against Plaintiff Wilson no longer exists, and the regulations have been amended, the Court can see no reason to address the issue of injunctive relief at this time.

In response, the Commonwealth filed an action requesting interlocutory relief from the Court of Appeals pursuant to Rules of Appellate Procedure (RAP) 20(B), which was transferred to our Court. We ruled in *Department of Corrections v. Baze*, 701 S.W.3d 549, 552 (Ky. 2024), that the circuit court's order reserving ruling essentially maintained the "status quo" and that RAP 20(B) did not provide us with a basis for reviewing "what is otherwise an unappealable interlocutory order of the circuit court." We further noted:

The Commonwealth could have, but did not, apparently take any subsequent action regarding the circuit court's non-ruling, such as requesting another hearing on the matter or requesting a definitive ruling resolving whether the injunction should continue or be dissolved in which the circuit court would set forth specific findings of fact and conclusions of law. *See generally* CR 52.01. The Commonwealth also failed to file a petition for a writ of mandamus pursuant to Supreme Court Rules (SCR) 1.030(3) to seek to compel the circuit court to make such a ruling. We express no opinion as to whether, if it had, the Commonwealth would be able to establish that it has no other adequate remedy and that it will suffer great and irreparable injury if the writ is not granted. *See Mischler v. Thompson*, 436 S.W.3d 498, 502-03 (Ky. 2014); *Foster v. Overstreet*, 905 S.W.2d 504, 505 (Ky. 1995).

Baze, 701 S.W.3d at 552.

In December 2024, the Commonwealth requested that the circuit court rule on its motion to dissolve the injunction. In February 2025, the circuit court issued an opinion and order in which found:

There are still substantial questions about how those regulations deal with condemned inmates with intellectual disabilities, and

how they apply in cases with post-conviction challenges still pending. The Commonwealth and Plaintiffs have submitted lists of inmates without intellectual disabilities or any post-conviction challenges still pending. However, there are additional claims that have been asserted in this case, including, among others, the constitutional right to counsel, which have not been fully adjudicated.

The circuit court also made extensive conclusions of law, which I quote in full:

1. The Supreme Court of Kentucky has stated that this Court's 2010 injunction "essentially forbids the Commonwealth from performing any more executions until the Franklin Circuit Court enters a final judgment in the declaratory judgment action." *Department of Corrections v. Baze*, 701 S.W.3d 549, 550 (Ky. 2024) (quoting *Commonwealth ex rel. Conway v. Shepherd*, 336 S.W.3d 98 (Ky 2011)).

2. It is unclear the extent to which the 2010 injunction may continue to have effect but even if it does continue to have effect, the last paragraph of the 2010 injunction states that the DOC and its employees and agents 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." The injunction therefore provides for its modification after notice and a hearing, for good cause shown, if there is any specific action that the Commonwealth seeks to take that would potentially run afoul of the injunction. Accordingly, if the Governor or DOC seek to proceed to implement the new regulations by issuing a death warrant, they are authorized under the prior injunction [to] file a motion to modify the injunction if necessary, or to authorize additional actions they deem necessary to implement the death penalty in any given case. Only upon the filing of such a motion, and a hearing thereon, can the Court determine if such action gives rise to irreparable injury, if it presents a substantial legal issue, determine the public interest and balance the equities, as required in ruling on injunctive relief under *Maupin v. Stansbury*, 575 S.W.2d 695 (Ky. App. 1978). The Court cannot decide such issues in the abstract, as the Attorney General urges here. In effect, the Attorney General seeks an advisory opinion as to whether undefined or speculative actions in the future would run afoul of the 2010 injunction.

3. However, at the present time, there is no action that the Commonwealth has taken to implement the new regulations and accordingly, any controversy regarding implementation of the new regulations is not ripe for consideration.

