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 SUPREME COURT

COMMONWEALTH OF KENTUCKY
 SUPREME COURT
 CASE NO. _____

FRANKLIN CIRCUIT COURT NO. 07-CI-01523

ORAL ARGUMENT REQUESTED

COMMONWEALTH OF KENTUCKY
 by and through
 JACK CONWAY, ATTORNEY GENERAL

PETITIONER

V. **MOTION FOR EMERGENCY RELIEF**

HONORABLE ROGER L. CRITTENDEN, SPECIAL JUDGE
 FRANKLIN CIRCUIT COURT

RESPONDENT

and

MARCO ALLEN CHAPMAN;
 KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY;
 ERNIE LEWIS, PUBLIC ADVOCATE;
 JOHN PALOMBI, ASSISTANT PUBLIC ADVOCATE; AND
 ALL OTHER EMPLOYEES AND AGENTS THEREOF

RESPONDENTS/
 REAL PARTIES IN INTEREST

** ** ** ** **

Comes the Petitioner, the Commonwealth of Kentucky by and through Jack Conway, Attorney General, by counsel, and hereby moves this Court for Emergency Relief. In support of its motion, the Commonwealth states as follows:

The Commonwealth has filed in the above-styled action a Petition for Writ of Mandamus and/or Prohibition and/or Supersedeas to order that Respondent Judge dismiss the case below as moot, to enjoin the Respondent Judge from enforcing his order for a competency evaluation of Marco Allen Chapman, and to issue an order superceding the Respondent Judge's order for competency evaluation. The Petitioner moves this Court to grant emergency relief to

prevent action on the Judge's order prior to an adjudication of the issues presented in the Petition.

The Petitioner will suffer immediate and irreparable injury if the Respondent Judge's order is enforced before the writ is decided. On October 27, 2008, the Department of Public Advocacy asked the Chapman Court for a stay of execution. Copies of the motions for stay are attached. Obviously, the hope of the Respondents is that their hand-picked evaluator will opine that Marco Allen Chapman is incompetent to discharge his counsel. It is no secret that certain experts are more defense-oriented than others. Common sense tells us that the Respondents, in submitting the list of hand-picked evaluators to Franklin Circuit Court, selected evaluators who would be more sympathetic to their cause. It is readily apparent that counsel are trying to exhaust state remedies before taking the preordained evaluation of their hand-picked evaluator to federal court for a stay of execution request. An order which does not take into account this Court's holding in Chapman and which designates an evaluator supplied by Respondents is incorrect. This Court must stop the Respondents' course of conduct. This Court must grant the Commonwealth's petition for writ.

It is highly doubtful that Marco Allen Chapman would have agreed to another evaluation had he known or suspected that Respondents would seek a stay of execution, against his wishes. Of course, Chapman is free to refuse to meet with the appointed evaluator.

The Commonwealth has a right to rely on this Court's final ruling that Mr. Chapman is competent to discharge his counsel. This Court has issued a mandate with the day of execution thereon. Mr. Chapman and Respondents are not entitled to another evaluation, as this Court's ruling is law of his case. Furthermore, if Mr. Chapman seeks to have his sentence carried out, *there is no legal requirement whatsoever that he has to undergo any further*

evaluations other than that which is required if KRS Chapter 431 is invoked. Should Chapman change his mind and seek to avoid his sentence at this time, Franklin Circuit Court has no jurisdiction to rule on **competency for execution**. KRS 431.240(2) states that an insane person cannot be executed. If a capital inmate wants to claim insanity, he may do so as provided for in KRS 431.2135. Any further competency evaluations must be held in the county of confinement or the county where the judgment was rendered, neither of which is Franklin Circuit Court. Furthermore, two evaluations are required, not one as has been ordered here.

The Commonwealth believes the writ is necessary and proper. The people of Kentucky have an interest in this matter of great concern. They have spoken through the legislature that they believe the death penalty is appropriate. The public also has a strong interest in seeing that both the dictates of the legislature and the mandates of this Court are carried out. Mr. Chapman himself wishes that his sentence no longer be delayed. A fourth competency evaluation on an issue that has been finally decided is manufactured delay which does not meet the requirements of KRS 431.2135 even if Chapman wanted to claim incompetence/insanity. The Commonwealth has moved to intervene in the case below, but no decision has issued and thus the Commonwealth has no standing to take an appeal from any decision which might be rendered by the lower court.

