

STATEMENT OF CONSIDERATION RELATING TO:  
 501 KAR 16:001, 16:290, 16:300, 16:310, 16:320, 16:330 and 16:340  
 AMENDED AFTER COMMENTS  
 Justice and Public Safety Cabinet  
 Department of Corrections

**I.** A public hearing on 501 KAR 16:001, 16:290, 16:300, 16:310, 16:320, 16:330, and 16:340 was held on January 29, 2010, at 9:00 a.m. in the Kentucky Transportation Building's Auditorium, 200 Mero Street, Frankfort, Kentucky, 40601. Written comments were also received during the public comment period.

**II.** The following people presented oral comments at the public hearing:

<u>Name and Title</u>	<u>Agency/Organization/Entity, Other</u>
Robert J. Castangna	Catholic Conference of Kentucky
Terrence Taylor	Interfaith Paths to Peace
Will Warner	Lexington Nichiren Buddhist Community
Ian Richetti	University of Louisville Brandies School of Law
Donald Vish	Kentucky Coalition to Abolish the Death Penalty
Carolyn Wehrle	Light of Christ Ministries
Pat Delahanty	Kentucky Coalition to Abolish the Death Penalty
Charles Wilton	Quaker Community on Kentucky Legislation
Kate Miller	American Civil Liberties Union of Kentucky
Michael Aldridge	American Civil Liberties Union of Kentucky
Shea Sheppard	American Civil Liberties Union of Kentucky
Carl Wedekind	
Tim Arnold	Department of Public Advocacy
Greg Coulson	
Jon Fleischaker	Kentucky Press Association, Associated Press, The Courier-Journal and The Lexington Herald Leader
Sister Alice Gerdeman	Sisters of Divine Providence
Sister Dorothy Schuette	Religious Communities Against the Death Penalty
Marian McClure Taylor	Kentucky Council of Churches
David Barron	Department of Public Advocacy

The following people submitted written comments:

<u>Name and Title</u>	<u>Agency/Organization/Entity, Other</u>
Donna Stopher	
Stephanie Faucher	Death Penalty Focus
David Barron	Department of Public Advocacy
Deborah Mauldin	
Mark Thornewill	
Donald Vish	

John Lydon  
Bruce Pearson  
Sister Mary Ann Broering  
Sister Regina Marie Baker  
Sister Lynn Stenken  
Margaret Phillips  
Mark Meade  
Rev. Dr. Robert Slocum      National Alliance on Mental Illness (NAMI KY)  
Randall Wheeler      Attorney  
Sean McDonald  
Judy Burris  
Abraham Bonowitz  
Marlene Lang  
Johanna Ryan  
Ashlee Shelton  
Eric Mount  
Chris Hitz- Bradley  
Carol Tures  
Kristin Parks  
Clarence Pugh  
Kathy Pugh  
Julie Pearson  
Barbara Arnwine  
Lynn Greer  
Lisa Cismior  
James Clark  
Rev. Stacy Rector  
Miriam Thimm Kelle  
Dr. & Mrs. J. Oleskevich  
Heather Hass  
Marian Durkin  
Gail Chasey  
Beth Wood  
James Graham  
Colleen Cunningham  
Jack Payden Travers  
Leslie Lytle  
Sarah Taylor  
Catherine Holtkamp  
Douglas Griggs  
Kathleen Lucas  
John Joerling  
Ernest Coverson  
Irene Peters  
Phyllis Jenness  
Ruslyn Case-Compton

Kathleen Ostrom  
 Sister Emmanuel Pieper  
 Maj. Gen. Thomas Lynch  
 Rev. Richard Sullivan  
 Myrtle Bingham  
 Naomi Bayne  
 Sue Pueshoff  
 Don Pratt  
 Charles Bussey  
 N. Fisher M. D.  
 Alice Wash  
 Kathleen Hils  
 Aja DeGroff  
 Minister Georgia R. Slaughter  
 Kaye Gallagher  
 Kevin Asay  
 Claudia Whitman  
 David Lamarque Vincent  
 Angelica Hoyos  
 Katie McKeown  
 Jennifer Kirby  
 Sue Johnson  
 Margaret Summers  
 Lauren Brown  
 Jojo Farr  
 Frank O'Donnell  
 Debbie Bibler  
 Brian Evans  
 Ann Johnson  
 Janet Bucher  
 Theresa Lyons  
 Kenneth Kurtz  
 Mary Jane Murphy  
 Tom Lyons  
 Loretta Baisden  
 Rose Jean Powers, OSU  
 Jodie Leidecker  
 Leif Halvorsen  
 Sister Mary Celine Weidenbenner  
 Donna Stopher  
 Kathy Adrian  
 Joetta Venneman  
 Sara Haines  
 Sister Alice Geideman  
 Sylvia Troescher  
 Linda Bullock

On behalf of Robert Bethel

Kentucky Coalition to Abolish the Death Penalty

Brescia University

Death Row Inmate

Deirdre O'Reilly	
Katherine Aronson	
Rosalyn Park	
David Harshaw III	The Advocates for Human Rights
	Department of Public Advocacy – On behalf of Virginia Caudill
Dennis Burkert	Department of Public Advocacy – On behalf of Virginia Caudill
Timothy Arnold	Department of Public Advocacy
Zach Everson	Kentucky Coalition to Abolish the Death Penalty
Dan Dalley	
Clay Kennedy	
Raphael Schweri	
Robert M. Hensley	
Susan Jackson Balliet	
Agnes Terry	
Timothy Shull	
Jessie Kemplin	
Margaret Stallmeyer	
Viki Elkey	
Jon Fleischaker	Kentucky Broadcasters Association and Kentucky AP Broadcasters
Margaret Mattice	
Laura Zacone	Brooklyn Law School
Jason Paget	Brooklyn Law School
Michael Kennett	Brooklyn Law School
Kathrine Southand	Brooklyn Law School
Sarah White	Brooklyn Law School
Anton Ditcher	Brooklyn Law School
Joseph Hamel	Brooklyn Law School
Ursula Bentele	Brooklyn Law School
Mark J. S. Heath, M.D.	Columbia University Medical Center
Father John S. Rausch	
Steven J. Olszewsky	Kentucky Bar Association
Hon. Erin Hoffman Yang	Department of Public Advocacy
Jennifer Moreno	Berkeley School of Law
Megan McCracken	Berkeley School of Law
Carol Weiher	Anesthesia Awareness Campaign
Joseph Miller, Ph.D.	Keck School of Medicine
Margaret L. Campbell	
John William Simon, Ph.D.	Constitutional Advocacy, LLC
Joan K. Miller	Attorney at Law
William Wells	
Deborah Mauldin	
Dr. Stan Gassaway	
Brooke Buchanan	
Antonya Gritton	

Gail Koehler	
Paula Skillicorn	
Ilker Onen	Department of Public Advocacy
Elizabeth Carlyle	Attorney at Law
Margaret Ivie	Attorney at Law
Kelly Schneider	Office of the Ohio Public Defender
Kimberly S. Rigsby	Office of the Ohio Public Defender
Ralph Ehrlich	
Jamala Rogers	Organization for Black Struggle
Laura Resteghini	
Deborah Denno	Fordham University School of Law
Jamesa Drake	Department of Public Advocacy
Amanda Bragg	University of Kentucky, Law Student
William Bill Vaughn	
Roberta Guthrie	
Marcia Wilson	

**III.** The following people from the promulgating administrative body responded to the written and oral comments:

Name and Title

Amy Barker, Assistant General Counsel  
 Steve Lynn, Assistant General Counsel

**IV.** Summary of Comments and Responses

(1) **Subject Matter:** Regulation Process

**Commenters:** Mark Thornewill; Loretta Ann Baisden; Sue Pueshoff; Claudia Whitman; Jennifer Kirby; Jojo Farr; Anonymous; Frank O’Donnell; Donald Vish; Greg Coulson; Terence Taylor; Ian Richetti; Carl Wedekind; Rev Patrick Delahanty – Kentucky Coalition to Abolish the Death Penalty; Robert Castagna – Catholic Conference of Kentucky; Chris Hitz- Bradley; Carol Tures; Myrtle Bingham; Kathleen Ostrom; John Joerling; Kathleen Lucas; Doug Griggs; Leslie Lytle; James Graham; Marian Durkin; Lisa Cismor; Barbara Arnwine; Abraham Bonowitz; Eric Mount; Zach Everson; John Lydon; Sister Regina Marie Baker; Sister Lynn Stenken; Margaret Phillips; Mark Meade; Sean McDonald; Judy Burris; Katherine Aronson; Stephanie Faucher – Death Penalty Focus; Amanda Bragg; Susan Jackson Balliet; Rapheal Schweri; Deirdre O’Reilly, M. Ed.; Sister Alice Gerdeman; Joetta Venneman; Gail Koehler; Rosalyn Park – the Advocates for Human Life; William Wells; Timothy Arnold – Department of Public Advocacy; Paula Skillicorn; Jamala Rogers – Organization for Black Struggle; Deborah Denno – Fordham University, School of Law; Deborah Mauldin; Anton Ditchev, Joseph Hamel and Sarah White – Brooklyn Law School BLS Legal Services Corp., Capital Defender and Federal Habeas Clinic; David Barron; Shea Sheppard – American Civil Liberties Union, Sister Mary Ann Broering, Roberta Guthrie; Kathleen Hils

(1)(a) **Comment:** How much is Kentucky spending on the execution process, including other agencies? The cost of an execution should be made public.

(b) **Response:** In the event that an execution is carried out, the costs for all governmental agencies involvement from the time the Execution Order is issued until disposition of the body are the following approximate figures:

- Department of Corrections, \$17,000.00
- Kentucky State Police, \$2,200
- Kentucky Department of Fish and Wildlife, \$450.00
- Office of the Kentucky State Medical Examiner, \$2,000.00
- Lyon County Sheriff's Office, \$500.00
- Kuttawa Fire Department, No fiscal impact. It is a volunteer agency and on standby only.
- Eddyville Fire Departments. No fiscal impact. It is a volunteer agency and on standby only.
- Lyon County Ambulance Service, \$640.00
- Kentucky National Guard, \$16,500.00
- Lyon County Coroner, \$190.38

The following information was submitted by the Kentucky Office of the Attorney General on behalf of its Office of Criminal Appeals and the state's 57 Commonwealth's Attorneys: The state's 57 Commonwealth's Attorneys handle the prosecution of capital cases in Kentucky and any post-conviction action in these cases that may be filed in the circuit courts. The Commonwealth's Attorneys and Assistant Commonwealth's Attorneys receive general fund dollars for the prosecution of all felony cases in their respective judicial circuits. Their pay does not increase or decrease depending upon whether they prosecute a death penalty case or a Class D felony. With respect to appellate matters, pursuant to KRS 15.020, the Office of the Attorney General represents the Commonwealth in all felony appeals in the Court of Appeals and the Kentucky Supreme Court. The Office of Criminal Appeals within the Attorney General's Office handles all felony appeals within the existing budget of the Office.

The following information was submitted by the Kentucky Department of Public Advocacy (assuming 10 days from date of warrant to execution):

<b>Costs Based on Projected Costs for an Execution</b>		
Salary for 4 Atty III	\$11,077	10 days
Salary for 2 Mit Specs	\$2,446	10 days
Salary for 2 Legal Secy	\$2,215	10 days
Salary for 1 Branch Manager	\$2,383	10 days
Salary for Division Director	\$2,302	7.5 days
Salary for Division Director LOPS	\$575	2 days
Salary for 2 IT Staff	\$1,015	4 days
Salary for 2nd Manager	\$572	2 days
	\$22,586	
Travel; mileage/hotel	\$1,340	

Conf Room & Phone	\$300
Subtotal:	\$24,226

(2)(a) **Comment:** The cost of the death penalty is too high. Maintaining the ability to provide electrocution is an unnecessary expense.

(b) **Response:** KRS 431.220(1) was enacted by the General Assembly and establishes the methods by which an inmate convicted of a capital crime shall be executed. Specifically, KRS 431.220(1)(b) establishes that electrocution shall be a method of execution that may be chosen by inmates convicted prior to March 31, 1998. KRS 13A.120(2)(i) prohibits the Department of Corrections from promulgating administrative regulations that modify a statute. Therefore, the Department of Corrections has no authority to abolish the death penalty or one of the methods of execution found in KRS 431.220(1).

(3)(a) **Comment:** Why is there a \$450 expenditure to Kentucky's Fish and Wildlife?

(b) **Response:** Two Fish and Wildlife officers are required to patrol the lake area in front of the Kentucky State Penitentiary. The \$450.00 expenditure is for their salary, meals, and travel.

(4)(a) **Comment:** Fiscal statement does not include the cost of trying a capital case. The accounting cost should include everything spent from trials, appeals, and stays through the burial and every agency involved.

(b) **Response:** The Department of Corrections is not involved in the decision of whether a defendant shall be charged and tried for a capital offense. Further, the Department of Corrections is not involved in appeals or stays of execution related to the conviction and sentence. All costs incurred by the Department of Corrections and other governmental agencies providing assistance during the execution process are addressed in the updated Regulatory Impact Analysis and Fiscal Note on State or Local Government filed with the administrative regulations that have been amended after comment.

(5)(a) **Comment:** Figuring cost of death penalty should include cost to health of state workers.

(b) **Response:** The Department of Corrections has no data regarding the cost of the death penalty relative to the health of state workers.

(6)(a) **Comment:** Why did the cabinet only take two weeks to file the administrative regulations? The condemned person's family is being victimized by the hastily prepared protocol.

(b) **Response:** The decision of the Kentucky Supreme Court in *Bowling v. Kentucky Department of Corrections*, --- S.W.3d ---, 2009 WL 4117353 (2009), that required the Department to promulgate administrative regulations for the execution protocols was rendered

on November 25, 2009. The Department of Corrections filed these administrative regulations on December 15, 2009. The protocols that are the subject of these administrative regulations have been in place for years and have even been reviewed and approved by the Supreme Court of Kentucky in *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2006), and the United State Supreme Court in *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008). The time period between November 25 and December 15, 2009 was sufficient for the Justice and Public Safety Cabinet and Department of Corrections to draft and file these protocols in the form of administrative regulations.

(7)(a) **Comment:** Why is the Department of Corrections not accepting e-mail comments?

(b) **Response:** For purposes of the public comment period, KRS 13A.270(2)(e) provides that each administrative regulations shall state the name, position, address, telephone number, and facsimile number of the person to whom a notification and written comments shall be transmitted. KRS Chapter 13A does not authorize acceptance of e-mails.

(8)(a) **Comment:** Why is the Department of Corrections scheduling just one hearing?

(b) **Response:** In addition to receiving written comments, 13A.270(1)(a) requires that the administrative body hold a *hearing*, open to the public, on the administrative regulation. KRS Chapter 13A does not require an administrative body to hold more than one hearing. It should be noted that the purpose of accepting written comments is for those members of the public who cannot or do not wish to attend the public hearing. Written comments and oral comments received at the public hearing carry the same weight and receive the very same consideration.

(9)(a) **Comment:** Why was the public hearing scheduled in the middle of the state on a work day and why was there no evening hearing?

(b) **Response:** The public hearing for these administrative regulations was scheduled in Frankfort due to being the headquarters of the Department of Corrections, and Justice and Public Safety Cabinet, and the necessity of having a suitable venue for conducting the public hearing. Further, the hearing was conducted in Frankfort due to being centrally located for those individuals in distant locations in the Commonwealth who might wish to attend. KRS 13A.270(1)(b) requires that the hearing be conducted before the twenty-first day of the month or later than the last workday of the month. KRS Chapter 13A does not require an administrative agency to conduct hearings on a weekend or during evening hours. In conducting the public hearing, the Department of Corrections complied fully with the requirements of the statute.

(10)(a) **Comment:** Why were the administrative regulations not more widely distributed and the public hearing not more publicized?

(b) **Response:** KRS 13A.050 established the publication of “The

Administrative Register” for purposes of giving notice of administrative regulations filed in accordance with KRS Chapter 13A. Further, these administrative regulations, including the notice of the public comment period required by KRS 13A.270(2), were published on the internet website of the Kentucky Legislative Research Commission shortly after being filed. Forty persons attended and nineteen persons spoke at the public hearing and the Department of Corrections has received 169 written comments, including comments from as far away as Berkeley, California and Brooklyn, New York.

(11)(a) **Comment:** Why are the administrative regulations not in Spanish, Braille, and “non-legalese” English?

(b) **Response:** KRS Chapter 13A does not require an administrative body to promulgate administrative regulations in Spanish, other foreign languages, or Braille. The administrative regulations were written consistent with the requirement for drafting regulations.

(12)(a) **Comment:** Why do the speakers have to register?

(b) **Response:** KRS 13A.270(6) requires persons wishing to be heard at the public hearing to notify an administrative body in writing of their desire to appear and testify at the hearing not less than five days before the hearing. Otherwise, the public hearing is cancelled.

