# Exhibit 7

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

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| **SEDLEY ALLEY,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **No. 3:06-0645** |
| | ) | **JUDGE TRAUGER** |
| **DR. BRUCE LEVY, in his official capacities as the Chief Medical Examiner for the State of Tennessee and Medical Examiner for the Metropolitan Government of Nashville and Davidson County, Tennessee; and** | ) | |
| | ) | |
| **RICKY BELL, in his official capacity as Warden, Riverbend Maximum Security Institution,** | ) | |
| | ) | |
| **Defendants.** | ) | |

**RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

On May 11, 2006, the plaintiff executed an affidavit in which he expressed his objections on religious grounds to the cutting and desecration of his body and his conviction that the performance of an autopsy on his body would be in direct conflict with his religious beliefs. The plaintiff waited until June 27, 2006, on the evening prior to his execution, to filed this action seeking to enjoin the medical examiner from performing an autopsy on his body after he is executed. This motion should be denied as an eleventh hour attempt of the plaintiff to delay his execution. Moreover, the motion should be denied because the defendants have a compelling governmental interest in performing an autopsy on the plaintiff's body after he is executed.

## ARGUMENTS

**I. THE STATE HAS A COMPELLING GOVERNMENTAL INTEREST IN HAVING AN AUTOPSY PERFORMED ON THE PLAINTIFF WHICH OUTWEIGHS THE PLAINTIFF'S RELIGIOUS RIGHTS.**

When considering a motion for preliminary injunctive relief, courts must balance: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Tumblebus Inc. v. Cramer*, 399 F.3d 754, 760 (6th Cir.), *cert. denied*, 126 S.Ct. 361, 163 L.Ed.2d 68 (2005) (citing *PACCAR Inc. v. TeleScan Techs., L.L.C.*, 319 F.3d 243, 249 (6th Cir. 2003)).

The sincerely held beliefs of an inmate may not be substantially burdened by the government unless it demonstrates that the action taken which infringes the religious belief is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. *Workman v. Levy*, 136 F.Supp.2d 899, 900 (M.D. Tenn. 2001). In this case the movant has not shown a strong likelihood of success on the merits because the State has a compelling interest in conducting an autopsy to insure that its lethal injection protocol does not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

Tenn. Code Ann. § 38-7-108(a) requires that knowledge of the death of a person "from sudden violence or by casualty or by suicide, or suddenly when in apparent health, or when found dead, *or in prison*, or in any suspicious, unusual, or unnatural manner" be immediately reported to the county medical examiner. Tenn. Code Ann § 38-7-106(a) authorizes the county medical examiner to perform or order an autopsy in cases involving "a homicide, a suspected homicide, a suicide, a violent, unnatural or suspicious death." The determination of whether a deceased has died under circumstances defined in Tenn. Code Ann. § 38-7-106(a) as

those for which autopsy is authorized is left to the medical examiner and/or the district attorney general.

During the hearing in *Abdur'Rahman v. Sundquist*, No. 02-2236-III (Davidson Chancery), Dr. Levy explained the reasons for conducting an autopsy of Robert Glen Coe following his execution:

> First, under the Medical Examiner Act in the Tennessee Code the death of all prisoners needs to be reported to the medical examiner in the county where that death occurred regardless of the reason for that prisoner's death.
> Secondly, Mr. Coe's death was a homicide, and under Tennessee law the medical examiner is authorized to order an autopsy on any victim of a homicide regardless of the reasons behind that homicide.
> Third, as the county medical examiner for Davidson County, it is my opinion that if prisoners are to be executed in Davidson County, it is my responsibility as the county medical examiner to ensure that that death was carried out according to law and to document anything that would be usual or unusual in those circumstances.

*Abdur'Rahman v. Sundquist*, Transcript of Proceedings, Vol. 4, pp. 348-49. (Copy of Transcript of Dr. Levy's testimony in *Abdur'Rahman* attached as Exhibit 1).