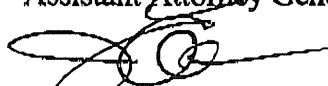
Thus, for the reasons stated herein, the Commonwealth requests this Honorable Court grant intermediate relief preventing Franklin Circuit Court from enforcing its order for an unauthorized evaluation, and from relitigating an issue already reviewed and made final by this Court, until a fair and adequate determination may be made on the merits of the Commonwealth's Petition.

Respectfully submitted,

JACK CONWAY
Attorney General of Kentucky



DAVID W. BARR
Assistant Attorney General



JEANNE ANDERSON
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Office of Criminal Appeals
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1024 Capital Center Drive
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(502) 696-5342
Counsel for Commonwealth

NOTICE

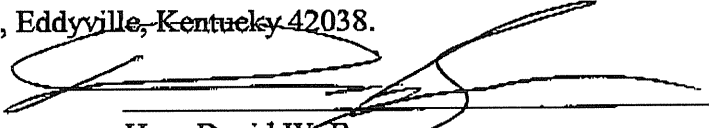
NOTICE is hereby given that the Commonwealth of Kentucky by and through Jack Conway, Attorney General will file the foregoing MOTION FOR EMERGENCY RELIEF this 28th day of October, 2008, to be considered at the pleasure of the Court.



Hon. David W. Barr

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION FOR EMERGENCY RELIEF and attached Order were this 28th day of October, 2008 mailed to Hon. Roger L. Crittenden, Special Judge, Franklin Circuit Court, P.O. Box 678, Frankfort, Kentucky 40601-0678; Hon. Mary Ann Palmer, General Counsel, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601; and, Hon. John Palombi, 201 Monroe Street, Suite 407, Montgomery, Alabama 36117; and, faxed and mailed to Marco Allen Chapman, #137809, Kentucky State Penitentiary, PO Box 5128, Eddyville, Kentucky 42038.


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ORAL ARGUMENT REQUESTED

COMMONWEALTH OF KENTUCKY
 by and through
 JACK CONWAY, ATTORNEY GENERAL

PETITIONER

V.

PETITION FOR
WRIT OF MANDAMUS
AND/OR
WRIT OF PROHIBITION
AND/OR
WRIT OF SUPERSEDEAS

HONORABLE ROGER L. CRITTENDEN, SPECIAL JUDGE
 FRANKLIN CIRCUIT COURT

RESPONDENT

and

MARCO ALLEN CHAPMAN;
 KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY;
 ERNIE LEWIS, PUBLIC ADVOCATE;
 JOHN PALOMBI, ASSISTANT PUBLIC ADVOCATE; AND
 ALL OTHER EMPLOYEES AND AGENTS THEREOF

RESPONDENTS/
 REAL PARTIES IN INTEREST

** ** ** ** **

Comes the Petitioner, Commonwealth of Kentucky, by and through Jack Conway, Attorney General, by counsel, and pursuant to Kentucky Constitution Section 110(2)(a), petitions this court to issue a writ of mandamus and/or prohibition and/or supersedeas directing Respondent, Hon. Roger L Crittenden, Special Judge, Franklin Circuit Court to: (1) dismiss the underlying action; (2) prohibit Respondent, Hon. Roger L Crittenden, Special Judge, Franklin

Circuit Court from enforcing his order requiring a competency evaluation on the question of whether Marco Allen Chapman is competent to discharge his attorneys; and/or, (3) to issue an order superceding the order of Hon. Roger L. Crittenden, Special Judge, Franklin Circuit Court, requiring a competency evaluation on the question of whether Marco Allen Chapman is competent to discharge his attorneys. In support of this petition, the Commonwealth submits the attached Memorandum in Support.

Respectfully submitted,

JACK CONWAY

Attorney General of Kentucky

DAVID W. BARR

Assistant Attorney General

JEANNE ANDERSON

Assistant Attorney General

Office of Criminal Appeals

Office of the Attorney General

Frankfort, Kentucky 40601-8204

(502) 696-5342

Counsel for Commonwealth

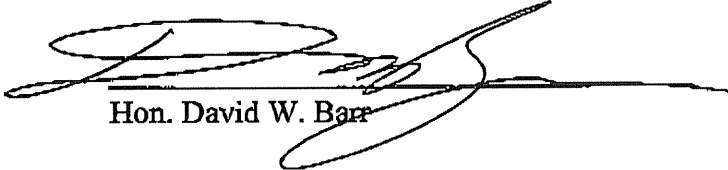
NOTICE

NOTICE is hereby given that the Commonwealth of Kentucky by and through Jack Conway, Attorney General will file the foregoing PETITION FOR WRIT PURSUANT TO SECTION 110(2)(a) OF THE CONSTITUTION OF KENTUCKY this 28th day of October, 2008, to be considered at the pleasure of the Court.