KRS 13A.280(1) requires the administrative body to file a statement of consideration of all comments that are received at the public hearing and during the public comment period. Further, KRS 13A.280(5) requires that the statement of consideration include a list of the persons who attended the hearing or submitted written comments and further requires that the administrative agency respond to the persons or organizations who submitted written comments or commented at the public hearing. It was necessary for speakers to register so the Department of Corrections could comply with these statutory requirements and adequately respond to the comments made by each person or organization. Further, all administrative agencies that conduct public hearings on administrative regulations follow this practice.

(13)(a) **Comment:** Regulations should replace the words “he” or “his” with gender neutral words to specify how the situation will be different depending on the gender of the condemned person.

(b) **Response:** KRS 13A.222(4)(j) and KRS 446.020(2) provides that a word importing the masculine gender may extend to females.

(14)(a) **Comment:** Death sentenced inmates should have right to speak at a public hearing on the regulations, not just submit written comments on the regulation.

(b) **Response:** Written comments and oral comments received at the public hearing carry the very same weight and receive the very same consideration. Every person, including death sentenced inmates, had the right to submit written comments to the proposed administrative regulations.

(15)(a) **Comment:** Why did the Cabinet not provide more media coverage for the hearing?

(b) **Response:** The Cabinet is not responsible for providing media coverage. The public hearing was publicized in the manner required by KRS Chapter 13A, open to the public, and was attended by representatives of the media.

(16)(a) **Comment:** No public records were created or maintained preventing thorough review of the administrative regulations.

(b) **Response:** The Department of Corrections has maintained and provided any records that were created regarding the execution process that do not relate to security measures. The Open Records Act (KRS 61.870 through 61.884) does not require an administrative agency to create records in response to an open records request.

(17)(a) **Comment:** The proposed administrative regulations are vague and sparse when compared with the detailed and specific regulations in other areas of Kentucky's administrative regulations and other states.

(b) **Response:** With the additions and changes to the administrative regulations made in response to comments received during the public comment period, the regulations address all facets of the execution process except matters of internal management and security.

(18)(a) **Comment:** Why has the full protocol not been released to the public?

(b) **Response:** The Kentucky Supreme Court ruled in *Bowling v. Kentucky Department of Corrections*, --- S.W.3d ---, 2009 WL 4117353 (2009), the identities of the execution team, the storage location of the drugs, and other security-related issues are issues of internal management that were not required to be included in a Department of Corrections (DOC) administrative regulation implementing the state's lethal injection protocol. All matters that do not relate to internal management and security have been released to the public.

(2) **Subject Matter:** Opposition to Death Penalty

**Commenters:** Jodie Leidecker; Loretta Ann Baisden; Tom Wallace Lyons; Naomi Bayne; Sue Pueshoff; Don Pratt; Charles Bussey; N. Fisher M.D.; Alice Walsh; Aja DeGross; Minister Gloria R. Slaughter; Kaye Gallagher; Kevin Asay; Claudia Whitman; David Lamarre Vincent; Angelica Hoyos; Katie McKeown; Sue Johnson; Margaret Summers; Lauren Brown; Jojo Farr; Anonymous; Debbie Bibler – for Robert Bethel; Brian Evans; Ann Johnson; Janet Bucher, CDP; Theresa Lyons; Kenneth Kurtz; Mary Jane Murphy; Greg Coulson; Rev. Dr. Marian McClure Taylor – Kentucky Council of Churches; Ian Richetti; Rev Patrick Delahanty – Kentucky Coalition to Abolish the Death Penalty; Robert Castagna – Catholic Conference of Kentucky; Chris Hitz- Bradley; Myrtle Bingham; Rev. Richard Sullivan; Sister Emmanuel Pieper; Phyllis Jenness; Ernest Coverson; John Joerling; Doug Griggs; Sarah Taylor; Leslie

Lytle; Kristin Parks; Johanna Ryan; Zach Everson; John Lydon; Sister Regina Marie Baker; Sister Lynn Stenken; Mark Meade; Sean McDonald; Judy Burris; Donna Stopher; Sister Mary Celine Weidbenner; Sister Alice Gerdeman; Dan Dalley; Clay Kennedy; Gail Koehler; Rosalyn Park – the Advocates for Human Life; Steven Olszewsky, MBA, JD, PhD; Margaret Stallmeyer; Agnes Terry; Dr. Stan Gassaway; Joan Miller; Antonya Gritton; Ralf Ehrlich; Jamala Rogers – Organization for Black Struggle; Carolyn Wehrle – Light of Christ Ministries; Sister Dorothy Schuette – St. Walburg Monastery; Jodie Leidecker; Rose Jean Powers, OSU – Brescia University; Tom Wallace Lyons; Donald Vish; Mary Jane Murphy; Kate Miller; Charles Wilton – Quaker Committees, Erin Hoffman Yang, William Bill Vaughn, Roberta Guthrie

(a) **Comment:** The death penalty is morally wrong, is racist, is unfairly applied, costs too much, is inhumane, is prone to mistakes, and is cruel and unusual punishment. Can the Administrative Regulations be withdrawn pending the report from the American Bar Association on the assessment of the Death Penalty?

(b) **Response:** The Kentucky General Assembly has approved, in KRS 431.220, the imposition of the death penalty for certain crimes in this Commonwealth and has mandated that all executions shall be carried out by the Department of Corrections. The imposition of capital punishment in Kentucky has been reviewed and upheld as constitutional by the U. S. Supreme Court in *Gregg v Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L. Ed.2d 859 (1976). The Department of Corrections has no authority to repeal or disregard KRS 431.220. Further, KRS 13A.120(2)(i) prohibits the Department of Corrections from promulgating administrative regulations that modify or vitiate a statute. In *Bowling v. Kentucky Department of Corrections*, -- S.W.3d ---, 2009 WL 4117353 (2009), the Kentucky Supreme Court required the Department of Corrections to draft death penalty administrative regulations consistent with the administrative regulations process set forth in KRS Chapter 13A.

(3) **Subject Matter:** Protests

**Commenters:** Donald Vish; Rev. Dr. Marian McClure Taylor – Kentucky Council of Churches; Rev Patrick Delahanty – Kentucky Coalition to Abolish the Death Penalty; Zach Everson; Bruce Pearson; Sean McDonald; Katherine Aronson; Stephanie Faucher – Death Penalty Focus; Amanda Bragg; Gail Koehler; Margaret Mattice; Deborah Mauldin; Michael Kennett, Jason Paget and Katharine Southard – Brooklyn Law School, BLS Legal Services Corp., Capital Defender and Federal Habeas Clinic; Shea Sheppard – American Civil Liberties Union, Margaret Ivie, Roberta Guthrie

(1)(a) **Comment:** Restrictions on the time and location of demonstrations or protests are vague, unduly restrictive, and violate the First Amendment right to free speech and assembly of demonstrators. There needs to be a permanent area for demonstrators near the prison, not at the firing range.

(b) **Response:** The provisions in Section 6 of the amended 501 KAR 16:300 relate to demonstrations on prison grounds and are intended to provide all demonstrators an opportunity to demonstrate. The Warden of the Kentucky State Penitentiary is responsible for the

safety of all inmates and visitors on prison grounds, as well as maintaining the security of the prison and its staff. Past demonstration areas have been located at the firing range, which is the area of the prison grounds closest to the Execution Building. There is minimal room at the front of the Kentucky State Penitentiary and this area must be kept clear in the event that an emergency vehicle must enter or exit the penitentiary.

The time for demonstrations is limited to the day of the execution because the Department of Corrections does not have sufficient resources to provide security on days before the execution. On the day of the execution, the demonstration areas are opened hours before the scheduled time of the execution and remain open for a reasonable time following the execution.

Neither demonstrators nor the media are prohibited from bringing cameras or other recording devices or their own pens, pencils, and paper to the demonstration area. Audio and video recording devices and writing utensils are prohibited only for those members of the media who will actually witness the execution.

(2)(a) **Comment:** The provision in 501 KAR 16:300 that addresses demonstrators should be a separate administrative regulation and subject to its own public hearing.

(b) **Response:** The Department of Corrections respectfully disagrees and believes that 501 KAR 16:300 adequately addresses demonstrators.

(4) **Subject Matter:** Personal Visitor Issues

**Commenters:** Katie McKeown, Rev Patrick Delahanty – Kentucky Coalition to Abolish the Death Penalty, Robert Castagna – Catholic Conference of Kentucky, Sister Emmanuel Pieper, Julia Pearson, Bruce Pearson, Sarah Taylor, Jack Payden-Travers, Gail Chasey, Johanna Ryan, Sister Lynn Stenken, Judy Burris, Amanda Bragg, Elizabeth Carlyle, Jessie Kemplin, Timothy Arnold – Department of Public Advocacy, Paula Skillicorn, Laura Resteghini, Kathy Adrian, Deborah Mauldin, Kimberly Rigsby – Ohio Public Offender, Michael Kennett, Jason Paget and Katharine Southard – Brooklyn Law School, BLS Legal Services Corp., Capital Defender and Federal Habeas Clinic, David Barron – Department of Public Advocacy, Carolyn Wehrle – Light of Christ Ministries, Michael Aldridge – American Civil Liberties Union

(1)(a) **Comment:** 501 KAR 16:300. Concerns were expressed about contact visits between the condemned person and family or friends on the day of the execution. Comments ranged from removing the ban on contact visits on the day of execution to allowing unlimited visits with family on the day of execution. Comments also stated the lack of a contact visit varied from the protocol reviewed by the U.S. Supreme Court. Comments stated that the regulation on visits on the day of execution appears arbitrary and places unnecessary burdens and limitations on the condemned inmate and his family and friends. Comments also asked about visits from children, stated inmate and family should be made as comfortable as possible, and stated there should be less discretion in decisions involving family.

(b) **Response:** For security and operational reasons, 501 KAR 16:300 was not

amended to allow the condemned person contact visits with personal visitors on the day of the execution. *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520 (2008), the U.S. Supreme Court decision, did not address the issue of contact visits in its opinion. There are no restrictions on visits from children.

(2)(a) **Comment:** 501 KAR 16:300. Comments indicated that personal visitors should be allowed to bring pictures or other items with them to visitation. The desire to have more than four visitors at one time was also expressed.

(b) **Response:** For security and operational reasons, 501 KAR 16:300 was not amended because of these comments.

(3)(a) **Comment:** 501 KAR 16:300. Daily visits should be allowed by personal visitors.

(b) **Response:** 501 KAR 16:300 was not amended because of these comments. The regulation, as written, allows personal visitors to request daily visits until the day of execution. The Department of Corrections has allowed expanded visiting by personal visitors in the days prior to the execution.

(5) **Subject Matter:** Security Risk

**Commenters:** James Graham, Kathy Pugh, John Lydon, Bruce Pearson, Katherine Aronson, Stephanie Faucher – Death Penalty Focus, Deirdre O’Reilly, M. Ed. , Gail Koehler

(a) **Comment:** 501 KAR 16:001 and 300. Define security risk for denying visitors or regarding visits. Define security risk.

(b) **Response:** 501 KAR 16:001 was amended in response to this comment. 501 KAR 16:300 was not amended in response to this comment.

(6) **Subject Matter:** Female Inmate Issues

**Commenters:** Kathleen Hils; Rev. Dr. Marian McClure Taylor – Kentucky Council of Churches; Kathleen Ostrom; Phyllis Jenness; Ernest Coverson; Colleen Cunningham; James Graham; Miriam Kelle; James Clark; Eric Mount; Bruce Pearson; Sister Mary Ann Broering; Margaret Phillips; Randall Wheeler; Judy Burris; Katherine Aronson; Stephanie Faucher – Death Penalty Focus; Elizabeth Carlyle;

(1)(a)**Comment:** 501 KAR 16:290. Provisions need to be made to allow for feminine hygiene products, female health products, and other female specific personal property in the condemned person’s cell.

(b)**Response:** 501 KAR 16:290 was amended to add feminine hygiene

products and female specific clothing to the list of property. The reduction in personal property is permissive and does not require that the personal items be limited only to the list in the regulations. The warden makes decisions on a case-by-case basis to determine if property should be reduced to the level indicated in the regulation.

(2)(a) **Comment:** 501 KAR 16:310. Provisions need to be made to ensure that a female prisoner is not pregnant at the time of execution since an execution is not allowed by statute if the condemned person is pregnant. KRS 431.240(2). Questions were also raised about whether an inmate will be required to have an abortion and concerning the type of pregnancy test that will be used.

(b)**Response:** 501 KAR 16:310 was amended to require pregnancy testing fourteen days and seven days before the date of execution. The Department of Corrections cannot require an abortion.

(3)(a) **Comment:** 501 KAR 16:290. How are female inmates transferred?

(b) **Response:** 501 KAR 6:999 incorporating by reference Corrections Policy and Procedures 9.9 contains provisions for the transport of inmates. This is a secure policy and is not available to the public.

(4)(a) **Comment:** 501 KAR 16:290. When is a female inmate transferred to the male prison and how is a female inmate housed at a male prison?

(b) **Response:** A female condemned person is transferred to the Kentucky State Penitentiary no sooner than ten days prior to the scheduled execution. A specific date is not placed in the regulation since this would create a security risk. A female inmate will be housed in a cell in an area that is separate from the view of male inmates. At least one of the officers scheduled to provide security to the area housing the female inmate will be a female.

(5)(a) **Comment:** 501 KAR 16:290. Distinctions were not made between men and women, women's needs should be addressed, greater consideration should be given to the treatment of women, and the regulation should be amended with specifics concerning women.

(b) **Response:** Specific issues concerning female inmates were addressed in other responses concerning female inmate issues and 501 KAR 16:290 and 501 KAR 16:310 were changed to address these issues. Male and female death row inmates are otherwise treated the same.

(6)(a) **Comment:** 501 KAR Chapter 16. The regulations should replace the words "he" or "his" with gender neutral words to specify how the situation will be different depending on the gender of the condemned person.

(b) **Response:** KRS 13A.222(4)(j) and KRS 446.020(2) provides that a word importing the masculine gender may extend to females.

(7)(a) **Comment:** 501 KAR 16:310. Will female inmates have access to female physicians?

(b) **Response:** Male and female inmates will be treated by the same medical staff. The gender of the medical provider may vary depending on the providers working immediately prior to and at the time of the execution.

(7) **Subject Matter:** Witnesses

**Commenters:** Mark Thornewill; Jon Fleischaker - The Associated Press, the Kentucky Press Association, the Courier- Journal, and the Lexington Herald-Leader and the Kentucky Broadcasters Association and Kentucky AP Broadcasters; Rev. Dr. Marian McClure Taylor – Kentucky Council of Churches; Rev Patrick Delahanty – Kentucky Coalition to Abolish the Death Penalty; Carol Tures; Doug Griggs; Jack Payden-Travers; James Graham; Beth Wood; Gail Chasey; Heather Hass; Dr. and Mrs. J. Oleskevich; James Clark; Barbara Arnwine; Julia Pearson; Kathy Pugh; Johanna Ryan; Eric Mount; Zach Everson; Bruce Pearson; Sister Lynn Stenken; Margaret Phillips; Sean McDonald; Katherine Aronson; Stephanie Faucher – Death Penalty Focus; Margaret Ivie; Elizabeth Carlyle; Joetta Venneman; Jamesa Drake; Jessie Kemplin; Viki Elkey; Timothy Arnold – Department of Public Advocacy; Paula Skillicorn; Kelly Schneider; Jamala Rogers – Organization for Black Struggle; Deborah Denno – Fordham University, School of Law; Deborah Mauldin; Kimberly Rigsby; Michael Kennett, Jason Paget and Katharine Southard – Brooklyn Law School, BLS Legal Services Corp., Capital Defender and Federal Habeas Clinic; David Barron, Department of Public Advocacy, Roberta Guthrie

(1)(a) **Comment:** More than three witnesses should be allowed from the victim’s family. The Commissioner of the Department of Corrections should not be permitted to choose what members of the victim’s family that will witness the execution. The Department of Corrections should allow the victim’s family members the right to choose who can attend.

(b) **Response:** KRS 431.250 establishes the persons who are permitted to witness an execution and specifically prohibits the presence of any others. Under KRS 431.250 only three witnesses from the victim’s family may be present and are to be designated by the commissioner of the Department of Corrections. KRS 13A.120(2) prohibits the Department of Corrections from promulgating administrative regulations that are the same or similar to an existing statute or from modifying a statute.

(2)(a) **Comment:** Witnesses from victim’s family should be banned from witnessing the execution and have no say on who can attend the execution.

(b) **Response:** KRS 431.250 allows members of the victim’s family to witness the execution. The Department of Corrections has no authority to disregard or modify the statute.

(3)(a) **Comment:** There should be witnesses available with technical and professional training who can attempt to assess visually what is going on in the chamber and with the condemned inmate.

(b) **Response:** KRS 431.250 establishes the persons who are to witness an execution and specifically prohibits any others. Again, KRS 13A.120(2) prohibits the Department of Corrections from promulgating administrative regulations that are the same or similar to an existing statute or from modifying a statute.