The relevance of an autopsy to the question of whether an execution complies to the requirements of the law is demonstrated by the plaintiff's repeated references to Robert Coe and the report of his autopsy in support of his claim that Tennessee's lethal injection protocol, in which doses of sodium thiopental, pancuronium bromide (Pavulon), and potassium chloride are administered, results in a painful death and, therefore, amounts to cruel and unusual punishment. *See Alley v. Little*, No. 3:06-340 (M.D. Tenn.), Document 1, Complaint, pp.9, 12; Document 11-1, Plaintiff's Position Regarding Status of Case, p. 4; Document 11-2, Affidavit of David A.

Lubarsky, M.D., M.B.A., pp. 4-6[1]; Document 11-5, Affidavit of James J. Ramsey, p. 8; Document 19, Response to Motion to Dismiss, Attached Letter to George Little dated March 30, 2006; Document 23, Motion for Preliminary Injunction, p. 5, n. 5; Document 25, Reply to Response to Plaintiff's Motion for Preliminary Injunction, p. 3. Clearly autopsies were essential to the plaintiff's presentation of his claims regarding Tennessee's lethal injection protocol. The plaintiff's autopsy is equally essential to verify whether the lethal injection protocol complies with or violates constitutional standards.

The Tennessee Supreme Court also relied on the Coe autopsy in considering whether the lethal injection protocol caused unnecessary pain and suffering:

> The evidence regarding the lethal injection execution of Robert Coe in 2000 supported this medical testimony. Dr. Levy testified, for instance, that the cause of Coe's death was an "acute intoxication" by sodium Pentothal, Pavulon, and potassium chloride. He further stated that, based on the levels of the drugs found in Coe's body, Coe would have been unconscious within seconds of being injected with sodium Pentothal and would have died within five minutes. Coe would not have regained consciousness and would not have experienced any pain or discomfort as a result of the three drugs. There was no proof to the contrary.

*Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 308 (Tenn. 2005). It is clear that the Coe autopsy is vital to a consideration of the effects of lethal injection.

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[1] In his affidavit Dr. Lubarsky cites an article he co-authored entitled *Inadequate anaesthesia in lethal injection for execution,* 365 The Lancet 1412 (Apr. 16, 2005), as support for his conclusion that Tennessee's lethal injection protocol results in "a reasonably high chance of suffering a cruel and inhumane death ...." Document 11-2, Affidavit of David A. Lubarsky, M.D., M.B.A., p. 7, ¶ 24. The relevance and importance of autopsies to this issue is demonstrated by that fact that the study outlined in the article analyzed autopsy toxicology results from forty-nine executions carried out in Arizona, Georgia, North Carolina and South Carolina.

The Tennessee Supreme Court further noted that several issues were raised regarding the lethal injection protocol that could serve as the basis for future study. *Abdur'Rahman v. Bredesen*, 181 S.W.3d at 308-09. Any effective update or modification of the lethal injection protocol cannot be accomplished except by continued monitoring of the effects of the lethal injection process through the use of autopsies. Consequently, an autopsy of the plaintiff is vital to the State's continuing effort to ensure that the lethal injection protocol complies with the law. The State's interest in this regard is compelling and sufficiently outweighs the plaintiff's recently asserted religious rights.

## II. THE STATUTE OF LIMITATIONS BARS THE PLAINTIFF'S ACTION.

There is no specific statute of limitations for actions arising under 42 U.S.C. § 1983. When Congress has not established a time limitation for a federal cause of action, the settled practice by federal courts has been to adopt a local time limitation as federal law if it is not inconsistent with the federal law or policy to do so. *Wilson v. Garcia,* 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). More specifically, federal courts should look to the most analogous state statute of limitations to apply to a claim for personal injury under 42 U.S.C. § 1983. *Board of Regents v. Tomanio,* 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980).