Hon. David W. Barr

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION AND/OR WRIT OF SUPERSEDEAS was this 28 th day of October, 2008 mailed to Hon. Roger L. Crittenden, Special Judge, Franklin Circuit Court, P.O. Box 678, Frankfort, Kentucky 40601-0678; Hon. Mary Ann Palmer, General Counsel, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601; and, Hon. John Palombi, 201 Monroe Street, Suite 407, Montgomery, Alabama 36117; and, faxed and mailed to Marco Allen Chapman, #137809, Kentucky State Penitentiary, PO Box 5128, Eddyville, Kentucky 42038.



Hon. David W. Barr

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. _____

FRANKLIN CIRCUIT COURT NO. 07-CI-01523

ORAL ARGUMENT REQUESTED

COMMONWEALTH OF KENTUCKY
by and through
JACK CONWAY, ATTORNEY GENERAL

PETITIONER

V.

**MEMORANDUM IN SUPPORT OF
PETITION FOR WRIT PURSUANT
TO SECTION 110(2)(a) OF THE
CONSTITUTION OF KENTUCKY**

HONORABLE ROGER L. CRITTENDEN, SPECIAL JUDGE,
FRANKLIN CIRCUIT COURT

RESPONDENT

and

MARCO ALLEN CHAPMAN;
KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY;
ERNE LEWIS, PUBLIC ADVOCATE;
JOHN PALOMBI, ASST. PUBLIC ADVOCATE; AND,
ALL OTHER EMPLOYEES AND AGENTS THEREOF

RESPONDENTS/
REAL PARTIES IN INTEREST

Comes the Commonwealth of Kentucky by and through Jack Conway, Attorney General, by counsel, and pursuant to Section 110(2)(a) of the Constitution of Kentucky, moves this Court for a writ of mandamus and/or prohibition and/or supersedeas. In support of its Petition, the Commonwealth states as follows:

THE UNDERLYING ACTION

The Commonwealth seeks a writ, or writs, against Hon. Roger L. Crittenden, Special Judge, Franklin Circuit Court, in the case of Marco Allen Chapman v. Kentucky

Department of Public Advocacy, et. al. Case No. 07-CI-01523. Hon. Roger L. Crittenden has ordered that Marco Allen Chapman be evaluated and that his competency to discharge his counsel be determined anew.

The Commonwealth notes that the above-named Marco Allen Chapman is the same Marco Allen Chapman in Chapman v. Commonwealth, ___ S.W.3d ___ (Ky. 2008). Chapman was a direct appeal of a death sentence. In Chapman, this Court found that Marco Allen Chapman is competent to discharge his counsel. Chapman's conviction and death sentence were affirmed. Chapman's execution has been set for November 21, 2008 per Mandate of this Court. A copy of this Court's Opinion in Chapman is attached. _

On October 27, 2008, Respondents asked this Court for a stay of execution in Chapman. Copies of the motions for stay are attached.

STATEMENT OF JURISDICTION

This petition for writ is brought pursuant to Section 110(2)(a) of the Constitution of Kentucky, which provides:

The Supreme Court shall have appellate jurisdiction only, except it shall have power to issue all writs necessary in aid of its appellate jurisdiction, or the complete determination of any cause, or as may be required to exercise the control of the Court of Justice.

Ordinarily, a petition for writ of prohibition and/or mandamus is brought in the Court of Appeals. SCR 1.030(3). Jurisdiction for writs of supersedeas is not specified in the various rules of court.

However, this is not to say that the Court of Appeals is the exclusive avenue for seeking such remedy [writ of prohibition]. As we recognized in Russell County, Kentucky Hosp. Dist. Health Facilities Corp. v. Ephraim McDowell Health, Inc., 152 S.W.3d 230, 235 (Ky. 2004), the Supreme Court is explicitly vested with the authority to entertain writs of prohibition under both the Kentucky Constitution and the Civil Rules. Ky. Const. § 110(2)(a) vests this Court with the authority to

issue all writs necessary to aid our appellate jurisdiction or to aid in the 'complete determination of any cause,' or as may be otherwise required 'to exercise control of the Court of Justice.'