(4)(a) **Comment:** What if the convicted person is guilty of killing more than one person from unrelated families? Provisions should be made for more witnesses if there are multiple victims.

(b) **Response:** The Department of Corrections interprets KRS 431.250 to permit three witnesses from the family of each victim. The Department of Corrections believes that it has sufficient room in the Witness rooms to accommodate witnesses for multiple victims.

(5)(a) **Comment:** The number of witnesses for the victim's family and the condemned's family should be proportionate.

(b) **Response:** The number of witnesses is set by KRS 431.250. KRS 13A.120(2) prohibits the Department of Corrections from promulgating administrative regulations that modify a statute.

(6)(a) **Comment:** Drawing the curtains prevents the witnesses and media from viewing the insertion of IV needles, strapping to electric chair, and entire execution process. Preventing witnesses from viewing the entire execution process is a violation of the First Amendment.

(b) **Response:** The provisions that designate the witnesses to an execution are contained in KRS 431.250. Closing the curtains during portions of the execution when members of the execution team could be observed is necessary to maintain the confidentiality and security of the execution team members or those individuals who certify the cause of death. There is no First Amendment right to unfettered media or public access to an execution.

(7)(a) **Comment:** 501 KAR 16:300 fails to specify the way to calculate time for submission of media witnesses, when the execution order is less than fourteen days.

(b) **Response:** 501 KAR 16:300 Section 3(3)(a) clearly indicates that witnesses shall be submitted in writing at least fourteen days prior to the execution "unless notice from the Department indicates a different time to send the names of the representatives or nominations."

(8) **Subject Matter:** Religious Issues

**Commenters:** Rev. Will Warner, Terence Taylor – Interfaith Paths to Peace, Rev. Dr. Marian McClure Taylor – Kentucky Council of Churches, Rev Patrick Delahanty – Kentucky Coalition to Abolish the Death Penalty, Robert Castagna – Catholic Conference of Kentucky, Chris Hitz-Bradley, Carol Tures, Myrtle Bingham, Rev. Richard Sullivan, Maj. Gen Thomas Lynch, Kathleen Ostrom, Ruslyn Case Compton, Phyllis Jenness, Irene Peters, Kathleen Lucas, Catherine Holtkamp, Sarah Taylor, James Graham, Gail Chasey, Dr. and Mrs. J. Oleskevich, Rev Stacy Rector, Julia Pearson, Johanna Ryan, Ashlee Shelton, Eric Mount, John Lydon, Sister Mary Ann Broering, Sister Regina Marie Baker, Sister Lynn Stenken, Mark Meade, Sean McDonald, Judy Burris, Katherine Aronson, Linda Dixon Bullock, Leif Halvorsen, Stephanie Faucher – Death Penalty Focus, Margaret Ivie, Elizabeth Carlyle, Father John S. Rausch, Sylvia Troesch, Deirdre O’Reilly, M. Ed., Sister Alice Gerdeman, Sara Haines, Joetta Venneman, Erin Hoffman Yang – Attorney at law, Margaret Mattice, Jessie Kemplin, Margaret Stallmeyer, Joan Miller – Attorney at Law, Brooke Buchanan, Kathy Adrian, Deborah Mauldin, Kimberly Rigsby – Ohio Public Offender, Michael Kennett, Jason Paget and Katharine Southard – Brooklyn Law School, BLS Legal Services Corp., Capital Defender and Federal Habeas Clinic, David Barron – Department of Public Advocacy, Carolyn Wehrle – Light of Christ Ministries, Michael Aldridge – American Civil Liberties Union, Roberta Guthrie, Marcia Wilson

(1)(a) **Comment:** 501 KAR 16:300. The regulation interferes with the condemned person’s ability to meet with his religious advisor and religious practices. The religious advisor should be allowed in the execution chamber. End-of-life ceremonies (anointing, last rites, sacraments, etc.) should be allowed. Clergy should be allowed to visit everyday, including weekends and the day of execution. A contact visit should be allowed with a religious advisor on the day of execution. The minister of record should be allowed a phone call the day of the execution if visitation is not possible.

(b) **Response:** 501 KAR 16:300 was amended to allow the minister of record visits on the weekend. The regulation was also amended to allow a minister of record a contact visit, not to exceed 30 minutes, on the day of execution. The visit on the day of execution shall be no later than three hours prior to the execution. The regulation was not amended to allow a religious advisor in the execution chamber. Religious observances with an advisor may be completed at the last contact visit prior to the execution.

(2)(a) **Comment:** 501 KAR 16:290 & 300. It was suggested that the state meet with a variety of religious groups to ensure all beliefs and practices are carried through prior to the execution and that punishment be meted out and administered in a way that is fair, equitable and sensitive to religion and spiritual standards.

(b) **Response:** Additional amendments to the regulations were not made for this comment. The Department has adopted a Religious Practice Manual which is incorporated by reference in 501 KAR 6:080. The condemned person has the ability to request a minister of record and may consult with his spiritual advisor concerning his spiritual needs. The warden has the ability to grant special requests that are not specifically prohibited in the regulations and do not constitute a security risk.

(3)(a) **Comment:** 501 KAR 16:290 & 300. It was suggested that the regulations violate the First Amendment for the free practice of religion and are arbitrary. Comments requested the removal of religious restrictions.

(b) **Response:** A condemned person cannot practice his religious beliefs in the exact same manner as if he was a free person. A maximum security prison necessarily has restrictions for reasons of security. The restrictions are based on legitimate penological interests. Amendments were made to provide additional avenues for religious practice.

(4)(a) **Comment:** 501 KAR 16:300. A religious advisor, support staff, and/or counselors should be onsite to counsel witnesses and/or staff that participated in the execution.

(b) **Response:** A chaplain is available at the Kentucky State Penitentiary. The Supreme Court of Kentucky held in *Bowling v. Kentucky Department of Corrections*, --- S.W.3d ---, 2009 WL 4117353 (2009), that issues concerning staff are matters of internal management. The agency is not responsible for providing counseling or support services to witnesses who attend the execution.

(5)(a) **Comment:** 501 KAR 16:290. Questions were raised about the time frame (ten days prior to the execution) for inmates to designate a minister of record and/or other designations required in the regulation.

(b) **Response:** 501 KAR 16:290 was amended to make it clear that the warden has discretion to allow designations or changes in designations outside the time set in the regulation. The times were set to allow for all necessary steps to be taken in advance of the execution. The condemned person is allowed to request other visitors in addition to the minister of record and those on his visitor list.

(6)(a) **Comment:** 501 KAR 16:290 & 300. The regulation should be changed to make it clear that a spiritual advisor will be provided upon request. The regulation should specify that a spiritual advisor of the condemned's denomination will be given to those who do not have one and request one.

(b) **Response:** The condemned person has the ability to designate a minister of record (spiritual advisor). A chaplain is available at the Kentucky State Penitentiary. The inmate may work with the chaplain to locate a spiritual advisor of a specific denomination and may write to the denomination for assistance in locating a spiritual advisor as well. No additional amendment was made to the regulations.

(7)(a) **Comment:** 501 KAR 16:290 & 300. The inmate should be allowed to visit his minister of record at any time, he should be allowed to visit with the minister that will witness the execution, and should be allowed weekend visits.

(b) **Response:** 501 KAR 16:300 has been amended to allow weekend visits for the minister of record and a visit on the day of execution. If the clergy witness is not the minister of record and is not on the inmate's visitor list, then the inmate may request a visit with the clergy witness.

(8)(a) **Comment:** 501 KAR 16:300. Warden should not be vested with the discretion to decide if the condemned person can meet with his “minister of record” and the “minister of record” should be able to bring religious materials in to the prison when doing so is necessary to provide the condemned person with spiritual counseling. A question was raised about religious items being permitted on the premises at the Kentucky State Penitentiary.

(b) **Response:** 501 KAR 6:020 incorporating by reference Corrections Policy and Procedure 23.1 allows for religious items to be at the penitentiary. The minister of record should work with the Kentucky State Penitentiary chaplain to determine if specific religious items are available at the institution. If the item is not available, the minister of record must seek permission from the warden to bring the item into the institution.

(9)(a) **Comment:** 501 KAR 16:300. The regulation should allow privacy for sacrament such as confession and should eliminate threats to the priest-penitent privilege.

(b) **Response:** 501 KAR 16:300 was not amended in response to these comments. Security requires an officer to remain in sight, but not nearby when clergy and the condemned meet.

(9) **Subject Matter:** Attorney and Legal Issues

**Commenters:** Rev. Dr. Marian McClure Taylor – Kentucky Council of Churches, Rev Patrick Delahanty – Kentucky Coalition to Abolish the Death Penalty, James Graham, Kristin Parks, Eric Mount, Randall Wheeler, Elizabeth Carlyle, Jamesa Drake – Department of Public Advocacy, Erin Hoffman Yang – Attorney at law, Margaret Stallmeyer, Joan Miller – Attorney at Law, Timothy Arnold – Department of Public Advocacy, Brooke Buchanan, Ilker Onen – Department of Public Advocacy, Kelly Schneider – Ohio Public Defender, Laura Resteghini, Kathy Adrian, Kimberly Rigsby – Ohio Public Offender, David Barron – Department of Public Advocacy

(1)(a) **Comment:** 501 KAR 16:290 and 300. Commenters stated that all or more than one attorney representing the condemned person as of the day of the execution should be allowed to visit on the day of the execution and questioned why the regulation limited the visit to one attorney. The regulation interferes with the condemned’s ability to meet with his attorney. The commenters state greater access should be allowed. The regulation should specify that a visit will be granted with the condemned’s attorney on the day of the execution. The term should be changed to “legal representative” and all attorneys should be allowed to visit with the condemned on the day of the execution. The condemned has a right to meet with counsel, in person, on the day of execution. The attorney of record should be allowed to designate someone from his staff to visit the condemned; however, the protocol limits visitation to one attorney on the day of the execution. Questions were raised about more than one attorney visiting at a time. The regulation has restrictions on legal visits on the day of the execution. The commenter said *McQueen v. Parker* states the attorney must be permitted visits with the inmate prior to execution and should have access to his attorney beginning 3 hours before the execution and until such

time as counsel is removed to the witness room. The commenter stated *McQueen v. Parker* requires the regulation to allow for telephonic communication between the attorney representing the condemned at the prison (including while sitting in the witness room) and other counsel outside of the prison on the day of execution.

(b) **Response:** 501 KAR 16:300 was amended to allow attorney visits on the day of execution.

(2)(a) **Comment:** 501 KAR 16:001, 290 and 300. Questions were raised about the condemned naming one attorney of record and limiting visits to the attorney of record. In the Department of Public Advocacy setting, attorneys are assigned and the condemned may not select his counsel. Multiple attorneys may represent the condemned. Naming an attorney of record may cause the condemned stress. Questions were raised about the condemned failing to specify an attorney of record or if there were multiple attorneys of record. Questions were raised about whether attorney of record or attorney meant the same thing and requesting definitions of both terms. Questions were raised concerning what would occur if the attorney of record had to be in court and could not visit the condemned on the day of execution. The regulation should substitute attorneys for attorneys of record or specify that there may be more than one attorney of record. Questions were raised about requiring the condemned to specify an attorney of record ten days prior to execution and whether he could be unconstitutionally denied counsel.

(b) **Response:** 501 KAR 16:290 was amended to address issues concerning the attorney of record.

(3)(a) **Comment:** 501 KAR 16:300. Concerns were raised about attorneys and legal staff being able to bring legal documents, pens and paper into the penitentiary without obtaining approval of the warden and without search of the documents. The regulation should be amended to allow legal staff to bring legal documents, legal pad, and a pen into the penitentiary. The regulation should require that pen and paper be provided if legal staff cannot bring them.

(b) **Response:** Attorney and legal staff are allowed to bring legal documents, pen and paper into the penitentiary subject to 501 KAR 16:300, as amended.

(4)(a) **Comment:** 501 KAR 16:001, 290 and 300. Concerns were raised about the use of the term paralegal and its meaning. Comments indicated that numerous individuals involved in the defense of the condemned with other titles may need to visit the condemned for defense purposes. Legal visits should not be limited to attorneys and paralegals. The regulation should define paralegal and it should include staff such as investigator or mitigation specialist. The condemned should be allowed access to his entire legal team. The protocol excludes other agents of the attorney. Restrictions on who may visit prior to the day of execution should not be restricted to “attorneys and paralegals.” The visitation policy should reflect and permit “persons who are an agent of the attorney” to visit the condemned. The regulation should be amended to include authorized contact visits for attorneys, paralegals, investigators, and mitigation specialist. Legal visits should not be limited to attorneys and paralegals since it impedes the condemned’s constitutional right to counsel. More than one member of the legal team should be allowed to visit at the same time. Any member of the condemned’s “legal team” (including mitigation

specialists and investigators) should be allowed visits, not just attorneys and paralegals.

(b) **Response:** 501 KAR 16:300 is amended to allow a number of individuals involved with the legal defense of the condemned to visit the inmate.

(5)(a) **Comment:** 501 KAR 16:300. The protocol improperly requires that a visit by attorneys and paralegals shall be in the discretion of the warden after the receipt of the execution order. Attorneys must be allowed to visit with condemned until he is moved to execution chamber. The warden cannot be vested with discretion to decide whether the condemned person will be allowed legal visits. Regulations should change to state “attorneys and paralegals shall be allowed daily visits.” The regulation should specify that the condemned person will have access to his attorneys until the execution actually takes place, including telephonic communication. The regulation uses both “may” and “shall” and should be revised to use the same term for consistency and to avoid potential misunderstandings. However, if use of terms was intentional, the regulation should be revised to guarantee the attorneys will be allowed visits and phone. Legal staff visits should be allowed daily. Concerns were raised about the condemned person’s access to counsel and legal visits prior to the day of the execution.

(b) **Response:** 501 KAR 16:300 was amended in response to this comment. A daily visit shall be provided upon request. Additional visits may be requested.

(6)(a) **Comment:** 501 KAR 16:300. The regulation does not ensure the attorney-client privilege will be honored. The regulation should eliminate threats to the attorney-client privilege. The regulation should specify the location for the legal visit and should specify the attorney-client privilege applies to all visits and phone calls and shall not be monitored by prison staff. Concerns were raised about restrictions on the nature of the attorney-client visit.

(b) **Response:** 501 KAR 16:300 was not amended in response to these comments. For safety and security, an officer remains in sight, but not nearby when legal staff and the condemned meet.

(7)(a) **Comment:** 501 KAR 16:300. The regulation should allow contact visits between legal staff and the condemned. Contact visits are needed to sign documents. Concerns were raised about restrictions on meetings between the attorneys and the condemned.

(b) **Response:** 501 KAR 16:300 was amended in response to this comment. Contact visits are allowed between legal staff and the condemned until the day of execution. If documents need to be signed by the condemned on the day of execution, special arrangements will be made to allow the legal staff person to obtain the signature during the visit.

(10) **Subject Matter:** Media Issues

**Commenters:** Mark Thornewill, Jennifer Kirby, Jon Fleischaker - The Associated Press, the Kentucky Press Association, the Courier- Journal, and the Lexington Herald-Leader and the Kentucky Broadcasters Association and Kentucky AP Broadcasters, Kate Miller, Rev.

Patrick Delahanty – Kentucky Coalition to Abolish the Death Penalty, Myrtle Bingham, Kathleen Lucas, Jack Payden-Travers, James Graham, Gail Chasey, Dr. and Mrs. J. Oleskevich, Rev. Stacy Rector, James Clark, Barbara Arnwine, Kathy Pugh, Marlene Long, Johanna Ryan, Ashlee Shelton, Eric Mount, Zach Everson, Bruce Pearson, Sean McDonald, Kathrine Aronson, Stephanie Faucher – Death Penalty Focus, Elizabeth Carlyle, Deirdre O’Reilly, M.Ed., Sister Alice Gerdeman, Joetta Venneman, Gail Koehler, James Drake – Department of Public Advocacy, Margaret Mattice, Timothy Shull, Timothy Arnold- Department of Public Advocacy, Paula Skillicorn, Ralf Ehrlich, Jamala Rogers – Organization for Black Struggle, Deborah Denno – Forham University, School of Law, Kimberly Rigsby – Ohio Public Offender, Michael Kennett, Jason Paget and Katharine Southard – Brooklyn Law School, BLS Legal Services Corp., Capital Defender and Federal Habeas Clinic, David Barron – Department of Public Advocacy

(1)(a) **Comment:** 501 KAR 16:300. The media can only use pens and paper provided by the Department of Corrections, but nothing guarantees they will be provided. Questions were raised about why media cannot bring their own paper and pens.

(b) **Response:** This restriction is limited to media representatives who witness the execution. 501 KAR 16:300 was amended to require that paper and pens be provided to media witnesses.

(2)(a) **Comment:** 501 KAR 16:300. The press is not allowed to video and record protesters, which raises First Amendment issues.