4. If the Commonwealth thinks there is a particular action that needs to be taken in implementation of the death penalty regarding any plaintiff in this case, it should file a motion and bring it before this Court. Each condemned inmate has a unique set of facts and circumstances relevant to the potential legal consequences of the implementation of the death penalty regulations against that inmate. It is impossible to predict the facts could form the basis for a modification to the original injunction in any individual case. Without a specific case with specific facts to consider, the Court cannot evaluate the factual and legal issues involved [in] a motion to dissolve or modify the 2010 injunction. Likewise, there may be actions proposed by the Commonwealth that are outside the scope of the original injunction. Therefore, the Commonwealth may seek modification or dissolution of the injunction with regard to any specific situation in which it believes further action to implement the death penalty is immediately warranted, but such issues cannot be decided in the abstract.

5. When the 2010 injunction was issued in this case, it was issued in regard to a specific factual situation pertaining to Plaintiff Gregory Wilson. The pardon of Gregory Wilson has eliminated any application of the injunction to that specific case. No plaintiff currently has a signed death warrant in place, as Gregory Wilson did, and the merits of the administrative regulations in their present form have not yet been litigated. As such, the Court declines to render an advisory opinion concerning whether or under what circumstances the prior September 2010 temporary injunction has any continuing applicability to matters currently before the Court. *See Newkirk v. Commonwealth*, 505 S.W.3d 770, 774–75 (Ky. 2016) (declining to rule on issues deemed moot due to lack of authority to render purely advisory opinions).

6. *Sturgeon Min. Co. v. Whymore Coal Co.*, 892 S.W.2d 591, 592 (Ky. 1995) outlines a three-part test for injunctive relief requiring a showing of irreparable injury, weighing the equities involved, and a finding by the issuing trial court that a substantial question is at issue. Here, the absence of a specific case or controversy presenting a concrete factual or legal dispute weighs in favor of denying the Attorney General's motion to issue a blanket ruling dissolving the injunction.

7. The motion to dissolve the injunction is **MOOT** with regard to inmate Gregory Wilson (the only named party to whom it originally applied), and it is **NOT RIPE** with regard to any other named Plaintiffs in this action.

8. The Court finds that the remaining legal issues to be adjudicated in this action include substantial legal questions regarding, among other issues: a) the procedure for determining if a death sentenced inmate has an intellectual disability that renders him constitutionally ineligible for execution, and b) the scope of a death sentenced inmate to access to counsel during the time preceding an execution. Accordingly, the public interest supports maintaining the status quo until those issues, and the validity of the most recent administrative regulations, have been resolved by the Supreme Court of Kentucky.

The circuit court concluded its opinion and order as follows:

The Commonwealth's Motion to Dissolve the Injunction is not ripe for adjudication. The Commonwealth has not shown that the 2010 injunction is preventing it from taking any specific action to implement the death penalty. If and when the Commonwealth shows it is actively seeking to take specific steps to implement the death penalty with regard to any specific death sentenced inmate, the Commonwealth should present that matter to the Court, and the Court will address whether the injunction wrongfully prevents the Commonwealth from taking those specific actions, or whether the injunction even applies to the Commonwealth's actions. This Court will carefully consider any motion to modify the injunction regarding any such specific situation, applying the standard that controls injunctive relief. Likewise, the Court will consider any argument that a specific action to implement a death sentence is outside the scope of the original injunction. But the Court will not issue an advisory opinion or decide an abstract dispute regarding the potential application of the injunction to an undefined situation. The Court will consider any such dispute on its own merits in terms of injunctive relief when such dispute is ripe for decision. Accordingly, the Attorney General's motion . . . to dissolve the 2010 injunction is **DENIED** without prejudice, for lack of ripeness, and for failure to present any concrete case or controversy with regard to the continued application of the injunctive relief ordered in 2010 barring the execution inmate Gregory Wilson, who has since had his death sentence commuted.

On November 6, 2025, the Commonwealth took up the circuit court’s invitation to present to the court that “it is actively seeking to take specific steps to implement the death penalty with regard to any specific death sentenced inmate” so that the court would “address whether the injunction wrongfully prevents the Commonwealth from taking those specific actions, or whether the injunction even applies to the Commonwealth’s actions[,] . . . carefully consider any motion to modify the injunction regarding any such specific situation, . . . [and] consider any argument that a specific action to implement a death sentence is outside the scope of the original injunction.”