Hilbert v. Seay, 2008 WL 3890410 (August 21, 2008). CR 76.28(4). A copy of Hilbert is attached.

Hilbert concerned death penalty litigation. Thus, this Court has held that writs may be sought in the Supreme Court in matters concerning death penalty litigation. This writ concerns death penalty litigation. Plus, any stay of execution which may be issued by Franklin Circuit Court would be automatically reviewed by this Court. Therefore, the Supreme Court of Kentucky is the proper forum for this writ.

The Commonwealth realizes that the Court exercises its power to issue writs very sparingly and then only as a matter of necessity to shield from injustice, against which there was no other adequate remedy and to preserve the orderly administration of the laws. Ohio River Contract Co. v. Gordon, 170 Ky. 412, 186 S.W. 178 (Ky.App. 1916). The Commonwealth has the greatest respect for Special Judge Crittenden and does not bring this Petition for Writ lightly. The Commonwealth brings this writ because it has no other remedy to protect its interests.

THE STANDARD FOR ISSUING A WRIT.

"A writ of prohibition *may* be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted." (Emphasis original.) Hoskins v. Miracle, 150 S.W.3d 1, 10 (Ky. 2004).

The great and irreparable harm requirement may be put aside in "certain special cases . . . [where] a substantial miscarriage of justice will result if the lower court is proceeding erroneously, and correction of the error is necessary and appropriate in the interest of orderly judicial administration. It may be observed that in such a situation the court is recognizing that if it fails to act the administration of justice generally will suffer the great and irreparable injury." Bender v. Eaton, 343 S.W.2d 799, 801 (Ky. 1961).

The case at hand is such a "certain special case" and a "rare exception." Grange Mut. Ins. Co. v. Trude, 151 S.W.3d 803, 808 (Ky. 2004). A writ is necessary as a "shield from injustice" in order to "to preserve the orderly administration of the laws." Bender, supra, at 801.

Marco Allen Chapman filed a Petition for Declaration of Rights in Franklin Circuit Court. The Circuit court has jurisdiction to hear such Petitions. However, for reasons stated later herein, Franklin Circuit Court is acting erroneously by conducting a *de novo* determination of an issue already settled by this Court—Marco Allen Chapman's competency to discharge his counsel. The Commonwealth has moved to intervene in Franklin Circuit Court, but it is not yet a party. The motion to intervene will not be heard until November 7, 2008.

The Commonwealth has no remedy by appeal or otherwise. And, should Franklin Circuit Court conduct a competency hearing to decide anew and *de novo* Marco Allen Chapman's competency to discharge his counsel, great injustice and irreparable injury would result. The rights of the Commonwealth and Marco Allen Chapman were finally decided in Chapman. Any collateral attack upon Chapman, even one which proves ultimately unsuccessful, constitutes a great injustice and irreparable injury.

A writ “may be used by a court in a discretionary manner and only when the situation is so exceptional that there is no other adequate remedy at law to prevent a miscarriage of justice.” Graham v. Mills, 694 S.W.2d 698, 700 (Ky. 1985), citing Shumaker v. Paxson, 613 S.W.2d 130 (Ky. 1981). See also, Warecke v. Richardson, 468 S.W.2d 795 (Ky. 1971) and Pace v. Wolfbarger, 420 S.W.2d 561 (Ky. 1967). “This careful approach is necessary to prevent short-circuiting normal appeal procedure and to limit so far as possible interference with the proper and efficient operation of our circuit and other courts.” Bender v. Eaton, 343 S.W.2d 799, 800 (Ky. 1961).

As noted on the previous page, the Commonwealth has moved to intervene and Respondent DPA has obtained an order to proceed with the competency testing of Marco Allen Chapman. Franklin Circuit Court will not hear the Commonwealth’s motion to intervene and motion to reconsider competency testing until November 7, 2008—most likely well after the competency evaluation has been completed. Since the Commonwealth is not yet a party, it cannot appeal the Franklin Circuit Court’s order for further competency testing. The Commonwealth’s only remedy to prevent this unnecessary competency evaluation, and to protect the final Opinion of this Court in Chapman, is to obtain a Writ from this Court. The Commonwealth has a vested legal interest in this Court’s Final decision in Chapman and any *de novo*, new action taken against that interest constitutes “great injustice” and “irreparable injury.”