(b) **Response:** 501 KAR 16:300 was not amended in response to this comment. The media is not prohibited from bringing cameras or other recording devices to the demonstration area.

(3)(a) **Comment:** 501 KAR 16:300, 330 and 340. The media is limited in their access and ability to give information to the public. The media should be allowed to view all actions in the execution chamber from the time the condemned person is brought in until death. The media was allowed to see the condemned strapped into the chair in the past. Comments indicated that hearing and seeing all in the execution chamber was required by KRS 431.250 and First Amendment concerns were raised. Media should be allowed access to all aspects of the procedure and be able to cover the execution in detail. The regulation limits the public’s right to know.

(b) **Response:** 501 KAR 16:300, 330, and 340 were not amended in response to this comment. The closing of the curtains allows the Department of Corrections to maintain confidentiality of the execution team members. The First Amendment does not guarantee unfettered media or public access to an execution. The media is allowed to attend the execution pursuant to KRS 431.250, but portions are not viewed to maintain confidentiality consistent with the safety and security of the execution team.

(4)(a) **Comment:** 501 KAR 16:300. A question was raised about why the execution is not videotaped, particularly if the condemned agrees and why video and still pictures were not permitted.

(b) **Response:** 501 KAR 16:300 was not amended in response to this comment. KRS 431.220 requires that the execution be held in an enclosure that excludes public view of the execution. KRS 431.250 prohibits the use of audiovisual equipment during the execution.

(5)(a) **Comment:** 501 KAR 16:300. Questions were raised about why the media cannot interview the condemned on the day of the execution and whether it raises freedom of speech and freedom of the press issues. The inmate should be allowed to decide about interviews on the day of the execution.

(b) **Response:** 501 KAR 16:300 was not amended in response to this comment. Rights and interests of the inmate and press are served by allowing media interviews prior to the day of execution.

(6)(a) **Comment:** 501 KAR 16:300. Ban the media.

(b) **Response:** 501 KAR 16:300 was not amended in response to this comment. Media representatives are allowed pursuant to KRS 431.250.

(7)(a) **Comment:** 501 KAR 16:300. The regulation should not preclude oral questions from the media. A question was raised concerning whether audio or video recording devices would be allowed in the media staging area.

(b) **Response:** 501 KAR 16:300 was amended to clarify that the use of audio or video recording devices in the media staging areas is allowed.

(11) **Subject Matter:** Lethal Injection

**Commenters:** David Barron – Department of Public Advocacy; Mark Thornewill; Sue Johnson; Donald Vish; Greg Coulson; Ian Richetti; Rev Patrick Delahanty – Kentucky Coalition to Abolish the Death Penalty; Carol Tures; Rev. Richard Sullivan; Phyllis Jenness; Kathleen Lucas; Catherine Holtkamp; Sarah Taylor; James Graham; Marian Durkin; Dr. and Mrs. J. Oleskevich; James Clark; Lynn Greer; Barbara Arnwine; Eric Mount; Sister Regina Marie Baker; Mark Meade; Sean McDonald; Judy Burris; Katherine Aronson; Linda Dixon Bullock; Stephanie Faucher – Death Penalty Focus; Carol Weihrer – Anesthesia Awareness Campaign; Margaret Campbell, PhD; Joseph Miller, Ph.d –Keck School of Medicine; Margaret Ivie; Elizabeth Carlyle; Mark Heath, M.D.; Susan Jackson Balliet; Rapheal Schweri; Donna Stopher; Sylvia Troescher; Deirdre O’Reilly, M. Ed.; Timothy Arnold – Department of Public Advocacy; Brooke Buchanan; Antonya Gritton; Paula Skillicorn; Kelly Schneider; Ralf Ehrlich; Jamala Rogers – Organization for Black Struggle; Deborah Denno – Fordham University, School of Law; Deborah Mauldin; David Harshaw III & Dennis Burke; Kimberly Rigsby; Megan McCracken – Eighth Amendment Resource Counsel for the Death Penalty Clinic at Berkeley Law; Jennifer Moreno – Eighth Amendment Fellow and Staff Attorney for the Death Penalty Clinic at Berkeley Law; Laura Zaccone, Jason Paget and Michael Kennett – Brooklyn Law

School BLS Legal Services Corp., Capital Defender and Federal Habeas Clinic; Anton Ditchev, Joseph Hamel and Sarah White – Brooklyn Law School BLS Legal Services Corp., Capital Defender and Federal Habeas Clinic; William Simon, J.D., Ph.D. Constitutional Advocacy, LLC, Roberta Guthrie, Joan Miller, Marcia Wilson

(1)(a) **Comment:** The Kentucky Supreme Court ruled that lethal injection procedures are illegal. Kentucky should evaluate capital punishment under Section 2 of the Kentucky Constitution.

(b) **Response:** The lethal injection procedure was held constitutional by the Supreme Court of Kentucky in *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2006), and the U.S. Supreme Court in *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008).

(2)(a) **Comment:** The administrative regulations should include contingency plans for any and every event during the execution process that may fail. There are no protocols for a botched execution by either lethal injection or electrocution. The administrative regulations disregard the dignity of human life by not having more precise protocols.

(b) **Response:** The Department of Corrections' administrative regulations contain sufficient safeguards concerning stabilization procedures.

(3)(a) **Comment:** When does the warden order the condemned person escorted to the execution chamber? How long before the execution starts does the condemned person lay strapped to a gurney?

(b) **Response:** The warden orders the condemned person escorted to the execution chamber shortly before the execution is scheduled to begin. The execution starts immediately after the condemned person is strapped to the gurney.

(4)(a) **Comment:** Insertion of an IV catheter into the neck or injecting lethal injection chemicals through the neck has been found unconstitutional and should be removed from Section 1(4)(e) of 501 KAR 16:330. The administrative regulation does not indicate what other sites would be used if IV access cannot be obtained in the listed sites?

(b) **Response:** 501 KAR 16:330 was amended to remove the provision for insertion of an IV into the neck.

(5)(a) **Comment:** Section 1(3) and 1(6) of 501 KAR 16:330 are not clear as to whether two IV sites will be required or just one IV site. The administrative regulation is not clear whether an execution by lethal injection will proceed if the team is unable to establish an IV site or is only able to establish one IV site. A procedure should be included in the event that the IV team has difficulties in starting an IV.

(b) **Response:** The Department of Corrections agrees with this comment and was amended 501 KAR 16:330 to clearly state in the event that two IV sites cannot be obtained within one hour, the Commissioner will contact the Governor's office.

(6)(a) **Comment:** Regardless of whether the condemned person appears unconscious, if resistance occurs when pushing the plunger to inject the lethal injection chemicals, the regulation should be revised to make clear the injections should immediately cease and the executioner should promptly switch to the backup IV site and proceed injecting all three lethal injection chemicals, unless the DOC switches to a single drug lethal injection. The administrative regulation also does not address what shall be done if an IV fails, leaks, or if the catheter comes out of the vein but not the IV site.

(b) **Response:** 501 KAR 16:330 was amended to provide that during the execution, the warden and deputy warden will monitor the IV sites for such problems. In the event that an IV fails, leaks, or if the catheter comes out of the vein but not the IV site, the execution team shall switch to the backup IV.

(7)(a) **Comment:** A second administration of drugs should not proceed without determining why the first set did not work.

(b) **Response:** Section 3(9) of the amended 501 KAR 16:330 states the execution team shall repeat the sequence of chemicals until death has occurred.

(8)(a) **Comment:** The pre-execution medical action portion of the regulations is overly vague and do not provide what type of examination is being performed or the purpose of the examination.

(b) **Response:** Section 2(1)(b) of the amended 501 KAR 16:330 provides that the IV team shall examine the condemned person's veins at least twenty-four hours before the execution to determine the most appropriate sites for IV insertion.

(9)(a) **Comment:** Kentucky should discontinue using pancuronium bromide and potassium chloride and adopt Ohio's one drug lethal injection protocol. Despite *Baze v. Rees*, Kentucky should evaluate under § 2 of the Kentucky Constitution. Use of these drugs have been banned for use on animals, violate the 13th Amendment, and constitute cruel and unusual punishment in violation of the 8th and 14th Amendments. The Department of Corrections should replace the potassium chloride with dilantin. Even if the Department of Corrections decides to maintain a three-drug cocktail, it should replace sodium thiopental with more modern, less risky barbiturate.

(b) **Response:** The lethal injection procedure that is used by the Department of Corrections has been reviewed by the Supreme Court of Kentucky in *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2006), and the United State Supreme Court in *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), and found to fully comply with constitutional provisions banning cruel and unusual punishment. In approving Kentucky's protocol the United State Supreme Court noted that veterinary practice for animals is not an appropriate guide for humane practices for humans.

(10)(a) **Comment:** Use of pancuronium bromide paralyzes the condemned person and prevents him from manifesting signs of pain and discomfort and can hide a “botched” execution.

(b) **Response:** The lethal injection procedure that is used by the Department of Corrections has been reviewed by the Supreme Court of Kentucky in *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2006), and the United State Supreme Court in *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), and found to fully comply with constitutional provisions banning cruel and unusual punishment.

(11)(a) **Comment:** The administrative regulations should indicate when the chemicals are obtained for lethal injection, who orders the drugs used, who mixes the drugs, where are they stored, and how they are stored. The administrative regulations should indicate where, how they are obtained, and how the chemicals are paid for.

(b) **Response:** The Department of Corrections agrees that additional information should be included in administrative regulation 501 KAR 16:330 regarding when the chemicals are obtained, who obtains the chemicals, who mixes the chemicals and how the chemicals are stored. The Department of Corrections believes the remaining comments address matters of internal management pursuant to *Bowling v. Kentucky Department of Corrections*, --- S.W.3d ---, 2009 WL 4117353 (2009).

(12)(a) **Comment:** The administrative regulation does not explain what the chemicals do, why they are used in the lethal injection process and what is the test for the lethal injection drugs.

(b) **Response:** The three drug protocol that Kentucky uses has been fully examined, explained and approved by the Supreme Court of Kentucky in *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2006), and the United State Supreme Court in *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008).

(13)(a) **Comment:** The administrative regulations should specify that a barbiturate will be injected again if the initial injection of chemicals does not kill the condemned person. How will the remaining chemicals be injected if the backup site is used for sodium thiopental?

(b) **Response:** The process is adequately set out in Section 3 of the amended 501 KAR 16:330.

(14)(a) **Comment:** The administrative regulation does not specify the volume or concentration of the sodium thiopental or other lethal injection chemicals, how they are administered, or the rate at which they are administered?

(b) **Response:** The process is adequately set out in 501 KAR 16:330.

(15)(a) **Comment:** The administrative regulations fail to ensure that the second

and third drug will not be injected until the condemned person is determined to be unconscious.

(b) **Response:** Section 3(3) of the amended 501 KAR 16:330 provides that if it appears to the Warden that the condemned person is not unconscious within sixty seconds of his command to proceed, the Warden shall stop the flow of Sodium Thiopental in the primary site and order that the backup IV be used with a new flow of Sodium Thiopental.

(16)(a) **Comment:** Does the warden receive training in determining how to check for and monitor unconsciousness? Procedures lack necessary trained personnel and equipment to make an adequate assessment of unconsciousness. The administrative regulations should include tests, such as touching, shaking, speaking, and use of noxious odors that the warden shall perform to determine whether the condemned person is unconscious.

(b) **Response:** The lethal injection procedure that is used by the Department of Corrections has been reviewed by the Supreme Court of Kentucky in *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2006), and the United State Supreme Court in *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), and found to fully comply with constitutional provisions banning cruel and unusual punishment.

(17)(a) **Comment:** The three drug procedure is complicated and is performed by non-physicians. If the Department of Corrections continues to use pancuronium bromide the administrative regulations should be revised to include a consciousness check by a medical professional trained in determining consciousness in persons injected with this drug before the second and third chemicals are injected.

(b) **Response:** Physicians are prohibited from participating in an execution under the rules and regulations of the Kentucky Board of Medical Licensure. The lethal injection procedure that is used by the Department of Corrections has been reviewed by the Supreme Court of Kentucky in *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2006), and the United State Supreme Court in *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), and found to fully comply with constitutional provisions banning cruel and unusual punishment.

(18)(a) **Comment:** A medical professional should determine whether the condemned person is unconscious and be prepared to intervene if necessary to induce unconsciousness. The administrative regulation should be revised to add additional and specific means for monitoring consciousness that other states have adopted.

(b) **Response:** KRS 431.220(3) and the Kentucky Board of Medical Licensure prohibit a physician from taking part in an execution. The lethal injection procedure that is used by the Department of Corrections has been reviewed by the Supreme Court of Kentucky in *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2006), and the United State Supreme Court in *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), and found to fully comply with constitutional provisions banning cruel and unusual punishment.

(19)(a) **Comment:** The administrative regulation should require a consciousness check after the injection of each chemical in the “three-drug cocktail.” The administrative

regulation should be amended to include a consciousness check after the administration of sodium thiopental and before the administration of pancuronium bromide and potassium chloride.

(b) **Response:** The Warden will monitor the condemned person and perform a visual inspection after sodium thiopental has been administered. The protocol was approved by the United States Supreme Court in *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008). Administrative regulation 501 KAR 16:330 has been amended to clarify the process.

(20)(a) **Comment:** What if a stay is issued after the first drug is given? Are the people attempting to maintain life in the case of a stay of execution qualified to do so? The administrative regulations should state that the medical personnel have been trained, have experience and knowledge in maintaining life when lethal injection chemicals have been injected. The administrative regulation does not ensure that the medical staff or equipment is kept sufficiently close by to ensure that resuscitation procedures begin as soon as a stay is received.

(b) **Response:** The ambulance and medical staff are qualified to employ life-saving measures. 501 KAR 16:330 and 501 KAR 16:340 provide that the Warden shall arrange for an ambulance and medical staff to be present on penitentiary property during the execution, and a medical crash cart and defibrillator to be located in the execution building. Further, a physician is required by each administrative regulation to be in the execution building for the purpose of certifying the cause of death and to lend medical assistance if needed to stabilize the condemned.

(21)(a) **Comment:** The administrative regulation fails to specify what shall be done to maintain life. Stabilize should be defined.

(b) **Response:** The ambulance and medical staff shall employ all medically reasonable measures in attempting to stabilize the condemned person. The term “stabilize” is used in its common and everyday meaning and therefore does not require a definition.

(22)(a) **Comment:** The provisions for resuscitation in the event of a stay are not adequate and should specify what drugs and equipment the crash cart contains and the drugs needed to reverse the effects of the lethal injection drugs.

(b) **Response:** The administrative regulation will not be amended to include the specific drugs and equipment located on the crash cart. The purpose of the crash cart is to resuscitate and stabilize for transfer to a hospital by ambulance.

(23)(a) **Comment:** The administrative regulations should have a conscience clause that allows anyone involved as a member of the Execution Team to opt out of participating.

(b) **Response:** The warden is a member by virtue of his position. He designates the Deputy Warden. All other members of the Execution Team are volunteers and no

employee of the Department of Corrections is required to serve against his will. The Department of Corrections will amend 501 KAR 16:320 to note that all members are volunteers.

(24)(a) **Comment:** The administrative regulation only provides requirements for an IV team and fails to designate the execution team or their qualifications. It is unclear whether an IV team is to be used for an electrocution as well. The administrative regulation does not list the qualifications of the individuals who handle the chemicals for lethal injection.

(b) **Response:** The Department of Corrections amended 501 KAR 16:320 based on these comments. The handling and administration of the chemicals used in lethal injection is performed in accordance with the manufacturer's clear instructions.

(25)(a) **Comment:** The execution team lacks knowledge and medical training to effectively administer anesthesia.

(b) **Response:** The members of the IV team must be certified as a phlebotomist, emergency medical technician, a paramedic, or a military corpsman. The Department of Corrections disagrees with the comment that the team lacks knowledge or medical training to administer anesthesia.

(26)(a) **Comment:** The administrative regulation should indicate how many members of the Execution team serve on the IV team.

(b) **Response:** The Department of Corrections agrees with this comment and has amended 501 KAR 15:320 to indicate that at least two members of the Execution team shall be designated as the IV team.

(27)(a) **Comment:** The administrative regulations only require one year of professional experience for members of the IV team, which is less than required for the euthanasia of an animal.

(b) **Response:** The 501 KAR 16:320 will not be amended. In *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2006), *aff'd*, *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), the U.S. Supreme Court approved the protocol requirement that IV team members have one year of experience.

(28)(a) **Comment:** All IV team members should have an awareness of the multiple problems that can arise during lethal injection and be prepared for such occurrences.

(b) **Response:** The IV team members are sufficiently trained to respond to any problem that might arise during an execution by lethal injection.

(29)(a) **Comment:** Personnel on the IV team should currently be employed and practicing in their field, have clear records, and been involved in an execution.