The Commonwealth filed a motion to clarify the scope of the circuit court’s 2010 temporary injunction as it applied to Baze. The Commonwealth explained the “Catch-22” it was facing in that Governor Andy Beshear refused to sign a death warrant for Baze (despite Attorney General Coleman determining that there was no legal impediment to him doing so) “because he believes the Court’s 2010 temporary injunction reaches into 2025 to prohibit signing a death warrant for Baze.” The Commonwealth argued there was a ripe dispute as to whether the governor could take action as to Baze, and it was seeking an order that the temporary injunction would not preclude the governor from signing a death warrant for Baze.

The Commonwealth explained that the circuit court’s concerns regarding the protocols as they related to inmates with potential intellectual disabilities and whether it was appropriate to proceed when inmates still had additional post-conviction options to pursue did not apply to Baze, as he has never

argued that he had any intellectual disabilities and has exhausted all avenues for state and federal relief. The Commonwealth additionally noted that it has confirmed through discovery that Baze does not have an intellectual-disability claim, with counsel confirming that he has no documents to establish an intellectual disability and does not currently claim to be intellectually disabled.

The Commonwealth denied that *Commonwealth ex. rel. Conway*, which affirmed the temporary injunction, prevents Baze’s execution given the subsequent changes in the Department of Corrections’ regulations. The Commonwealth disagreed that our recent statement in *Baze*—reciting that the previous case “essentially forbid the Commonwealth from performing any more executions” before a final judgment in this action—could accurately be read as stating that “the injunction *currently* forbids the Commonwealth from performing executions” and opined that this “statement was accurate as to the injunction’s effect in 2011” before the regulations were replaced and any commentary in *Baze* regarding the history of this case could not be dispositive where our Court ruled it lacked jurisdiction over the appeal.

The Commonwealth advised the circuit court that it had heeded its advice as to how to ripen this dispute and needed a ruling, as there was nothing more at this junction that it could do without a ruling on the effect of the temporary injunction. The governor’s concerns about protocol relating to persons with possible intellectual disabilities did not apply to Baze, and the governor’s observation that the Department of Corrections does not currently have the needed drugs on hand for executions, could not provide a reasonable

basis for refusing to sign a death warrant. The Commonwealth further noted that if the circuit court ruled that the temporary injunction did not apply to Baze, that Baze could seek his own injunction if appropriate.

In December 2025, the circuit court issued an order that denied the Commonwealth's motion to clarify. The circuit court emphasized that "the Kentucky Supreme Court interpreted the injunction as barring any executions under the final disposition of the case[,] and it declined to dissolve the injunction while allowing the Commonwealth to seek modification if certain conditions were satisfied. The circuit court ruled that it "fails to see any material change in circumstances since the entry of its April 21, 2025 Order, which provided all the clarification the Court can give absent the Governor's decision to issue an execution warrant." The circuit court further opined that "the motion before the [circuit court] does not present a justiciable controversy that [it] has jurisdiction to adjudicate, because it would violate the separation of powers, and it would constitute an advisory opinion" as it was inappropriate for it "to weigh in on a dispute between the Governor and the Attorney General on the issuance of a death warrant." The circuit court ultimately determined that the matter was still not ripe for adjudication.

It was that decision which resulted in the Commonwealth's petition for a writ of mandamus, in which the Commonwealth requested that we issue a second-class writ ordering the circuit court to clarify that the temporary injunction does not bar the governor from issuing a death warrant for Baze.

II. AVAILABILITY OF ENTITLEMENT TO A SECOND-CLASS WRIT

In considering whether a writ of mandamus is warranted to require the circuit court to make a ruling on the Commonwealth's motion, we are governed by the familiar standard that must be established for entitlement to a second-class writ.

Entitlement to a writ is satisfied if the petitioner establishes that "the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted." *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004).

However, as acknowledged in *Hoskins*, there is an alternative standard which substitutes for establishing "great injustice and irreparable injury" as set out in *Bender v. Eaton*, 343 S.W.2d 799 (Ky. 1961):

[I]n certain special cases this Court will entertain a petition . . . provided a substantial miscarriage of justice will result if the lower court is proceeding erroneously, *and* correction of the error is necessary and appropriate in the interest of orderly judicial administration. It may be observed that in such a situation the court is recognizing that if it fails to act the administration of justice generally will suffer the great and irreparable injury.