STATEMENT OF FACTS

A. Chapman v. Commonwealth.

On October 23, 2008, this Court made Final its Opinion in Marco Allen Chapman v. Commonwealth of Kentucky, ___ S.W.3d ___ (Ky. 2008), No. 2005-SC-000070-MR. That same day, this Court issued a Mandate ordering that Marco Allen Chapman be executed on

November 21, 2008. On October 27, 2008, Respondents asked this Court for a stay of execution.

The issue of Marco Allen Chapman's competency was fully litigated in Chapman. The Court considered the issues of whether Marco Allen Chapman was competent to discharge/waive his counsel, stand trial, plead guilty, waive mitigation evidence and jury sentencing, and seek the death penalty.

The Chapman Court observed that Chapman had been subjected to three (3) pre-trial competency evaluations, and, each time, he had been found competent in all regards. The Chapman Court held that: "[t]he standard for determining a defendant's competency to waive counsel is the same standard used to determine if a defendant is competent to stand trial." Slip Opinion, at p. 12. (A copy of the Court's Slip Opinion is attached.). The Chapman Court found that the trial court was not clearly erroneous in finding Marco Allen Chapman competent to waive/discharge his counsel and to stand trial. Slip Opinion at p. 11 - 15. Thus, Marco Allen Chapman is competent to discharge his counsel, and this finding is binding upon all lower courts of the Commonwealth. The issue is final and may not be re-litigated in any court of this Commonwealth. It is proper for this Court to issue any writ upon any lower court which seeks to re-litigate Marco Allen Chapman's competency to discharge his counsel.

Applying the heightened standard of competency required by Rees v. Peyton, 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966), the Chapman Court also found that Marco Allen Chapman was competent to plead guilty, waive mitigation evidence and jury sentencing, and seek the death penalty. Slip Opinion at p. 32 - 38.

B. Chapman v. Kentucky Dept. of Public Advocacy, et. al

On September 20, 2007, while Chapman was pending before this Court, Marco Allen Chapman filed in Franklin Circuit Court a "Petition (hereinafter "Petition") for the

Declaration of Rights to Prohibit the State, the Department of Public Advocacy, the Public Advocate Ernie Lewis and Any Other of its Employees or Agents From Pursuing Appeals on Behalf of the Petitioner Against his Will.” Marco Allen Chapman v. Kentucky Department of Public Advocacy; Hon. Ernie Lewis, Public Advocate, in his official and private capacity; Hon. David Barron, Assistant Public Advocate, in his official and private capacity; and, All other employees and agents, thereof, Case No. 07-CI-01523. The Commonwealth was not named as a party to this action, and, until recently, had no knowledge of this action. This case was assigned to Hon Roger L. Crittenden, Special Judge, Franklin Circuit Court.

In his Petition, Marco Allen Chapman asked Franklin Circuit Court to issue:

[an Order] prohibiting the DPA, Ernie Lewis, David Barron or any of their employees or agents from filing undesired appeals or other legal actions in the petitioner’s name but in further of their own agenda rather than the competent decisions of the petitioner.

A copy of the Petition is attached hereto. Respondents argued that Marco Allen Chapman was not competent to discharge the respondents as counsel. The respondents asked that Franklin Circuit Court have Marco Allen Chapman evaluated to ascertain his competency to discharge counsel.

On August 5, 2008, Franklin Circuit Court ordered:

The Defendants’ motion for a competency evaluation prior to a hearing is granted. The Commonwealth shall have the defendant evaluated as to his decision-making competency and the report of the evaluation by qualified medical personnel shall be supplied to the Court.

A copy of the Order of August 5, 2008 is attached. The Order was served by the Franklin Circuit Court Clerk upon the Attorney General.

On October 8, 2008, respondent, Hon. John Palombi (previously substituted for Hon. David Barron) filed an “Agreed Motion for Modification and Clarification of Order.”

Respondent Palombi asked that the Order of Franklin Circuit Court of August 5, 2008 be modified by deleting "any reference to involvement by the Attorney General's Office in this matter." Respondent also asked that the competency evaluation be conducted by "an independent evaluator chosen from a list provided to the Court." This list of hired-gun evaluators was compiled and provided to the Franklin Circuit Court by the respondent(s), John Palombi. A copy of the Agreed Motion, without attachments, is attached.