(b) **Response:** 501 KAR 16:320 was amended. Section 2 of 501 KAR 16:320 requires each member of the IV team to have current certification and at least one year of experience in their specialty. The Department of Corrections does not agree with the comment that each member of the IV team should have been involved in an execution. The administrative regulation will be amended to reflect that the Kentucky State Penitentiary Warden shall review annually the training and current certification, as appropriate, of each IV team member to ensure compliance with the required qualifications and training.

(30)(a) **Comment:** The administrative regulation requires that the execution team shall practice lethal injection at least ten times per year, but the IV team members are only required to take part in two practices. The IV team members should partake in more than two practices per year.

(b) **Response:** 501 KAR 16:320 will not be amended. IV team members participate in at least ten lethal injection practices per year. Prior to participating in an execution, an IV team member must have participated in at least two practices. This qualification process was approved by the U.S. Supreme Court in *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2006), *aff'd*, *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008).

(31)(a) **Comment:** The administrative regulation should require that a stopwatch be used when the sodium thiopental is injected to ensure that the pancuronium bromide is not injected before enough time has elapsed for the sodium thiopental to circulate and a determination of consciousness made.

(b) **Response:** 501 KAR 16:330 has been amended. The regulation notes the revised visual inspection by the warden considered in *Baze v. Rees*.

(32)(a) **Comment:** The administrative regulation should describe the layout of the execution facility or the manner in which the IV lines will be set up and arranged, including the length of the IV tubing, the number of extensions that will be used, if any, and whether the Execution team can visualize the entire length of the tubing throughout the procedure. The administrative regulation should state whether the execution team will be administering the drugs from a separate room than the condemned and what additional equipment is needed to accomplish this. The equipment and execution team should be located in the same room as the condemned. The regulation should state whether the chemicals shall be administered by pushing a plunger or by mechanical means.

(b) **Response:** 501 KAR 16:330 will not be amended. Pursuant to *Bowling v. Kentucky Department of Corrections*, --- S.W.3d ---, 2009 WL 4117353 (2009), the Department of Corrections is not required to draft administrative regulations on subjects that are matters of internal management.

(33)(a) **Comment:** An EEG should be used to monitor brain activity during the execution.

(b) **Response:** The Department of Corrections utilizes a heart monitor which is observed to determine that electrical activity of the heart has ceased.

(34)(a) **Comment:** The administrative regulations should make clear that the IV team has the discretion to use any size catheter, syringe and needle it deems appropriate to insert an IV and that each size catheter, syringe and needle will be available to the IV team.

(b) **Response:** 501 KAR 16:330 will not be amended in response to this comment. The Department of Corrections makes available to the IV team all necessary equipment that is required to carry out an execution by lethal injection.

(35)(a) **Comment:** The administrative regulation should indicate how many syringes of each drug are prepared, labeled, arranged, and stored from the time of preparation until administration.

(b) **Response:** 501 KAR 16:330 has been amended to address the preparation of two complete sets of syringes. The remaining comments are matters of internal management not subject to administrative regulation.

(36)(a) **Comment:** The administrative regulation should indicate the location of the crash cart, defibrillator, and medical staff for purposes of reversing the effects of the lethal injection chemicals.

(b) **Response:** 501 KAR 16:330 will not be amended in response to this comment. Sections 4 of 501 KAR 16:330 and 501 KAR 16:340 both provide that the Warden shall arrange for an ambulance and other members of medical staff to be present on penitentiary property during the execution, and a medical crash cart and defibrillator to be located in the execution building. Further, a physician is required by Section 2 of each administrative regulation to be in the execution building for the purpose of certifying the cause of death and to lend medical assistance if needed to stabilize the condemned.

(37)(a) **Comment:** The timing and pressure used to actually inject the drugs into the tubing and apparatus used by the execution team to connect the syringe to the IV tubing should be included in the administrative regulation.

(b) **Response:** 501 KAR 16:330, in conformity with KRS 431.220(1)(a), states a rapid flow of lethal chemicals shall be injected into the sited IV line. The Department of Corrections does not agree that the administrative regulation should be amended as a result of this comment.

(38)(a) **Comment:** Specify how the execution team shall ensure that all the equipment is functioning properly before and during the execution. What is the test equipment and where are the test documents? There are no procedures utilized to test the reliability and functionality of the equipment that is being used during the process. No procedures in place to assess and evaluate and therefore minimize the risk of equipment malfunctions, human error, and personnel problems or personnel impairments on the day of execution and during the process.

How is the execution team ensuring the equipment is functioning? What is to be done if the equipment is found to be malfunctioning?

(b) **Response:** Regarding equipment used during an execution by lethal injection, the heart monitor is checked to ensure it works properly and contains a sufficient amount of graph paper. Syringes, IV needles, valves and needles are contained in sterile packaging and are therefore not tested prior to use.

(12) **Subject Matter:** Electrocutation Issues

**Commenters:** Kevin Asay, Donald Vish, Rev. Will Warner, Ian Richetti, Linda Dixon Bullock, Leif Halvorsen, Margaret Ivie, Elizabeth Carlyle, Raphael Schweri, Deborah Mauldin, Anton Ditchev, Joseph Hamel and Sarah White – Brooklyn Law School BLS Legal Services Corp., Capital Defender and Federal Habeas Clinic, David Barron- Department of Public Advocacy

(1)(a) **Comment:** 501 KAR 16:340. It was suggested that death by electrocution be abolished because the pain from it is unjust, the cost is high, and maintaining the ability to execute by electrocution is an unnecessary expense.

(b) **Response:** 501 KAR 16:340 was not amended in response to this comment. KRS 431.220 requires that prisoners who received a death sentence prior to March 31, 1998 be able to choose execution by electrocution. The Supreme Court of Kentucky has held that execution by electrocution is not unconstitutionally cruel punishment. *McQueen v. Parker*, 950 S.W.2d 226 (Ky. 1997).

(2)(a) **Comment:** 501 KAR 16:320 and 340. The regulation has no procedures to assess and evaluate and therefore minimize the risk of equipment malfunctions, human error, and personnel problems or personnel impairments on the day of execution and during the process. The proposed regulations do not specify how the electrocution equipment will be tested for reliability, functionality, and to make sure the equipment will generate the proper voltage and amps of electricity. Questions were raised about how often the equipment is tested and how the headgear is tested.

(b) **Response:** 501 KAR 16:320 and 340 were amended to clarify.

(3)(a) **Comment:** 501 KAR 16:001 and 340. It was requested that definitions be added for headgear, electrical connections, and execution equipment. Questions were asked about the material of which the headgear is made and how it fits.

(b) **Response:** 501 KAR 16:001 and 340 were amended to include additional definitions and an explanation concerning electrical connections.

(4)(a) **Comment:** 501 KAR 16:320 and 340. It was indicated that the regulation is unclear whether an IV team is to be used for an electrocution as well. Questions were raised about the qualifications for those that participate in the electrocution, the role of the execution

team in the electrocution process, and the training required for someone to operate an electrocution chair.

(b) **Response:** 501 KAR 16:320 was amended in response to this comment. An IV team is an additional component of the execution team used only in execution by lethal injection.

(5)(a) **Comment:** 501 KAR 16:340. The protocol does not account for what is to occur if the chair malfunctions. Questions were raised concerning how many times an execution is repeated, how it is determined if the chair is malfunctioning, what is done if the equipment malfunctions. It was stated that it is cruel and unusual punishment for the inmate to wait five minutes before receiving another cycle of electricity if the electrocution is not successful and that execution by electrocution should be abolished if the waiting period cannot be avoided.

(b) **Response:** 501 KAR 16:340 was amended in response to this comment. See previous response about abolishing execution by electrocution.

(6)(a) **Comment:** 501 KAR 16:340. The regulation fails to mention that a sponge will be used during an electrocution and that it must be moistened and specify in detail how it will be moistened before use during an execution. Questions were raised about what percentage of solution is used on the sponge, what is the solution, how is it tested, and who makes it.

(b) **Response:** 501 KAR 16:340 was amended to clarify the electrocution process. 501 KAR 16:320 was amended to address testing electrocution equipment.

(7)(a) **Comment:** 501 KAR 16:340. A request was made to include in the regulation directions on how the electrical connections to the head and leg are made. The regulation should state what equipment will be used and how it will be activated. The electrocution regulation fails to specify how the electrocution will be carried out.

(b) **Response:** 501 KAR 16:340 was amended in response to this comment.

(8)(a) **Comment:** 501 KAR 16:340. Questions were raised about the use of 1,600 to 2,400 volts of electricity for a period of 15 seconds and then 240 volts for the remaining 105 seconds of a 2 min cycle, the number of amps used, and the steps taken to ensure that the amount of voltage intended is delivered. The regulation fails to ensure that enough electricity is run through the condemned's body to cause death without causing severe pain and fails to state the amperage that will be used. The range of voltage should be removed from the regulation and a specific amount given. The voltage amount is too low and should be at least 2,000 volts.

(b) **Response:** 501 KAR 16:340 was amended to address voltage. The electrocution equipment was specifically designed for execution by electrocution. The electrocution equipment is designed to deliver 5-10 amps, depending upon the inmate's physique. The amperage is handled by the equipment and the execution team does not adjust or input it. An amperage meter is part of the equipment.

(9)(a) **Comment:** 501 KAR Chapter 16, 501 KAR 16:340. Questions were raised concerning protocols for a botched execution by electrocution, the steps used to handle faulty equipment, what happens if the body burns or if the institution loses power, and whether physical attributes of the condemned must be considered. The regulations should include procedures for determining whether a stay is issued, resuscitation, and the viewing curtain should apply to the execution by electrocution.

(b) **Response:** 501 KAR 16:340 was amended in response to this comment. See also previous comment responses pertaining to determining whether a stay is issued, resuscitation, and the viewing curtain.

(13) **Subject Matter:** Execution Process

**Commenters:** Mark Thornewill; Naomi Bayne; Jojo Farr; Anonymous; Donald Vish; Rev. Will Warner; Charles Wilton; Rev. Dr. Marian McClure Taylor; Rev Patrick Delahanty; Robert Castagna; Carol Tures; Sister Emmanuel Pieper; Phyllis Jenness; Irene Peters; Kathleen Lucas; Catherine Holtkamp; Sarah Taylor; Leslie Lytle; Jack Payden-Travers; James Graham; Beth Wood; Dr. and Mrs. J. Oleskevich; Miriam Thimm Kelle; Rev Stacy Rector; Lynn Greer; Barbara Arnwine; Clarence Pugh; Kristin Parks; Johanna Ryan; Eric Mount; Sister Regina Marie Baker; Sister Lynn Stenken; Rev. Robert B. Slocum; Randall Wheeler; Sean McDonald; Katherine Aronson; Linda Dixon Bullock; Stephanie Faucher – Death Penalty Focus; Amanda Bragg; Margaret Ivie; Elizabeth Carlyle; Sylvia Troescher; Sara Haines; Joetta Venneman; Robert Hensley, DVM; Erin Hoffman Yang; Jessie Kemplin; Viki Elkey; Timothy Arnold – Department of Public Advocacy; Brooke Buchanan; Kelly Schneider; Ralf Ehrlich; Deborah Mauldin; Kimberly Rigsby; Megan McCracken – Eighth Amendment Resource Counsel for the Death Penalty Clinic at Berkeley Law; Jennifer Moreno – Eighth Amendment Fellow and Staff Attorney for the Death Penalty Clinic at Berkeley Law; Michael Kennett, Jason Paget and Katharine Southard – Brooklyn Law School, BLS Legal Services Corp., Capital Defender and Federal Habeas Clinic; Anton Ditchev, Joseph Hamel and Sarah White – Brooklyn Law School BLS Legal Services Corp., Capital Defender and Federal Habeas Clinic; David Barron; Kathleen Hils, Roberta Guthrie

(1)(a) **Comment:** Executions undermine the core of the Department of Corrections and are not a deterrent to crime. What is the purpose of an execution other than to provide “justice” to the victim’s family? Is an execution supposed to give closure to the families of crime victims? Does an execution make a prison less safe and secure for the other inmates and staff due to the lasting psychic damage?

(b) **Response:** The Kentucky General Assembly has approved, in KRS 431.220, the imposition of the death penalty for certain crimes in this Commonwealth and has mandated that all executions shall be carried out by the Department of Corrections. The imposition of capital punishment in Kentucky has been reviewed and upheld as constitutional by the U. S. Supreme Court in *Gregg v Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L. Ed.2d 859 (1976). The Department of Corrections has no authority to repeal or disregard KRS 431.220. Further, KRS 13A.120(2)(i) prohibits the Department of Corrections from promulgating

administrative regulations that modify or vitiate a statute.

(2)(a) **Comment:** Any safety interests of Department of Corrections personnel is outweighed by the personal interest of condemned to be free from a potentially painful procedure and the interests of the public and press to know how executions are performed.

(b) **Response:** The imposition of capital punishment in Kentucky has been reviewed and upheld as constitutional by the U. S. Supreme Court in *Gregg v Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L. Ed.2d 859 (1976). In *Bowling v. Kentucky Department of Corrections*, --- S.W.3d ---, 2009 WL 4117353 (2009), the Supreme Court recently held the protocol for execution should be promulgated in administrative regulations for notice and information to the public. To the extent that the administrative regulations do not address matters of internal management and security, the Department of Corrections' interest in protecting the identity of execution team members outweigh the interest of the public and press.

(3)(a) **Comment:** The administrative regulations should define the "execution building."

(b) **Response:** 501 KAR 16:001 has been amended to include this definition.

(4)(a) **Comment:** What protocol is in place if it turns out that the person executed was innocent?

(b) **Response:** The regulations were not amended in response to this comment. The Department of Corrections does not determine who is executed.

(5)(a) **Comment:** Limiting the condemned person's last words to just two minutes can deprive the victim's family members of closure.

(b) **Response:** The Department of Corrections believes this a reasonable limit. Two minutes is a sufficient amount of time for the condemned person's last words.

(6)(a) **Comment:** The administrative regulations fail to account for a last minute stay.

(b) **Response:** Section 2(13) of the amended 501 KAR 16:330 and Section 1(19) of the amended 501 KAR 16:340 provide that prior to commencing the execution the warden shall ask Counsel assigned by the Cabinet and counsel assigned by the Office of the Attorney General whether any stays, orders, pardons, or commutations of sentence have been issued.

(7)(a) **Comment:** The death chamber should be wired for continuous sound.

(b) **Response:** During an execution, members of the Execution Team will be speaking to one another while performing their duties. To protect the identity and ensure the safety of the members of the Execution Team, the Department of Corrections disagrees that the

death chamber should be wired for continuous sound.

(8)(a) **Comment:** The protocol has no provision to stop the execution of a volunteer, even temporarily, if the volunteer changes his mind after the execution has been initiated. The administrative regulations should provide for access to counsel to assist in seeking stay if a volunteer changes his mind.

(b) **Response:** 501 KAR 16:001 and 300 have been amended in response to this comment.

(9)(a) **Comment:** Who is responsible for designing the protocol? A physician would be in violation of ethical standards if they participated in designing the protocol. If the “panel” stays anonymous it should be noted that no certified physician was involved in the protocol.

(b) **Response:** The design of the protocol and personnel who worked on the protocol is a matter of internal management and is therefore will not be included in the administrative regulations.

(10)(a) **Comment:** The execution process actually begins at the time the inmate under a death penalty is delivered into the custody of the Department of Corrections and no description of the protocol has been released.

(b) **Response:** No amendment was made to the regulations of the Chapter in response to this comment. 501 KAR Chapter 16 is intended to start with receipt of the Execution Order. Corrections Policies and Procedures and institutional procedures apply to the condemned prior to the Execution Order.

(11)(a) **Comment:** The administrative regulation should make clear that a condemned person who has not exhausted his or her appeal and who has decided to resume his or her appeals after previously waiving those will not be executed until those appeals are exhausted.

(b) **Response:** 501 KAR 16:001 and 300 have been amended in response to this comment.

(12)(a) **Comment:** The attorneys should be permitted to have cellular telephones.

(b) **Response:** The administrative regulations will not be amended in response to this comment for institutional security reasons.

(13)(a) **Comment:** The administrative regulations should make clear that an execution will not begin if a motion for a stay of execution is pending in a court but has not yet been ruled on.

(b) **Response:** Pursuant to KRS 431.240(1), the Department of Corrections

must proceed with an execution in the absence of a stay. Prior to beginning the execution the warden shall ask Counsel assigned by the Cabinet and counsel assigned by the Office of the Attorney General whether any stays, orders, pardons, or commutations of sentence have been issued.

(14)(a) **Comment:** The administrative regulations should provide more detail in order to prevent botched executions and provide transparent process. What is the process to correct any errors that occur during the execution? Failure to have specific and adequate regulations for protocol and administration of executions can result in botched executions. How are the duties of the execution team evaluated to see if they were done properly?

(b) **Response:** The administrative regulations will not be amended in response to this comment. Any evaluation or review of the execution process is a matter of internal management.

(15)(a) **Comment:** The time of the executions should be specified in the administrative regulations.

(b) **Response:** No amendment was made to the regulations of the Chapter in response to this comment. KRS 431.240 (1) authorizes the warden to set the time of the execution.