Hoskins, 150 S.W.3d at 20 (quoting *Bender*, 343 S.W.2d at 801). I proceed to consider this petition for a writ of mandamus under the requirement of this alternative standard and would grant the Commonwealth relief.

A. The Circuit Court is Acting Erroneously in Refusing to Review and Decide Whether the Temporary Injunction has Continued Effect and the Commonwealth has No Adequate Remedy by Appeal or Otherwise.

“Whether the right of appeal is an adequate remedy is an issue necessarily determined on a case-by-case basis.” *Id.* at 19. In this case, the equities favor determining that the right to appeal after this case has a merits determination is entirely inadequate and will never resolve the underlying issue as to whether the temporary injunction should have been continued in the lengthy interim.

The temporary injunction order has lasted much longer than anyone could have anticipated in 2011, when we denied the Commonwealth’s request for a writ dissolving it. In large part, that is because “goal post” of a final judgment has been repeatedly moved back time and time again until its completion appears, some twenty years after the declaratory action was filed and some fourteen years after we declined to grant the Commonwealth a writ, to be a mirage at the horizon, always in sight but never reached. We could certainly not anticipate that various new regulations would be adopted, various amendments to challenge those new regulations would be permitted in this suit, and the issues under consideration would vastly change, all the while with the same temporary injunction in place.

Whether the scope of the injunction extending to all inmates was appropriate when the temporary injunction was put into place was an issue which was not before us in *Commonwealth ex rel. Conway* as the Commonwealth sought to dissolve the temporary injunction, rather than limit

its reach. Therefore, it is a mistake for anyone to interpret our summary of the scope of the temporary injunction as an endorsement of its reach.

Our recitation of this language from *Commonwealth ex rel. Conway* in the subsequent case of *Baze*, 701 S.W.3d at 550, similarly did not reflect any kind of ruling on whether the scope of this temporary injunction was appropriate, either in 2011 or in 2024, or whether the temporary injunction needed to remain in effect as conditions changed.

There can be no adequate remedy by appeal or otherwise where, on the current posture of the case, the Commonwealth can never receive any review as to whether the temporary injunction is still appropriate after all these years and changed circumstances when the circuit court refuses to make a ruling which can then be brought before us pursuant to RAP 20(B). The Commonwealth has engaged in every option it has at its disposal to try to get the circuit court to issue a final ruling. Having failed to receive such a ruling, it properly comes before us for a remedy through mandamus. This is its only option for appropriate redress.

This litigation has been extremely prolonged, and despite the majority opinion's optimism, there is no real end to this litigation in sight. The fact that there is a pending discovery deadline next year, in 2027, does not guarantee that this deadline will not be extended, that additional amendments will not be allowed, and that the matter will ultimately be resolved and reviewable on appeal before these death penalty inmates all pass away from natural causes while incarcerated, as has occurred with some of the original named plaintiffs.

I vehemently disagree with the majority's conclusion that the Commonwealth has failed to demonstrate that it lacks an adequate remedy by appeal. I ask, how will the Commonwealth ever be able to receive review of this ongoing temporary injunction when the circuit court refuses to issue a final and appealable order? We have previously ruled that we cannot review such interlocutory "non" orders in *Baze*.

How then is the matter ever to be reviewed by us? It is not sufficient that at some point this litigation will end with a ruling on the merits. Once the case has finally been resolved, whether that is one or two years from now or another two decades from now, the ongoing application of this preliminary injunction will be at an end as, ostensibly, the circuit court will either dissolve it or issue a permanent injunction. Either way, review will never be had of this temporary injunction as it applies to drastically different operative facts than when it was first issued.

What actions may be taken regarding *Baze* all hinge upon the ongoing application of the temporary injunction to him. Yet, we will never be able to review the ongoing application of this temporary injunction in light of the substantial regulatory changes that have occurred since 2011, unless the circuit court finally deigns to issue a ruling on the merits on this issue.