Tenn. Code Ann. § 28-3-104(3) provides that civil actions for compensatory or punitive damages, or both, under the federal civil rights statutes must be brought within one year after the cause of action accrues. This statutory provision has been held by the Sixth Circuit to be the applicable statute of limitation with respect to section 1983 actions brought in the State of Tennessee. *Berndt v. State of Tennessee*, 796 F.2d 879 (6th Cir. 1986).[2] Therefore, the plaintiff

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[2] This one year statute of limitation has been extended to suits for injunctive relief under 42 U.S.C. § 1983. *See Cox v. Shelby State Community College*, 48 Fed.Appx. 500, 507 (6th Cir. 2002) (copy attached).

in this case is limited to one year after the accrual of his claim within which to bring an action under 42 U.S.C. § 1983.

Although the duration of the statute of limitations for actions under 42 U.S.C. § 1983 is governed by state law, federal law governs when the statute begins to run. *Sharpe v. Cureton*, 319 F.2d 259, 266 (6th Cir. 2003), *cert. denied*, 540 U.S. 876, 124 S.Ct. 228, 157 L.Ed.2 138 (2003). Under federal law, the "discovery rule" applies to establish the date on which the statute of limitations begins to run, i.e., when the plaintiff knew or in the exercise of due diligence should have known of the injury that forms the basis of his or her action. *Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984). The test is an objective one. The Court must determine "what event should have alerted the typical lay person to protect his or her rights." *Dixon v. Anderson*, 928 F.2d 212, 215 (6th Cir. 1991).

The plaintiff herein has been a death-row inmate in Tennessee since before 1989. His death sentence and conviction were affirmed by the Supreme Court of Tennessee on August 7, 1989. *State v. Alley*, 776 S.W.2d 506 (Tenn. 1989). In June of 1998, shortly after the legislature enacted lethal injection as a means of execution, the TDOC Commissioner appointed a committee to establish a lethal injection protocol. *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 300 (Tenn. 2005). This lethal injection protocol was used in the execution of Robert Glen Coe in April of 2000. *Id.* at 301. The plaintiff's complaint evidences the fact that he was aware that this protocol was used in the execution of Robert Glen Coe in April of 2000 and that an autopsy was conducted shortly after the execution. (Complaint, ¶¶ 46-48 and 74). Thus, the plaintiff knew as early as April of 2000, or in the exercise of due diligence should have known, that an autopsy would be performed on an inmate after his execution.

The plaintiff's complaint herein was filed on June 27, 2006. The statute of limitations on his cause expired in 2001 at the latest. Therefore, the plaintiff's complaint is barred by the statute of limitations.

## III. THE PUBLIC DEFENDER'S OFFICE IS BARRED FROM BRINGING A PRIVATE CIVIL ACTION. THEREFORE, THIS ACTION SHOULD BE DISMISSED AS THE UNAUTHORIZED PRIVATE PRACTICE OF LAW.[3]

The defendants further aver that this matter should be dismissed because the Federal Public Defender is not authorized to pursue a civil rights actions on behalf of the plaintiff or any other individual. There is no provision for the appointment of a Federal Public Defender in a civil action, and the office of Federal Public Defender is barred from instituting any action on its own. *See* 18 U.S.C. § 3006A(g)(2)(A) ("Neither the Federal Public Defender nor any attorney so appointed by him may engage in the private practice of law"); Administrative Office of the U.S. Courts, *Guide to Judiciary Policies and Procedures*, Vol. II, Ch. VI. Moreover, Canon 5 of the Code of Conduct for Federal Public Defender Employees provides:

> A federal public defender employee should regulate extra-official activities to minimize the risk of conflict with official duties.

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[3] The defendants note that the Federal Public Defender's Office, which was appointed by U. S. District Judge Bernice Donald to represent the plaintiff in his 28 U.S.C. § 2254 action, was allowed to proceed on behalf of the plaintiff in *Alley v. Key*, No. 2:06-CV-2201, a 42 U.S.C. § 1983 action filed in the U. S. District Court for the Western District of Tennessee. The decision was based on 21 U.S.C. § 848(q)(8) which allows attorneys appointed in death penalty cases to "represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." The defendants disagree that § 848(q)(8) should be read so broadly as to permit the filing of a § 1983 action.