(16)(a) **Comment:** The last days of the condemned person's life should be made comfortable for him and his family. The administrative regulations should include a provision for the condemned having a "last meal" of his or her choice.

(b) **Response:** The Department of Corrections agrees that the last days of the condemned person's life should be made comfortable and they are made as comfortable as possible subject to the safety and security of the Kentucky State Penitentiary. Customarily, the condemned person is provided with a "last meal" of his choice. However, this custom is granted at the discretion of the Warden and is not being included in the administrative regulations.

(17)(a) **Comment:** 501 KAR Chapter 16. A question was raised concerning whether letters are sent to notify the inmate's family of the scheduled execution. Family should be allowed to visit the inmate every day, week, weekend and on the day of execution.

(b) **Response:** No amendment was made to the regulation in response to this comment. The inmate has the ability to write or call any family to give notice of the execution.

(18)(a) **Comment:** The phones in the execution chamber should be checked on the day of the execution to be sure they are in working order. The execution should stop immediately if a phone call comes in to the execution chamber and will not resume until the person who made the call gives authorization to continue. The administrative regulations should specify that a phone will be in the execution chamber and a direct line to the Governor's office, the Kentucky Supreme Court, the federal district courts, the United States Court of Appeals for the 6th circuit and the United States Supreme Court. The attorneys for the condemned person

should be given the direct line phone number for the phones to the execution chamber. The administrative regulations do not provide that counsel for the condemned be asked whether any stay, order, pardon, or commutation has been received immediately before the execution.

(b) **Response:** The administrative regulations are not amended in response to this comment. As indicated in Section 2(13) of the amended 501 KAR 16:330 and Section 1(19) of the amended 501 KAR 16:340, before an execution begins the Warden shall ask Counsel assigned by the Justice and Public Safety Cabinet and Counsel assigned by the Office of the Attorney General whether any stays, orders, pardons, or commutations of sentence have been received. Both counsels are on open telephone lines.

(19)(a) **Comment:** References to timeframes for execution order that do not allow for 10 days notice should be removed since the statutory timeframe is the “fifth Friday following the date of the mandate” and all other executions occur on a date set by the Governor which conceivably would never be fewer than ten days. Any language contemplating that an execution order would be received less than two weeks prior to execution should be removed.

(b) **Response:** The Department of Corrections disagrees that 501 KAR 16:290 should be amended in response to this comment. An execution order can be made by a mandate from the Supreme Court of Kentucky or by an Executive Order or “Death Warrant” from the Governor. KRS 431.218 provides the mandate shall fix the day of execution as the “Fifth Friday following the date of the mandate of the court.” However an Executive Order or Death Warrant issued under KRS 431.240 has no time frames regarding when the execution shall be scheduled.

(14) **Subject Matter:** Post Execution

**Commenters:** Leif Halvorsen; Deborah Mauldin; Gail Koehler; Margaret Mattice; Timothy Shull; Kentucky Coalition to Abolish the Death Penalty; Kathleen Hils; Frank O’Donnell; Rev Patrick Delahanty – Kentucky Coalition to Abolish the Death Penalty; Carol Tures; Catherine Holtkamp; Colleen Cunningham; Zach Everson; John Lydon; Bruce Pearson; Katherine Aronson; Stephanie Faucher – Death Penalty Focus

(1)(a) **Comment:** Provisions should be included to allow the condemned inmate to designate what will happen to his remains after execution. A provision should be included which allows a condemned inmate to request to have his remains cremated if he chooses and what should be done with his remains.

(b) **Response:** KRS 431.270 provides that the body of the condemned shall be delivered to any friend or relative making request for it. If the inmate so desires, he can request that his friend or relative cremate his body. KRS 13A.120 (2) prohibits the Department of Corrections from promulgating administrative regulations that are the same or similar to an existing statute or from modifying a statute.

(2)(a) **Comment:** The media, public, condemned person’s attorney, and family should be allowed to view government and complete medical and autopsy records pertaining to

execution afterwards.

(b) **Response:** All records relating to a condemned person and an execution are subject to the Open Records Act (KRS 61.870 through 61.884). KRS 13A.120 (2) prohibits the Department of Corrections from promulgating administrative regulations that are the same or similar to an existing statute or from modifying a statute.

(3)(a) **Comment:** The administrative regulation should include that personal property cannot be picked up until after the execution due to possibility of a stay of execution being issued. It should be included as the well that the personal property can be mailed if he so chooses at the expense of the prison.

(b) **Response:** Section 3(1)(a) and 9(3) of 501 KAR 16:290 take into consideration that a stay may be granted and provide that the condemned person's property be picked up *after* the execution. Some items of the condemned's personal property may not be suitable for mailing due to the possibility of damage.

(4)(a) **Comment:** Why does the family have to wait up to 3 days to receive the inmate's property?

(b) **Response:** The administrative regulation does not require that the condemned person's family wait three days to receive his property. Section 8(3) provides that the penitentiary shall have three days, a reasonable amount of time, in which to *call* the person designated by the condemned to pick up his personal property. This is in the event that the condemned person has not notified the designated person to pick up his property. A person who has been notified by the condemned prior to the execution that he has been designated to pick up the personal property may contact the penitentiary at any time after the execution to make arrangements to pick up the personal property.

(5)(a) **Comment:** Language should be included regarding securing the inmates funds in his personal inmate account and where the money in his account will be sent. A receipt for the funds should be sent with a copy of all expenditures from the last monthly statement to date of withdrawal showing balance and total. A copy should also be given to the condemned prior to the execution so he may confirm the amount and designate who should receive the money.

(b) **Response:** This comment is covered by existing institutional practices which allow the condemned to send funds in his inmate account to whomever he chooses prior to execution. The inmate will be sent a copy of his inmate account upon request.

(15) **Subject Matter:** Pre-Execution Procedure Issues

**Commenters:** Donald Vish, Rev. Dr. Marian McClure Taylor, Rev. Patrick Delahanty – Kentucky Coalition to Abolish the Death Penalty, Robert Castagna, Doug Griggs, Randall Wheeler, Elizabeth Carlyle, Timothy Arnold – Department of Public Advocacy, Brooke

Buchanan, Deborah Mauldin, Kimberly Rigsby- Ohio Public Offender, David Barron – Department of Public Advocacy- Kathleen Hills

(1)(a) **Comment:** 501 KAR Chapter 16. The execution process actually begins at the time the inmate under a death penalty is delivered into the custody of the Department of Corrections and no description of the protocol has been released. A question was raised concerning why the regulations do not include the inmate's entire stay on death row from the time they are received at the penitentiary.

(b) **Response:** No amendment was made to the regulations of the Chapter in response to this comment. 501 KAR Chapter 16 is intended to start with receipt of the Execution Order. Kentucky State Penitentiary policies incorporated by reference in 501 KAR Chapter 6 apply to the condemned prior to the Execution Order.

(2)(a) **Comment:** 501 KAR 16:290. There are no provisions regarding inmates that cannot read or write or who will be designated to make their last requests. The regulation should be amended to include what will be done if condemned person is unable to designate in writing. The inmate's attorney should be present while completing the paperwork.

(b) **Response:** 501 KAR 16:290 was amended in response to this comment.

(3)(a) **Comment:** 501 KAR Chapter 16. A question was raised about why the time of the execution not specified in the regulations. Does not include the time of execution implicates public interest, e.g. cost and demonstrators.

(b) **Response:** No amendment was made to the regulations of the Chapter in response to this comment. KRS 431.240 (1) authorizes the warden to set the time of the execution.

(4)(a) **Comment:** 501 KAR Chapter 16. The regulations should make clear that a condemned person who has not exhausted his appeal and who has decided to resume his appeals, after previously waiving those, will not be executed until those appeals are exhausted. The regulations should provide for a volunteer's access to counsel to assist in seeking stay if volunteer changes his mind. If a volunteer changes his mind, he should be allowed to ask for a temporary stay to consult attorney. The protocol provides no way for a person who has volunteered for execution to designate an attorney to visit less than 10 days before the execution if the person decides to pursue legal action or needs advice.

(b) **Response:** 501 KAR 16:290 was amended in response to this comment. 501 KAR 16:001 was also amended to define volunteer.

(5)(a) **Comment:** 501 KAR 16:290. A question was raised concerning the time frame (ten days prior to the execution) for inmates to make various designations as indicated in the regulation and what happens if the inmate does not meet this deadline.

(b) **Response:** 501 KAR 16:290 was amended to make clear that the warden has discretion to allow designations or changes in designations outside the time set in the

regulation. The times were set to allow penitentiary staff to begin taking necessary steps in advance of the execution.

(6)(a) **Comment:** 501 KAR 16:290. A comment was made expressing reservations about the limitations on clothing and personal items and a reference was given to Washington state's regulation with language to allow religious items and other personal property.

(b) **Response:** 501 KAR 16:290 was not amended in response to this comment. The reduction in personal property is permissive and does not require that the personal items be limited only to the list in the regulations. The warden makes decisions on a case-by-case basis to determine if property should be reduced to the level indicated in the regulation.

(7)(a) **Comment:** 501 KAR Chapter 16. A question was raised about why the state does not allow time and access to the condemned person's finals hours.

(b) **Response:** 501 KAR 16:300 was amended to permit clergy and attorney visits on the day of the execution.

(16) **Subject Matter:** Pre-execution - Medical Issues

**Commenters:** Mark Thornewill, Kathleen Hils, Frank O'Donnell, Rev. Will Warner, Carl Wedekind, Rev. Patrick Delahanty – Kentucky Coalition to Abolish the Death Penalty, Ernest Coverson, Colleen Cunningham, Eric Mount, Katherine Aronson, Margaret Ivie, Elizabeth Carlyle, Sylvia Troescher, Timothy Arnold – Department of Public Advocacy, Brooke Buchanan, Deborah Mauldin, David Barron – Department of Public Advocacy

(1)(a) **Comment:** Concerns and questions were expressed about a doctor being required to be present. Requiring a physician to be nearby violates the spirit of the American Medical Association's guidelines, as well as the Hippocratic Oath. Physicians would be in violation of ethical standards if they participate. If the "panel" stays anonymous it should be noted that no certified physician was involved in the protocol. Requiring a physician to be present forces professional misconduct. Physicians should not be put in a situation that causes misconduct. A question was raised about how the Department of Corrections selects the physician who certifies death. A question was raised about where the physician is located prior to, during and after the execution. A question was raised about when and where the physician needs to certify the cause of death. A question was raised about whether the physician participates in any other part of the execution or stay of execution process. A question was raised about who designed the protocol. Requiring a physician to be nearby for an execution is contrary to his purpose. Physicians have no legitimate business on the scaffold. A question was raised about why both a coroner and a physician are at an execution.

(b) **Response:** 501 KAR 16:310, 330 and 340 were not amended regarding this comment. KRS 431.250 authorizes the physician of the institution and representatives of the Department of Corrections designated by the commissioner to be present at the execution. KRS 431.220 (3) states that no physician shall be involved in the conduct of an execution except to

certify cause of death provided that the condemned is declared dead by another person. A physician is in the building to provide medical assistance if needed to stabilize the condemned in the event of a stay. The coroner is present to declare death. The design of the protocol and personnel who worked on the protocol is a matter of internal management and is therefore will not be included in the administrative regulations.

(2)(a) **Comment:** A question was raised concerning what is the policy on health, healthcare, and health follow-up for the condemned.

(b) **Response:** 501 KAR 16:310 was not amended in response to this comment.

(3)(a) **Comment:** 501 KAR 16:001 and 310. The protocol does not explain what the nurse and mental health doctor are looking for during their physical exam of the inmate. A question was raised concerning the purpose of the nurse checks. A question was raised about why repeated or daily exams and extensive notes are necessary for documenting the condemned person's change in physical or mental condition. A question was raised about the significance of the changed person's condition and what impact that the condemned person's condition might have on the proceeding. The regulation does not state specifically what the daily nurse evaluations and observations involve and what use will be made of the information. The regulation does not define what constitutes a "visit" or "check." The regulation does not define what constitutes a "special note." A question was raised about what the physician is required to cover. A question was raised about what specific medical professional handles the physical. A question was raised about the type of physical exam and the purpose for it. A question was raised about what constitutes a change in a person's medical or psychiatric condition. For all interviews, observations, evaluations and examinations performed by any medical or mental health personnel or any of their designees regarding the condemned's status, the regulation should specify what is being performed, when and why it is being performed, what the professional will be looking for, what will be documented, what happens if an unusual result is discovered, and to whom the results will be reported. Define medical professional and explain the qualifications of a medical professional. Define "designated medical professional" because it is too vague. Pre-execution medical actions portion of the regulations are overly vague.

(b) **Response:** 501 KAR 16:001 and 310 were amended to include additional definitions and provide clarification. The purpose of monitoring is to determine if the condemned persons' physical and mental health remain stable.

(4)(a) **Comment:** 501 KAR 16:310. A question was raised concerning whether the records of the nurse or mental health doctor's exam, the autopsy, and the executed inmate's complete medical record are made available to the condemned's family or attorney after the execution.

(b) **Response:** 501 KAR 16:310 was not amended in response to this comment. Nonexempt public records maintained by state government agencies are available for inspection pursuant to the Open Records Act. Some records are exempt under the Act and other statutes.

(5)(a) **Comment:** 501 KAR 16:001 and 310. The regulation should establish a procedure for defense attorneys to obtain medical and mental health records in the final days before execution. A question was raised about what is included in the medical records.

(b) **Response:** The administrative regulations were not amended in response to this comment. With the inmate's authorization, defense attorneys may request records through normal open records procedures. The medical and mental health records are entered into the electronic medical record for the condemned. In response to other comments 501 KAR 16:001 was amended to define special notes which are included in the medical records.

(17) **Subject Matter:** Government Documents

**Commenter:** Kathleen Hils

(1)(a) **Comment:** 501 KAR Chapter 16. Questions were raised concerning defense attorneys, the public and the media not being allowed to view the government records after the execution.

(b) **Response:** The Department of Corrections has maintained and provided any records that were created regarding the execution process that do not relate to security measures. The Open Records Act (KRS 61.870 through 61.884) does not require an administrative agency to create records in response to an open records request.

(18) **Subject Matter:** Mental Health Issues

**Commenters:** Rev. Will Warner, Rev. Patrick Delahanty – Kentucky Coalition to Abolish the Death Penalty, Miriam Thimm Kelle, Rev. Robert B. Slocum – National Alliance on Mental Illness, Randall Wheeler, Elizabeth Carlyle, Susan Jackson Balliet- Attorney At Law, Erin Hoffman Yang – Attorney at Law, Timothy Arnold – Department of Public Advocacy, Deborah Mauldin, Kimberly Rigsby – Ohio Public Defender, Laura Zaccone, Jason Paget and Michael Kennett – Brooklyn Law School BLS Legal Services Corp., Capital Defender and Federal Habeas Clinic, David Barron – Department of Public Advocacy

(1)(a) **Comment:** 501 KAR Chapter 16, 501 KAR 16:310. The provisions for evaluation and observation of the condemned are vague and ambiguous. The regulations should have continuous psychiatric monitoring for the five days prior to execution. The regulations do not ensure that a condemned person is competent to be executed. The regulations should be revised to make sure steps are taken to ensure that an “insane” or “incompetent” person is not executed and specify what steps are taken to prevent this. There is nothing in the regulations addressing mental illness. Someone should not be executed without 4 micron MRI. For all interviews, observations, evaluations and examinations performed by any medical or mental health personnel or any of their designees regarding the condemned's status, the regulation should specify what is being performed, when and why it is being performed, what the professional will be looking for, what will be documented, what happens if an unusual result is discovered, and to whom the results will be reported. The following questions were raised: What

is done with the mental health evaluation? Should a person's mental illness prevent their execution? Can only some varieties of mental illness prevent an execution? What is the purpose of the psychiatric interview and evaluation? What standards apply? Who will review the records? What use will be made of this clinical information? What type of mental health professional will make the observations? What types of observations and evaluations will be noted? What is the purpose of those observations and evaluations and what use will be made of them? What type of psychiatric interview? How will the results of the psychiatric exam be used? What constitutes a change in a person's psychiatric condition? What is done for a psychiatric interview and evaluation? What constitutes an observation by a mental health professional? What is the purpose of these observations and the evaluation? What kind of observations are to be noted in the medical record? What use will be made of the observations and evaluations?

(b) **Response:** 501 KAR 16:310 was amended in response to this comment. The purpose of the monitoring is to observe and document the condemned person's mental health and ensure compliance with KRS 431.242. The amount of mental health monitoring provided is adequate. KRS 431.2135 establishes a legal procedure for determining whether a condemned inmate is insane. KRS 431.240(2) only prohibits execution of an inmate who is insane as defined by KRS 431.213.

(2)(a) **Comment:** 501 KAR Chapter 16, 501 KAR 16:310. The regulations should be modified to include regular mental health evaluations during the entire time an inmate is on death row due to the negative affect it has on a person's mental capacity.