B. The Commonwealth has Established that the Circuit Court's Refusal to Rule Constitutes a Substantial Miscarriage of Justice and Correction of the Error is Necessary and Appropriate in the Interest of Orderly Judicial Administration.

All parties and the circuit court acknowledge that the reasons justifying the original grant of the temporary injunction no longer exist. That is because

all the underlying regulations being challenged have changed in the interim. Without a final order by the circuit court dispositively resolving the continued application of the temporary injunction, the Commonwealth is deprived of any opportunity to receive review by our Court. Therefore, I conclude that allowing the temporary injunction to last indefinitely under such circumstances results in a substantial miscarriage of justice. Furthermore, correction of such error is both necessary and appropriate in the interest of orderly judicial administration of our laws as applied to death row inmates.

Kentucky law provides that death is an eligible penalty for the most heinous of capital offenses. Such a penalty is authorized pursuant to KRS 532.030 after the jury has weighed aggravating and mitigating factors pursuant to KRS 532.035 and has concluded it is the appropriate penalty in a given capital case. The United States Supreme Court has repeatedly concluded that the death penalty generally, and Kentucky's death penalty specifically, do not violate the United States Constitution. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976); *Baze*, 553 U.S. at 63. Our Court has similarly concluded that our death penalty is not unconstitutional. *Meece v. Commonwealth*, 348 S.W.3d 627, 727-28 (Ky. 2011). Therefore, until such precedent is overturned, or our statutes are amended by the General Assembly to retroactively eliminate such a penalty,¹¹ this authorized imposed penalty should be carried out against our

¹¹ See Russell D. Covey, *Death in Prison: The Right Death Penalty Compromise*, 28 Ga. St. U.L. Rev. 1085 (2012) (proposing that the death penalty be replaced with a "death in prison" sentence, for multiple reasons including the substantial delay in most death penalty cases in carrying out executions).

death row inmates (subject of course to whether they have exhausted all authorized avenues for judicial relief, as Baze has). Baze should be deemed eligible to be executed unless there are current reasons why the temporary injunction continues to be authorized and appropriate specifically to him.

Suspending application of the death penalty in Kentucky is a serious matter which causes a not insignificant hardship to victims' families. The circuit court acknowledged this in its 2010 order granting the motion for temporary injunction when it noted the hardship to the family of Wilson's victim. However, the circuit court justified such a delay based on "serious questions about whether all statutory and constitutional requirements have been met in the challenged administrative regulations at issue here." The situation involving Wilson, who had a signed death warrant and provided evidence that he had an intellectual disability and yet had never been assessed to determine if he was death-eligible, was indeed serious. He had identified that there was a gap in the structure set up for determining whether a given death row inmate was death penalty eligible, which made certain individuals vulnerable to being wrongfully executed.¹²

The landscape of Kentucky's pertinent statutes and regulations has changed extensively since 2010. The "serious concerns" identified by the circuit

¹² KRS 532.135 provided a mechanism for determining prior to trial if the defendant had a serious intellectual disability or a serious mental illness, and KRS 532.140 provided that such defendants could not be executed. However, if a defendant was tried prior to the effective date of KRS 532.135, there were no safeguards in place to determine whether that individual was death-penalty eligible, or if previously deemed eligible, continued to be eligible.

court in 2010, which could be applicable to other remaining death row inmates, have been fully addressed through the implementation of amended and new regulations. 501 KAR 16:310 § 1, 3-4 provides a mechanism to evaluate the death row inmates for insanity and intellectual disability prior to any execution, and 501 KAR 16:330 § 3(1) provides protocols for execution via one drug, which is consistent with KRS 431.220(1)(a), which permits execution via “a substance or combination of substances sufficient to cause death.”

When, after the issuance of a temporary injunction, “the entire legal and factual landscape has changed[,]” with no disputed regulations left to be enforced, any existing temporary injunction can become moot. *See, e.g., Beshear v. Goodwood Brewing Co., LLC*, 635 S.W.3d 788, 798 (Ky. 2021). It is only apt that when issues underlying a temporary injunction become moot, but there are new, currently disputed regulations at issue, that upon request the circuit court should reevaluate the appropriateness of maintaining such injunction.