D. Practice of Law. A defender employee should not engage in the private practice of law. Notwithstanding this prohibition, a defender employee may act pro se and may and may, without compensation, give legal advice to and draft or review documents for a member of the defender employee's family, so long as such work does not present an appearance of impropriety and does not interfere with the defender employee's primary responsibility to the defendant office. Note: See 18 U.S.C. § 3006A(g)(2)(A) (prohibiting public defenders from engaging in the private practice of law). See also 18 U.S.C. § 203 (representation in matters involving the United States); 18 U.S.C. § 205 (claims against the United States).

In describing the unique — and limited — role of public defenders generally, one federal district court in Nevada aptly observed:

> The office of public defender is sui generis. Unlike other public offices, it is not established to serve the public generally. Such offices have been created in implementation of the obligations created by the Sixth and Fourteenth Amendments to the United States Constitution, to the end that every person charged with crime shall have an opportunity to be represented by counsel and to receive a fair trial. *Recipients of the services of a public defender's office are only those indigents in whose aid a court or magistrate appoints a public defender to render legal advice and assistance. As noted, the relationship thus created is a strictly professional one.*

*Sanchez v. Murphy*, 385 F.Supp. 1362, 1365 (D. Nev. 1974) (emphasis added).[4]

The plaintiff did not initiate this action *pro se*; rather, acting outside the scope of its enabling statute and/or any appointment order entered pursuant to that statute, the Federal Public Defender's Office, acting on its own initiative, filed this action on the plaintiff's behalf. But because a § 1983 action is outside the scope of permissible proceedings for which appointment is authorized under § 3006A(a) — and no appointment has been made in this case

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[4] Like the federal statute at issue here, the Nevada statute implicated in *Sanchez* expressly prohibited the private practice of law.

in any event — by initiating this proceeding, the attorneys in the Federal Public Defender's Office of the Middle District of Tennessee are engaging in the private practice of law in violation of 18 U.S.C. § 3006A(g)(2)(A) and the Code of Conduct for Federal Public Defender.[5] This unauthorized activity should not be condoned by the Court.[6] *See also United States v. Howard*, 429 F.3d 843, 849 (9th Cir. 2005) ("The Federal Public Defender cannot pursue a civil class action . . . because there is no provision for the appointment of a Federal Public Defender in a civil action, and the office of Federal Public Defender is barred form instituting any action on its own.").

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[5] Even beyond the obvious question of whether Federal Defender employees possess the requisite expertise to pursue civil rights actions on behalf of death-sentenced inmates in the specialized area of § 1983 litigation, one practical implication of the private-practice prohibition is that a Federal Public Defender appointed pursuant to 18 U.S.C. § 3006A(g)(2)(A) is deemed an "employee of the government" for purposes of 28 U.S.C. § 2671 (defining "federal employees" for purposes of the Federal Tort Claims Act) and acts within the scope of that employment when representing his clients. *See Sullivan v. United States*, 21 F.3d 198, 202 (7th Cir. 1994). Aside from being a clear violation of federal law, the private practice of law by a federal defender employee, even if limited to capital cases, undermines the rationale behind the extension of FTCA protections to Federal Defenders while "acting within the scope of his office or employment" and calls into question the existence of immunity in civil litigation initiated on behalf of state inmates.

[6] Nor may this matter be deemed an "ancillary matter" related to the plaintiff's federal habeas corpus action and/or some potential executive clemency proceeding. *See, e.g.*, *Howard*, 429 F.3d at 849 (noting that a district-wide challenge to the requirement that pretrial detainees wear leg shackles should be made in the context of "actual prosecutions" and not in the civil context, because the Federal Public Defender - the only available attorney to represent the criminal defendants - "cannot pursue a civil class action on their behalf . . . and [indeed] is barred from instituting any action on its own.")

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2006, a copy of the foregoing response was filed electronically. Notice of this filing will be sent to the parties listed below by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt or by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

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