(b) **Response:** No amendment was made to the administrative regulations in response to this comment. 501 KAR Chapter 16 is intended to start with receipt of the Execution Order. Kentucky State Penitentiary policies incorporated by reference in 501 KAR Chapter 6 apply to the condemned prior to the Execution Order and require regular psychological reviews of death row inmates.

(3)(a) **Comment:** 501 KAR Chapter 16, 501 KAR 16:290. The regulations require the condemned person to do things, which may be an issue with mentally ill inmates.

(b) **Response:** 501 KAR 16:290 was not amended because the issues raised are addressed by existing laws.

(4)(a) **Comment:** 501 KAR Chapter 16, 501 KAR 16:310. The protocol does not require that counsel be notified immediately of any change in the medical or psychiatric condition of the condemned person during the two weeks before the execution. The regulation does not provide for the psychiatrist to report to authorities or the condemned person's attorney. The warden should be required to notify the condemned's attorney of any information the warden receives indicating that the condemned is not competent to be executed. The regulation does not provide for the mental health professional to report to authorities or the condemned person's attorney observations suggesting incompetency to be executed. The regulation does not require the warden to act on information received from mental health and medical professions regarding the inmate's condition. The regulation should require the warden to notify the Governor, the Attorney General and the attorney for the inmate. The regulations do not contain

training of the warden and other personnel on what to do should something be found during any examination of the condemned. The regulation should be revised to make clear that all medical personnel shall be given all information and documents obtained under the proposed regulation, 501 KAR 16:310, to determine if the condemned is competent to be executed and should be changed to provide the condemned's attorney with any medical documentation of the condemned. Why is the evaluation sent to the Warden and not the condemned's attorney? Why aren't the reports given to the inmate's attorney? Why is the warden not notified of mental health concerns? What does the Warden do with the information or is he required to do anything with the information received?

(b) **Response:** 501 KAR 16:310 was amended. The Department of Corrections does not have authority to release medical or mental health information concerning the condemned person to his attorney without an authorization or an appropriate court order.

(5)(a) **Comment:** 501 KAR Chapter 16, 501 KAR 16:310. The regulation should state a mental health professional on behalf of the inmate and they should have full access and be allowed to bring in documentation. A mental health professional may be retained by the inmate's counsel for evaluations up to the day of the execution. Expert witnesses should be permitted as well as mental health professionals who may evaluate the inmate. The Commonwealth must ensure that the condemned has access to mental health experts. The regulations should state regular contact visits by mental health professionals and to allow them to bring into the prison any documents or tools necessary to make a fair and reliable evaluation. The regulations should provide for a full mental health evaluation by an independent expert on the day of the execution. The regulations should include any mental health professional retained by the condemned will be given access to him or her for purposes of conducting a mental health evaluation, including a contact visit without the condemned being shackled, and in a private room on the days leading up to the execution and the day of the execution. What access does the condemned have to mental health assessments by qualified personnel?

(b) **Response:** 501 KAR 16:300 was amended to allow the warden discretion under special circumstances to alter visitation restrictions.

(6)(a) **Comment:** 501 KAR Chapter 16, 501 KAR 16:310. The department should conduct a study of the mental and physical health effects on state workers that are likely to be affected by the procedures.

(b) **Response:** 501 KAR Chapter 16 was not amended in response to this comment. Issues concerning state workers are internal management.

(7)(a) **Comment:** 501 KAR Chapter 16, 501 KAR 16:001 and 310. The term mental health professional should be defined and should require a licensed psychologist. The regulation does contain the qualifications of a mental health professional.

(b) **Response:** 501 KAR 16:310 was amended to substitute the term licensed psychologist for mental health professional.

(8)(a) **Comment:** The regulation does not provide for the nurse to report to

authorities or condemned person's attorney, observations suggesting incompetency to be executed. A question was raised concerning why the evaluation is sent to the warden and not the condemned's attorney. A question was raised concerning what the warden does with the information. The regulation does not require the warden to act on information received from mental health and medical professionals regarding the inmate's condition. The regulation should require the warden to notify the Governor, the Attorney General and the attorney for the inmate. The regulation does not address training of the warden and other personnel on what to do should something be found during any examination of the condemned. The regulation should be revised to make clear that all medical personnel shall be given all information and documents obtained under the proposed regulation (501 KAR 16:310) to determine if the condemned is competent to be executed and should be changed to provide the condemned's attorney with any medical documentation of the condemned.

(b) **Response:** 501 KAR 16:310 was amended in response to this comment. The medical and mental health special notes are contained in the electronic medical record for the condemned and are reviewed by the designated medical professional to address this issue. Other medical personnel also have access to the electronic medical record. The information is also reported to the warden who notifies the commissioner. In turn, the commissioner notifies the Governor or the court. With the inmate's authorization, defense attorneys may request records through normal open records procedures.

Summary of Statement of Consideration and  
Action Taken by Promulgating Administrative Body

The public hearing on these administrative regulations was held and written comments were received. The Kentucky Department of Corrections responded to the comments and have amended 501 KAR 16:001, 16:290, 16:300, 16:310, 16:320, 16:330 and 16:340 based on the comments received.

**501 KAR 16:001. Definitions for 501 KAR Chapter 16**

Page 1  
Section 1(5)  
Line 20

After "KRS 196.010(3) and 197.010(3).", insert the following:

(6) "Designated medical professional" means the physician designated by the Department to monitor the clinical activities, assessments and examinations involving the condemned person during the fourteen days prior to execution.

Page 2  
Section 1(6)  
Line 1

Insert "(7)"

Delete “(6)”

Page 2  
Section 1(7)  
Line 3

Insert “(8)”  
Delete “(7)”

Page 2  
Section 1(7)  
Line 3

After “KRS 431.220(1)(b).”, insert the following:

(9) “Electrocution equipment” means the device at the penitentiary that was specifically manufactured to cause death by electrocution.

(10) “Execution building” means the dedicated structure at the Kentucky State Penitentiary containing the execution chamber.

Page 2  
Section 1(8)  
Line 4

Insert “(11)”  
Delete “(8)”

Page 2  
Section 1(9)  
Line 6

Insert “(12)”  
Delete “(9)”

Page 2  
Section 1(10)  
Line 11

Insert “(13)”  
Delete “(10)”

Page 2  
Section 1(10)  
Line 12

After “if execution is by lethal injection.”, insert the following:

(14) “Headgear” means the leather device used to hold the electrode and sponge to the condemned person’s head.

Page 2  
Section 1(11)  
Line 13

Insert “(15)”  
Delete “(11)”

Page 2  
Section 1(12)  
Line 15

Insert “(16)”  
Delete “(12)”

Page 2  
Section 1(13)  
Line 16

Insert “(17)”.  
Delete “(13).  
After “Media”, insert “representative”.  
Delete “representatives”.  
After “means”, insert “one of”

Page 2  
Section 1(14)  
Line 18

Insert “(18)”  
Delete “(14)”

Page 2  
Section 1(15)  
Line 20

Insert “(19)”  
Delete “(15)”  
After “Kentucky State Penitentiary.”, insert the following:  
(20) “Personal visitor” means a visitor who is listed on the condemned person’s visitation list or other visitor who is not the:  
(a) media  
(b) minister of record; or  
(c) clergy who is providing religious services to the condemned person.

(21) “Security risk” means as determined in the Warden’s discretion a potential threat to:

(a) the security of:

1. the institution;
2. an inmate;
3. a Department employee; or
4. any other person; or

(b) the order of the institution.

(22) “Special notes” mean specifically designated entries made in the electronic medical record that contain information concerning the condemned person from the period of time stated in 501 KAR 16:310(1)(1).

(23) “Testing device” means the device that was specifically manufactured to simulate an execution for purposes of testing the functioning of the electrocution equipment.

Page 2  
Section 1(16)  
Line 21

Insert “(24)”

Delete “(16)”

After “in accordance with KRS 431.250.”, insert the following:

(25) “Volunteer” means a death sentenced inmate who requests to be executed before he has completed the available legal challenges to his conviction or sentence.

(26)

Page 2  
Section 1(17)  
Line 23

Delete “(17)”

### **501 KAR 16:290. Preliminary and Post Execution Procedures Concerning Condemned Person.**

Page 1  
Section 1(3)  
Line 20

After “31, 1998.”, insert the following:

(4) For any designation required to be made in writing in this administrative regulation, if the condemned person cannot see, read, or write sufficiently to complete his designation, then a staff person at the penitentiary shall:

- (a) Ask the condemned person to state his designation;

- (b) Write the designation stated by the condemned person;
- (c) Read the designation as written to the condemned person; and
- (d) Ask the condemned person to make his mark on the document.

Page 2  
Section 2(2)  
Line 6

After “time that the Warden reads the execution order.”, insert the following:

(3) The warden may allow the condemned person additional time to comply with subsection (1) of this section or to change a previous designation, if a request is made by the condemned person.

Page 2  
Section 3(3)  
Line 17

After “(3)”, insert the following:

The warden may allow the condemned person additional time to comply with subsection (1) of this Section or to change a previous designation, if a request is made by the condemned person.

(4)

Page 2  
Section 4(1)  
Line 20

After “order has been issued”, insert a comma.

Page 2  
Section 4(1)  
Line 21

After “designate in”, insert “writing his”

Delete the following:

writing:

- (a) His attorney of record; and
- (b) His

Page 3  
Section 4(2)  
Line 4

After “execution order.”, insert the following:

(3) The warden may allow the condemned person additional time to comply with subsection (1) of this Section or to change a previous designation, if a request is made by the condemned person.

Page 3  
Section 5  
Line 6

After “CPP 17.1”, insert “CPP 14.2,”

Page 3  
Section 5(13)  
Line 21

After “wash cloth.”, insert the following:

Section 6. Limitations on Condemned Person’s Clothing, State-issued Items, and Personal Property for Females.

(1) Notwithstanding 501 KAR 6:020, CPP 17.1, CPP 14.2, 501 KAR 6:040, KSP 17-01-01, 17-01-03 and 17-01-04, the Warden may limit the condemned person’s clothing, state-issued items, and personal property for a female to the items in Section 5 and the following:

- (a) One bra;
- (b) Sanitary napkins; and
- (c) Tampons.

(2) The bra shall be white and if it contains stays or underwire, they shall be plastic.

(3) The supply of sanitary napkins and tampons shall be in a sufficient quantity to allow the individual to maintain an acceptable level of personal hygiene.

Section 7. Transfer of Female Condemned Person.

(1) If the condemned person is female, she shall be transferred to the penitentiary for execution. The date of the transfer shall be determined by the Warden.

Page 3  
Section 5  
Line 22

After “Section”, insert “8.”  
Delete “5.”

Page 4  
Section 6  
Line 4

After “Section”, insert “9.”  
Delete “6.”

Page 4  
Section 6(1)  
Line 5

After “made in accordance”, insert “with”

**501 KAR 16:300. Execution Procedures Concerning Witnesses, Visitors, and Demonstrators.**

Page 2  
Section 3  
Line 19

After “Section 3. Media”, insert the following:  
“Representative”.

Page 3  
Section 3(3)(b)  
Line 18

After “the three (3)”, insert the following:  
“representatives”.  
Delete “witnesses”.

Page 3  
Section 3(4)  
Line 20

Delete the following:  
“(4) The Department may establish a media staging area where scheduled press briefings may be held prior to the execution. Reporters may submit written questions at each press briefing for response at a subsequent briefing, except for the final briefing.”

Page 3  
Section 3(5)  
Line 23

Insert “(4)”.  
Delete “(5)”.  
Insert “After media representatives to the execution are separated from other media in preparation for transfer to the witness room, media representatives”  
Delete “Media witnesses to the execution”.

Page 4  
Section 3(5)(a)

Line 1

After “pencil and paper”, insert the following:  
“which shall be”.

Page 4

Section 3(5)(b)

Line 3

After “(b) Audio or video recording devices”, delete the following:  
“on the grounds of the penitentiary where the execution is held.”.

Page 4

Section 5

Line 5

After “Section”, insert “4.”.  
Delete “5.”.

Page 4

Section 5(2)

Line 9

After “(2)”, delete the following:  
“Prior to the day of execution:  
(a) Attorneys and paralegals may seek daily visits;  
(b) Personal visitors who are listed on the condemned person’s visitation list may seek daily visits;  
(c) The minister of record may seek visits daily on weekdays; and  
(d) Members of the news media may seek visits daily on weekdays.  
(3)”.

Page 4

Section 5(4)

Line 17

Insert “(3)”.  
Delete “(4)”.  
After “The”, insert “Warden”.  
Delete “penitentiary”

Page 4

Section 5(4)

Line 17

After “the location of the visit.”, insert the following:

“(4) For any visit allowed in this regulation on the day of execution, the condemned person shall not have more than one (1) visitor at a time.”.

Page 4  
Section 5(5)  
Line 18

Delete the following:

“(5) An attorney, paralegal, member of the clergy, or member of the news media shall not bring any item into the penitentiary, unless prior approval is given by the Warden. A personal visitor shall not bring any item into the penitentiary.

(6) Visitors shall be limited to four (4) at a time.”.

Page 4  
Section 5(7)  
Line 22

Insert “(5)”.  
Delete “(7)”.

Page 5  
Section 5(8)  
Line 1

Insert “(6)”.  
Delete “(8)”.

Page 5  
Section 5(9)  
Line 3

Insert “(7)”.  
Delete “(9)”.

Page 5  
Section 5(9)  
Line 3

After “visitors before and after the visit.”, insert the following:

“(8) Media Visitors.

(a) Prior to the day of the execution, a member of the media:

1. Shall not bring any item into the penitentiary, unless prior approval is given by the Warden;

2. Shall make any request to bring items into the penitentiary at the time of the call to request an appointment to visit; and

3. May request daily visits on weekdays.

(b) On the day of the execution:

1. The Department may establish a media:

a. Staging area where media shall be directed to gather before entering into the penitentiary; and

b. Assembly room where scheduled press briefings may be held prior to the execution. Reporters may submit written questions at each press briefing for response at a subsequent briefing, except for the final briefing.

2. Media shall not be allowed visits.

(c) Seven days prior to the execution, the Department Communication Director may issue a press advisory stating the date and approximate time of the pending execution.

(9) Clergy Visitors and Minister of Record Visits.

(a) A member of the clergy or the minister of record may request to bring religious items into the penitentiary by making the request to the penitentiary chaplain. The chaplain shall notify the Warden of the request. The Warden shall:

1. Give due consideration to any request to bring religious items into the penitentiary; and

2. Not deny a religious item needed for an end-of-life ceremony unless it poses a significant operational problem or security risk.

(b) Prior to the day of execution, a member of the clergy or the minister of record may request daily visits.

(c) On the day of the execution:

1. Clergy visits shall not be allowed, except for the minister of record;

2. The minister of record shall call for an appointment for the visit prior to the day of execution;

3. The minister of record may visit for thirty (30) minutes up to three (3) hours before the execution;

4. The visit shall not be a contact visit, unless a religious ceremony, sacrament, or rite accepted by the religion being practiced by the condemned person requires contact to be accomplished; and

5. If a contact visit is necessary pursuant to subparagraph 4 of this paragraph, then the need for a contact visit shall be stated in the call for the appointment.

(10) Personal Visitors.

(a) Prior to the day of execution:

1. A personal visitor who is listed on the condemned person's visitation list may request daily visits; and

2. Personal visitors shall be limited to four (4) at a time.

(b) A personal visitor shall not bring any item into the penitentiary.

(c) On the day of execution, a personal visitor shall not be allowed a visit.

(11) Attorneys Defending the Condemned Person and Staff Employed by the Defense Attorneys' Office.

(a) An attorney defending the condemned person or staff employed by the defense attorneys' office:

1. May bring into the penitentiary:

a. Pens;

b. Pads of paper without metal; and

c. Legal documents for a visit with the condemned person.

The legal documents and other items shall be searched, but shall not be read by staff performing the search;

(b) Prior to the day of execution, an attorney defending the condemned person or staff employed by the defense attorneys' office:

1. Shall be allowed a visit daily between 7:30 a.m. and 2:30 p.m.;

2. May request daily visits; and

3. May request that visits be contact visits.

(c) On the day of execution, an attorney defending the condemned person:

1. Shall be allowed a visit between 7:30 a.m. and 2:30 p.m.

2. May request additional visits until four (4) hours prior to the execution.

(d) The Warden shall notify the condemned person of all requests from an attorney defending the condemned person or staff employed by the defense attorneys' office for a phone call from the condemned person.

(e) Visits shall be noncontact, unless there is a need for the condemned person to sign a document. If a document needs to be signed, the visitor shall be allowed to obtain the signature of the condemned person in a location designated by the Warden.”.

Page 5  
Section 5(10)  
Line 4

Delete the following:

“(10) On the day of execution:

(a) The attorney of record may call for an appointment for any visit or phone call;

(b) The minister of record shall may call for an appointment for any visit he seeks;

(c) Personal visitors and media shall not be allowed visits;

(d) Items shall not be brought into the penitentiary, except for legal documents by the attorney of record;

(e) The condemned person shall not have more than one (1) visitor at a time; and

(f) Visits shall be noncontact.”.