A circuit court refusing to undertake such a reevaluation under such circumstances involves “important issues concerning the inherent authority of the trial courts of this Commonwealth,” which is a proper reason to “reach the merits of the [Commonwealth’s] petition under the exception to the normal requirements for entertaining a writ for extraordinary relief[.]” *Roman Cath. Diocese of Lexington v. Noble*, 92 S.W.3d 724, 729-30 (Ky. 2002).

Whether executions may be carried out in the Commonwealth is a matter of great importance and is separate from the issue as to whether the Governor

will choose to sign death warrants for any current death row inmates.

Suspension of the death penalty over the course of many years without the ongoing justifications that prompted the initial entry of the temporary injunction order disrupts the orderly judicial administration of our duly enacted laws. By failing to act, the circuit court essentially eliminates the death penalty from applying to any death row inmates who die of natural causes in the interim and prevents our review.

C. Granting Mandamus and Requiring that the Circuit Court Issue a Ruling on the Merit is Appropriate to Remedy this Matter.

Mandamus is an appropriate mechanism to require that the circuit court undertake to make a ruling on the merits as to the continuing application of the temporary injunction. Absent a granting of the Commonwealth's petition for a writ of mandamus, it is left to linger in an uncertain state, with the issue unresolved as to whether the temporary injunction has continuing application or not, which is itself a substantial miscarriage of justice.

Pursuant to CR 65.04(1):

A temporary injunction may be granted during the pendency of an action on motion if it is clearly shown by verified complaint, affidavit, or other evidence that the movant's rights are being or will be violated by an adverse party and 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.

Assuming these grounds were established when the circuit court granted the temporary injunction, it is unclear they remain satisfied after pertinent regulatory changes were made.

At all times, the circuit court has had the power to modify or dissolve this temporary injunction. CR 65.04(2), (4). Granting mandamus is necessary to clarify matters for the circuit court so that it understands it has the responsibility to definitively rule upon the Commonwealth's motions to dissolve the temporary injunction. As noted in the prior action before us, while we can grant relief from a temporary injunction that has been "granted, denied, modified, or dissolved" pursuant to RAP 20(B), there are strict time limits as to when such an action can be taken, and non-final orders which do none of these things do not provide us with jurisdiction to proceed. Thus, a definitive ruling will make further review available.

In ruling that mandamus ought to be granted and the circuit court ordered to make a ruling on the merits as to the continued application of the temporary injunction, I reject the Commonwealth's argument that the circuit court ought to be ordered to rule that the temporary injunction does not apply to Baze. "While mandamus will lie to set a court in motion, it cannot be used to control the result." *Fannin v. Keck*, 296 S.W.2d 226, 226 (Ky. 1956). While a higher court can compel a lower court to act, the higher court cannot control the lower court's discretionary judgment; a writ of mandamus cannot be used as a mechanism to correct a lower court's error in judgment. *Kaufman v. Humphrey*, 329 S.W.2d 575, 576 (Ky. 1959); *N. Ky. Mut. Tel. Co. v. Bracken Cnty.*, 220 Ky. 297, 295 S.W. 146, 148 (1927); *J.B.B. Coal Co. v. Halbert*, 169 Ky. 687, 184 S.W. 1116, 1120 (1916).

Although the circuit court balanced the equities in 2010 to determine that a temporary injunction was appropriate then, there has been no ruling as to whether the temporary injunction is appropriate now. The circuit court should determine whether the new regulations serve to violate Baze's rights and whether he "will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action[.]" CR 65.04(1). The circuit court must also reevaluate whether "the various equities involved favor issuance of the relief requested and that a substantial question exists on the merits." *Beshear v. Acree*, 615 S.W.3d 780, 829 (Ky. 2020). These equities include the "possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo." *Id.* (quoting *Maupin v. Stansbury*, 575 S.W.2d 695, 697 (Ky. App. 1978)). "To satisfy the 'substantial question' prong of the temporary injunction analysis, the trial court must determine there is a 'substantial possibility' that the plaintiff 'will ultimately prevail on the merits.'" *Id.* at 830 (quoting *Norsworthy v. Ky. Bd. of Med. Licensure*, 330 S.W.3d 58, 63 (Ky. 2009)) (removing emphasis).