On October 10, 2008, Franklin Circuit Court entered an Order granting the "Agreed Motion" of October 8, 2008. Franklin Circuit Court ordered that Marco Allen Chapman be subjected to a fourth (4th) competency evaluation, and the Franklin Circuit Court ordered that the evaluation be "arranged or coordinated . . . by [respondent] Mr. Palombi." Franklin Circuit Court also ordered that the competency evaluation be conducted by Dr. Michael Ray Harris. A copy of the Order of Franklin Circuit Court of October 10, 2008 is attached.

On October 17, 2008, the Commonwealth of Kentucky by and through Jack Conway, Attorney General, filed its "Motion to Intervene," its "Intervening Complaint," and its "Motion to Reconsider Order of October 10, 2008 and Motion to Hold in Abeyance." Copies of each document are attached. A hearing on the motion to intervene was held on Thursday, October 23, 2008.

At the October 23, 2008 hearing, the Commonwealth informed Franklin Circuit Court that the Opinion of this Court in Chapman, supra, was final. The Commonwealth also informed Franklin Circuit Court that a Mandate for execution had been issued. The Commonwealth argued that Marco Allen Chapman's competency to waive counsel had been decided by the Supreme Court of Kentucky in Chapman and that its Final Opinion was controlling and binding upon Franklin Circuit Court. The Commonwealth also argued that it

should be allowed to intervene so that it could protect from collateral attack this Court's Opinion in Chapman.

Also at the October 23, 2008 hearing, Hon. Roger L. Crittenden, Special Judge, Franklin Circuit Court, asked Marco Allen Chapman for his position on the Commonwealth's motion to intervene. Chapman objected to the intervention. Chapman stated that he was aware that he would have to be evaluated prior to his execution and that he did not wish to delay this evaluation. It appears Marco Allen Chapman is mistaken, or has been made mistaken, as to the requirement of further evaluation. An evaluation of his competency to discharge his counsel is not required for his execution to proceed. Rather, only his competency to be executed will be evaluated. This evaluation of his competency for execution is governed by KRS Chapter 431.

Also at the October 23, 2008 hearing, Respondents argued that they had not had sufficient time to file a response to the Commonwealth's motion to intervene. Franklin Circuit Court agreed and ordered, on the record, that a hearing on the Commonwealth's Motion to Intervene be held more than two weeks later, on Friday, November 7, 2008 at 2:00 p.m. The Commonwealth is still not a party to the Petition. **Franklin Circuit Court also held, on the record, that the (fourth) competency evaluation be conducted during the interim per its prior order.** Of course, by the time the November 7, 2008 hearing is held, the preordained competency evaluation will most likely be completed, assuming Marco Allen Chapman cooperates with the same.

ARGUMENT

Franklin Circuit Court Special Judge Roger L. Crittenden has not followed this Court's holding in Chapman that Marco Allen Chapman is competent to discharge his counsel. Franklin Circuit Court Special Judge Roger L. Crittenden has ordered a fourth competency

evaluation of Chapman and is prepared to decide the issue anew and *de novo*. This Court's Opinion in Chapman is final; it is binding; it is controlling. Marco Allen Chapman is competent to discharge his counsel. He did not need to file a lawsuit to discharge them. Once Marco Allen Chapman communicates the termination to respondents, they are ethically obligated to withdraw. SCR 3.130(1.16)(1)(3).

This is not to say that Marco Allen Chapman's competency cannot be revisited prior to his execution. A condemned prisoner's competency to be executed can be challenged on grounds of insanity. A prisoner is competent to be executed if he is able to understand that he is about to be executed and if he understands the reason for his execution. Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986). If the condemned can make a requisite preliminary showing of insanity/incompetency under the Ford standard, the condemned prisoner himself may request a hearing before the criminal trial court to determine his competency. Panetti v. Quarterman, ___ U.S. ___, 127 S.Ct. 2842, 2848, 168 L.Ed.2d 662 (2007).

But, even if Chapman wished to challenge his competency for execution, Franklin Circuit Court lacks jurisdiction to conduct a Panetti hearing. Per KRS 431.2135(1), any challenge brought by a condemned inmate claiming incompetency for purposes of execution must be brought either in the county in which he was convicted or the county where he is imprisoned. Chapman was convicted in Boone County, and he is imprisoned in Lyons County. Franklin Circuit Court lacks jurisdiction to hear any challenge to Chapman's competency to be executed.