Page 5  
Section 6  
Line 12

After “Section”, insert “5.”.  
Delete “6.”.

Page 5  
Section 6(4)  
Line 22

After “management of the penitentiary.”, insert the following:  
“(5) In extenuating circumstances, the Warden shall have the authority in his discretion to alter limitations on visitors in Section 4 of this administrative regulation.”.

Page 5  
Section 7  
Line 23

After “Section”, insert “6.”.  
Delete “7.”.

Page 6  
Section 7(2)  
Line 2

After “(2) A press”, insert “advisory”.  
Delete “release”.

### **501 KAR 16:310. Pre-execution Medical Actions.**

Page 2  
Section 1(1)(b)  
Line 1

Insert “nurse”  
Delete “Nurse”

Page 2  
Section 1(1)(b)  
Line 2

After “of this subsection.”, insert the following:  
The nurse notes shall state the presence or absence of signs of physical or emotional distress observed.

Page 2  
Section 1(1)(c)

Line 3

After “(c) A”, insert the following:

licensed psychologist

Delete “mental health professional”

Page 2

Section 1(1)(d)

Line 9

After “medical professional”, delete the following:

“or his designee”

Page 2

Section 1(1)(e)

Line 12

After “(e) A”, insert the following:

psychiatrist

Delete “medical professional”

Page 2

Section 1(2)(a)

Line 16

After “(a) A”, insert the following:

doctor or advanced registered nurse practitioner

Delete “medical professional”

Page 3

Section 1(3)

Line 1

After “medical professional”, delete the following:

“or his designee”

Page 3

Section 1(3)1.

Line 2

Insert (a) before “Personally”, delete “1.”

Renumber remaining subsection accordingly.

Page 3

Section 1(4)

Line 9

Insert the following:

Section 2. Pregnancy Testing for Female Condemned Persons

- (1) If the condemned person is female, a pregnancy test shall be administered.
- (2) If the execution order is received at least fourteen days prior to the scheduled date of execution, a pregnancy test shall be administered:
  - (a) Fourteen days prior to the scheduled date of execution; and
  - (b) Seven days prior to the scheduled date of execution.
- (3) If the execution order is received less than fourteen days prior to the scheduled date of execution, a pregnancy test shall be administered as soon as practicable. A physician shall determine if a second pregnancy test is feasible given the date the execution order is received and when the initial pregnancy test is taken.
- (4) If a pregnancy test is positive, then:
  - . The warden shall:
    - (a) Medical staff shall notify the Warden of the positive test;
    - (b) The Warden shall notify the Commissioner of the positive test;
    - and
    - (c) The Commissioner shall notify the Governor's Office or court issuing the mandate.

Section 3. Insanity Issues.

- (1) If the Warden receives information from medical or mental health staff that the condemned person may be insane as defined in KRS 431.213(2), the Warden shall inform the designated medical professional.
- (2) The designated medical professional shall determine if the information is:
  - (a) The opinion of the psychiatrist; or
  - (b) If the information is sufficient to indicate that an additional psychiatric evaluation needs to be performed on the condemned person.
- (3) The designated medical professional shall order an additional psychiatric evaluation if he determines one is needed.
- (4) The designated medical professional shall notify the Warden and the Commissioner if a Department psychiatric evaluation determines that the condemned person may be insane as defined in KRS 431.213(2).
- (5) If a Department psychiatric evaluation determines that the condemned person may be insane as defined in KRS 431.213(2):
  - (a) The Warden shall immediately notify the Commissioner; and
  - (b) The Commissioner shall notify the Governor's Office or court issuing the mandate.

**501 KAR 16:320.Execution Team Qualification.**

Line 13

After “Section 1.”, insert the following:

Selection of Execution Team.

(1) The Warden of the Kentucky State Penitentiary shall be a member of the execution team by virtue of his official position.

(2) The Warden shall designate a Deputy Warden to be a member of the execution team.

(3) All other members of the execution team shall not be required to serve as a member of the execution team without their consent.

(4) An execution team member shall read and understand the execution procedures. A review of the execution procedures shall be conducted by the Warden annually.

Section 2.

Page 1

Section 1(1)

Line 14

After “(1)”, insert the following:

At least two (2) members of the execution team shall be designated as the IV Team for an execution by lethal injection. An IV team shall not be part of the execution team for an execution by electrocution.

(2) A member of the IV team shall be a:

Delete the following:

“The following people may serve on the IV team:”

Page 1

Section 1(2)

Line 19

Insert “(3) A member”

Delete “(2) Members”.

After “IV Team”, insert the following:

shall:

(a) Have

Delete “shall have”.

Line 20

After “in”, insert the following:

his specialty;

(b) Remain certified in his specialty or profession; and

(c) Fulfill all continuing education requirements in his specialty or profession.

Delete “their specialty.”

Page 2

Section 1(3)

Line 1

Insert “(4)”.

Delete “(3)”.

After “in an execution,” insert “a”

Delete “the”.

Line 2

After “two (2)”, insert the following:

execution practices receiving step-by-step instructions from an existing IV Team member.

(5) The Warden shall review annually the training and current certification, as appropriate, of each IV Team member to ensure compliance with the required qualifications and training.

Delete “practices.”

Page 2

Section 1(4)

Lines 3-5

Delete Section 1(4) in its entirety.

Page 2

Section 2

Line 6

After “Section”, insert “3.”.

Delete “2.”.

Page 2

Section 2(2)(b)

Line 11

After “IVs into a”, insert “person who serves voluntarily”

Delete “volunteer”

Page 2

Section 2(3)

Line 12

After “execution by”, insert the following:

electrocution:

(a) The

Delete “electrocution, the”

After “practice the”, insert “electrocution”.

Delete the second “execution”.

Line 13

After “calendar”, insert the following:

year; and

(b) During each practice of execution by electrocution, the execution team shall:

1. Visually inspect the:

a. Headgear and electrode;

b. Strap and electrode for the leg;

c. Leather straps on the chair; and

d. Cables to the electrocution equipment; and

2. Use a testing device placed in the chair and connected to the cables of the electrocution equipment to simulate an electrocution.

(4) The Warden shall maintain a record of all execution team training documenting the:

(a) Date of practice;

(b) Type of execution practiced; and

(c) Names of the participants.

Delete “year.”.

#### **501 KAR 16:330.Lethal Injection Protocol.**

Page 1

Section 1

Line 13

After “Section 1.”, insert the following:

Procurement, Storage, and Accountability of Chemicals.

(1) Upon receipt of an Execution Order, the Warden shall check the supply of chemicals and the expiration dates of the chemicals on hand. If it is determined that additional chemicals are needed, the Warden shall place an order to obtain the necessary chemicals for an execution by lethal injection.

(2) The Warden shall transport the chemicals from the point of procurement and place them in a secured area of the penitentiary in locked containers.

Pancuronium bromide shall be stored separately from the other chemicals in its own locked container, which shall be refrigerated at a temperature of at least 40 degrees Fahrenheit. The Warden shall maintain control to the keys to the secured areas and containers at all times. A duplicate set of keys shall not be made.

(3) A log shall be maintained in the storage containers which shall record:

(a) New supplies of chemicals received and added to inventory;

(b) Chemicals removed for use;

(c) Disposal of chemicals due to expiration; and

(d) Any other reason that a chemical is removed or deducted from inventory.

Section 2.

Page 1

Section 1(1)(a)

Line 15

After “(a)”, insert “If male, his”.

Delete “His”.

Line 16

Delete the second “the”.

Page 1

Section 1(1)(b)

Line 18

After “twenty-four (24) hours prior to the”, insert the following:

execution to determine possible locations of the IV sites.

(2) On the day of execution the Warden shall provide to the IV Team sufficient amounts of each chemical listed in Section 3 of this administrative regulation to prepare two (2) complete sets of syringes. One set shall serve as the primary set of syringes shall be the primary set. The other set of syringes shall be a back-up set.

(3) At the Execution Building, each chemical shall be prepared in accordance with the manufacturer’s instructions and drawn into the two sets of syringes by one (1) member of the IV Team designated by the Warden. The other member of the IV Team shall observe preparation of the chemicals and verify that the instructions and procedures have been carried out correctly.

(4) Any syringes that are loaded with lethal injection chemicals that are not used during the execution shall:

(a) Not be used;

(b) Be returned to the Warden; and

(c) Be destroyed and documented in the log maintained in accordance with Section 1(3) of this administrative regulation.

(5) Any unused chemicals that were not mixed in preparation of the lethal injection shall be:

(a) Returned to the Warden;

(b) Locked in the storage container; and

(c) Documented in the log maintained in accordance with Section 1(3) of this administrative regulation.

(6)

Delete “execution.”

Page 1

Section 1(2)

Line 19

Delete “(2)”.

Page 1

Section 1(3)

Line 21

Insert “(7)”.  
Delete “(3)”.

Page 2  
Section 1(4)  
Line 3

Insert “(8)”.  
Delete “(4)”.

Page 2  
Section 1(4)(c)  
Line 7

After “(c) Ankles;”, insert “or”.

Page 2  
Section 1(4)(d)  
Line 8

After “(d)”, insert “Feet.”  
Delete the following:  
“Feet; or  
(e) Neck.”

Page 2  
Section 1(5)  
Line 10

Insert “(9)”.  
Delete “(5)”.

Page 2  
Section 1(6)  
Line 12

Insert “(10)”.  
Delete “(6)”.  
After “If the IV team cannot secure”, insert “two (2) IV”.  
Delete “one (1) or more”.

Page 2  
Section 1(7)  
Line 14

Insert “(11)”.  
Delete “(7)”.

Page 2  
Section 1(8)  
Line 15

Insert “(12)”.  
Delete “(8)”.

Page 2  
Section 1(9)  
Line 19

Insert “(13)”.  
Delete “(9)”.  
After “assigned by the”, insert “Office of the”.

Page 2  
Section 1(10)  
Line 21

Insert “(14)”.  
Delete “(10)”.

Page 2  
Section 1(11)  
Line 22

Insert “(15)”.  
Delete “(11)”.

Page 3  
Section 1(12)  
Line 1

Insert “(16)”.  
Delete “(12)”.

Page 3  
Section 1(13)  
Line 4

Insert “(17)”.  
Delete “(13)”.

Page 3  
Section 2  
Line 5

After “Section”, insert “3.”.  
Delete “2.”.

Page 3  
Section 2(1)  
Line 6

After “(1)”, insert the following:  
At the Warden’s order to proceed, a  
Delete “A”.

Page 3  
Section 2(2)  
Line 14

After “(2) If it appears to the Warden”, insert the following:  
“based on his visual inspection”

Page 3  
Section 2(2)  
Line 16

After “flow of Sodium Thiopental”, insert the following:  
“and the other chemicals listed in Subsection (1) of this Section.  
(3) If it appears to the Warden based on his visual inspection that the condemned  
person is unconscious after the injection of Sodium Thiopental, the Warden shall  
order the designated team member to continue the injections of the other  
chemicals listed in Subsection (1) of this Section through the primary IV.

Page 3  
Section 2(3)  
Line 17

Delete “(3)”.  
Insert “(4)”.

Page 3  
Section 2(4)  
Line 19

Insert “(5)”.  
Delete “(4)”.

Page 3  
Section 2(5)  
Line 23

Insert “(6)”.  
Delete “(5)”.

Page 4  
Section 2(6)  
Line 3

Insert “(7)”.  
Delete “(6)”.

Page 4  
Section 2(7)  
Line 7

Insert “(8)”.  
Delete “(7)”.

Page 4  
Section 2(7)  
Line 8

After “occurred.”, insert the following:

(9) During the execution by lethal injection the Warden and Deputy Warden shall watch the primary IV site for failure, leakage, the catheter coming out of a vein, or any other problem. In the event that an IV fails, leaks, if the catheter comes out of the vein, or any other problem arises the execution team shall be instructed to switch to the backup IV.

Page 4  
Section 3  
Line 9

After “Section”, insert “4.”.  
Delete “3.”.

Page 4  
Section 4  
Line 14

After “Section”, insert “5. Stabilization”.  
Delete “4. Stabalization”.

Page 4  
Section 4(2)  
Line 19

After “(2) If”, insert the following:  
at anytime during the execution process

Page 4  
Section 4(2)(b)  
Line 23

After “of this section.”, insert the following:

Section 6. Volunteer.

(1) If a condemned person who is a volunteer, tells Department staff that he does not wish to continue with the execution process, the staff shall tell the Warden.

(2) If the execution is in process, the execution team shall stop the execution.

(3) The Warden shall allow the condemned person to contact his attorney.

(4) The Warden shall notify the Commissioner.

(5) The Commissioner shall notify the Governor’s Office or Court issuing the mandate.

**501 KAR 16:340.Electrocution Protocol.**

Page 1  
Section 1(1)  
Line 14

After “(1)”, insert the following:

The electrocution equipment shall be designed to deliver approximately five (5) to ten (10) amps depending upon the condemned person’s physique at the designed voltage.

(2) The electrocution equipment shall be checked within forty-eight (48) hours of the time scheduled for an execution by electrocution.

(3) A sodium chloride solution shall be made by a member of the execution team within five (5) hours prior to the time scheduled for an execution by electrocution.

(4) Natural sea sponges for the head and leg electrodes shall be prepared by soaking them in the sodium chloride solution.

(5) If the penitentiary does not have power at the time of the execution, the generator for the execution building shall be started.

(6)

After “shaved on the day of”, delete “the”.

Page 1  
Section 1(2)  
Line 15

Insert “(7)”.  
Delete “(2)”.

Page 1  
Section 1(3)  
Line 17

Insert “(8)”.  
Delete “(3)”.

Page 1  
Section 1(4)  
Line 18

Insert “(9)”.  
Delete “(4)”.

Page 1  
Section 1(5)  
Line 19

Insert “(10).”  
Delete “(5)”.

Page 2  
Section 1(6)  
Line 1

Insert “(11)”.  
Delete “(6)”.

Page 2  
Section 1(7)  
Line 2

Insert “(12)”.  
Delete “(7)”.

Page 2  
Section 1(8)  
Line 3

Insert “(13)”.  
Delete “(8)”.

Page 2

Section 1(8)(e)  
Line 8

After “(e)”, insert the following:

Attach the cables from the electrocution equipment to the head and leg electrodes with the nuts sufficiently tightened to ensure a firm connection;

Delete the following:

“Make electrical connections to the condemned person’s head and leg;”

Page 2  
Section 1(8)(f)  
Line 9

After “any salt water”, insert “released from the sponges”.

Page 2  
Section 1(9)  
Line 11

Insert “(14)”.  
Delete “(9)”.

Page 2  
Section 1(10)  
Line 12

Insert “(15)”.  
Delete “(10)”.

Page 2  
Section 1(11)  
Line 13

Insert “(16)”.  
Delete “(11)”.

Page 2  
Section 1(12)  
Line 14

Insert “(17)”.  
Delete “(12)”.

Page 2  
Section 1(13)  
Line 17

Insert “(18)”.  
Delete “(13)”.

Page 2  
Section 1(14)  
Line 18

Insert “(19)”.  
Delete “(14)”.  
After “assigned by the”, insert “Office of the”.

Page 3  
Section 2(2)(a)  
Line 1

After “(a)”, insert “Approximately 2,400”.  
Delete “1600-2400”.

Page 3  
Section 2(2)(b)  
Line 2

After “(b)”, insert “Approximately”.

Page 3  
Section 2(3)  
Line 3

After “(3)”, insert the following:  
If the Warden sees evidence of a malfunction, he shall press the stop button on the electrocution equipment to end the cycle.  
(4)

Page 3  
Section 2(4)  
Line 7

Insert “(5)”.  
Delete “(4)”.

Page 3  
Section 2(5)  
Line 11

Insert “(6)”.  
Delete “(5)”.  
After “the execution,” insert the following:  
shall be stopped. The Commissioner shall contact the Governor’s Office and request that the execution be suspended.

Delete the following:  
steps in subsections (3) and (4) of this section shall be repeated until death.

Page 3  
Section 2(6)  
Line 13  
Insert “(7)”.  
Delete “(6)”.

Page 3  
Section 4  
Line 21  
Delete “Stabalization”.  
In lieu thereof, insert “Stabilization”.

Page 4  
Section 4(2)  
Line 4  
After “If”, insert the following:  
at anytime during the execution process

Page 4  
Section 4(2)(b)  
Line 8  
After “section.”, insert the following:  
Section 5. Volunteer.  
(1) If a condemned person who is a volunteer, tells Department staff that he does not wish to continue with the execution process, the staff shall tell the Warden.  
(2) If the execution is in process, the execution team shall stop the execution.  
(3) The Warden shall allow the condemned person to contact his attorney.  
(4) The Warden shall notify the Commissioner.  
(5) The Commissioner shall contact the Governor’s Office and request that the execution be suspended.