In determining whether the temporary injunction should remain, be modified, or be dissolved, the circuit court needs to make appropriate findings of fact and conclusions of law to justify its decision. CR 65.04(5).

The circuit court's continued refusal to resolve this issue, as demonstrated in its numerous orders, makes it appear that perhaps there are no longer adequate grounds to support the temporary injunction under the standards provided above. For example, in the circuit court's April 2024 ruling,

it did not resolve whether the death row inmates had a probability of success regarding their current challenges to the new administrative regulations, stating “[t]he amended regulation may or may not satisfy Constitutional requirements[.]” Similarly, in its February 2025 opinion and order, it stated that there were additional claims asserted in this case, but made no ruling as to the death row inmates’ likelihood of success on such claims and refused to resolve whether the temporary injunction continued to have any effect, only stating these were substantial legal issues to be determined. Again, its December 2025 order refused to rule on the issue, concluding that the issue was not ripe, and accordingly not making any determination as to whether the death row inmates had any probability of success on the current claims. The circuit court confuses the issue by providing reasons that it refuses to rule on the Commonwealth’s motion that have nothing to do with whether the temporary injunction should continue to apply to Baze despite the changes in the administrative regulations.

The majority has accepted the circuit court’s arguments as to why it cannot rule upon the matter. I wholly disagree with such an interpretation that, by requiring the circuit court to make a final decision, it would be acting in violation of the separation of powers or rendering an advisory opinion. To the extent that the Commonwealth is requesting that we direct the circuit court to clarify what the Governor may do, we need not grant mandamus with such specificity and may instead direct the circuit court to simply resolve the scope and application of the present temporary injunction as to Baze. It remains

uniquely the province of the circuit court to determine this issue. What the Governor may choose to do after such a ruling, should the temporary injunction be dissolved as to Baze, is an issue which is beyond the scope of our resolution of this matter.

III. CONCLUSION

No matter what one's personal opinion of the death penalty, the delay in resolution of this matter is inappropriate and intolerable. A ruling as to the continued application of the temporary injunction ought to be made forthwith, by requiring the Franklin Circuit Court to make a definitive ruling as to the ongoing application of the temporary injunction to Baze.

So long as the circuit does not act, the continued application of the temporary injunction remains unreviewable in a manner that is anathema to our system of justice. I express no opinion of what the Franklin Circuit Court's ruling should be; I only opine that such a ruling must be made. I conclude that whatever form its ruling takes, this will ultimately allow the losing party an opportunity to seek review before our Court, something that has been lacking since 2011.

Accordingly, I dissent.

COUNSEL FOR PETITIONER:

Russell M. Coleman
Kentucky Attorney General

John H. Heyburn
Principal Deputy Solicitor General

Jacob M. Abrahamson
Deputy Solicitor General

Christopher Henry
Director of Capital Litigation and Assistant Solicitor General

RESPONDENT:

Honorable Phillip J. Shepherd, Judge, Franklin Circuit Court
Pro Se

COUNSEL FOR REAL PARTY IN INTEREST/APPELLEE, KENTUCKY
DEPARTMENT OF CORRECTIONS:

Angela T. Dunham
Crystal Thompson
Daenayia Harris
Justice and Public Safety Cabinet, Office of Legal Services

COUNSEL FOR REAL PARTIES IN INTEREST/APPELLEES, RALPH BAZE;
RONNIE BOWLING; VIRGINIA CAUDILL; ROBERT FOLEY; BENNY HODGE;
DONALD JOHNSON; DAVID MATTHEWS; BRIAN KEITH MOORE; DAVID
SANDERS; VICTOR TAYLOR; WILLIAM THOMPSON; ROGER WHEELER; KARU
GENE WHITE; AND MITCHELL WILLOUGHBY:

David M. Barron
Assistant Public Advocate

Dennis J. Burke
Assistant Public Advocate