Obviously, the hope of the Respondents is that their hand-picked evaluator will opine that Marco Allen Chapman is incompetent to discharge his counsel. It is no secret that some experts are more defense-oriented than others. Common sense tells us that the

Respondents, in submitting the list of hand-picked evaluators to Franklin Circuit Court, selected evaluators who would be more sympathetic to their cause. It is readily apparent that counsel are trying to exhaust state remedies before taking the preordained evaluation of their hand-picked evaluator to federal court for a stay of execution request. By not following this Court's holding in Chapman and by picking their own evaluator, the Department of Public Advocacy is renewing their efforts to prevent Marco Chapman's own request that his sentence be carried out. This Court must stop this inevitable course of conduct. This Court must grant the Commonwealth's petition for writ.

It is highly doubtful that Marco Allen Chapman would have agreed to another evaluation had he known or suspected that Respondents would seek a stay of execution, against his wishes. Of course, Chapman is free to refuse to meet with the appointed evaluator.

A writ is necessary to assure compliance with this Court's opinion in Chapman and to exercise control over an inferior court. A writ is necessary to prevent Franklin Circuit Court Special Judge Roger L. Crittenden from acting incorrectly. A writ is necessary because the Commonwealth has no other remedy by appeal or otherwise. The Commonwealth has a vested interest in the Court's FINAL decision in Chapman and any *de novo*, new action taken against that interest constitutes "irreparable injury." A writ is necessary and appropriate herein in the interest of orderly judicial administration and to prevent a substantial miscarriage of justice. A writ is proper and must be issued.

WHEREFORE, the Commonwealth prays as follows:

1. That this Court issue a writ of mandamus directing Hon. Roger L. Crittenden, Special Judge, Franklin Circuit to dismiss as moot the case of Marco Allen Chapman v. Commonwealth of Kentucky Department of Public Advocacy, et. al., Franklin Circuit Court, No.

07-CI-01523, the issues therein having already been previously decided by this Court.

2. That this Court issue a writ of prohibition prohibiting Hon. Roger L. Crittenden, Special Judge, Franklin Circuit from ordering or receiving any competency evaluation conducted upon Marco Allen Chapman and from deciding the competency of Marco Allen Chapman to discharge the Respondents as his counsel, the issue having been previously decided by this Court.

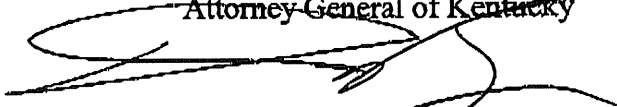
3. That this Court issue a writ of supersedeas superceding the Orders of Hon. Roger L. Crittenden, Special Judge, Franklin Circuit Court, of August 5, 2008 and October 10, 2008 wherein the court ordered that a competency evaluation be performed upon Marco Allen Chapman.

4. Any and all other relief to which it may appear entitled.

Respectfully submitted,

JACK CONWAY

Attorney General of Kentucky



DAVID W. BARR

Assistant Attorney General

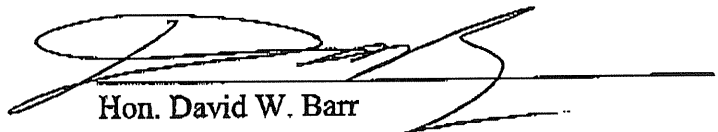


JEANNE ANDERSON

Assistant Attorney General
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1024 Capital Center Drive
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Counsel for Commonwealth

NOTICE

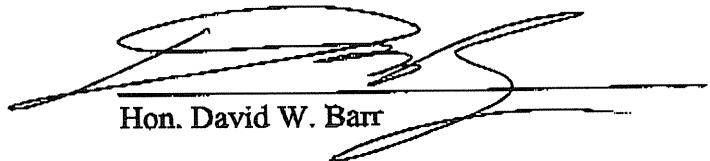
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Hon. David W. Barr

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF PETITION FOR WRIT PURSUANT TO SECTION 110(2)(a) OF THE CONSTITUTION OF KENTUCKY was this 28th day of October, 2008 mailed to Hon. Roger L. Crittenden, Special Judge, Franklin Circuit Court, P.O. Box 678, Frankfort, Kentucky 40601-0678; Hon. Mary Ann Palmer, General Counsel, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601; and, Hon. John Palombi, 201 Monroe Street, Suite 407, Montgomery, Alabama 36117; and, faxed and mailed to Marco Allen Chapman, #137809, Kentucky State Penitentiary, PO Box 5128, Eddyville, Kentucky 42038.



Hon. David W. Barr