

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

PHILIP WORKMAN, )  
)  
TERRY LEE WORKMAN ) No.  
)  
Plaintiffs, )  
) **DEATH PENALTY CASE**  
v ) **EXECUTION DATE 5/9/07, 1:00 a.m.**  
)  
DR. BRUCE LEVY, in his official capacities ) Jury Demand  
as the Chief Medical Examiner for the )  
State of Tennessee and Medical )  
Examiner for the Metropolitan )  
Government of Nashville and )  
Davidson County, Tennessee; )  
)  
FORENSIC MEDICAL and All Employees )  
And Agents, Including, But Not )  
Limited To: )  
Dr. Bruce Levy, President, CEO and )  
Chief Medical Examiner; )  
Dr. Amy McMaster, )  
Deputy Medical Examiner; )  
Dr. Feng Li, )  
Assistant Medical Examiner; )  
Dr. Thomas A. Deering, )  
Assistant Medical Examiner; )  
Dr. Staci A. Turner, )  
Assistant Medical Examiner; )  
Adele Lewis, M D., )  
Assistant Medical Examiner; )  
Larry Barker, )  
Chief Forensic Technician; )  
Denise Overton, )  
Director Of Investigations; )  
Karen Chancellor, M D., )  
Chief Medical Examiner; )  
Lisa Funte, M D., )  
Assistant Medical Examiner; )  
Miguel Laboy, M.D., )  
Assistant Medical Examiner; )  
Sean Lester, Chief Investigator; )

Anthony Bell, )  
Chief Forensic Technician )  
RICKY BELL, in his official capacity as )  
Warden, Reverend Maximum )  
Security Institution. )  
JOHN DOES 1-100 )

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A  
TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION**

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When ruling on a motion for a preliminary injunction, a district court must consider and balance four factors: (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) how the public interest would be affected by issuance of the injunction. Blue Cross & Blue Shield Mutual of Ohio v. Blue Cross and Blue Shield Association, 110 F 3d 318, 322 (6th Cir. 1997)

Because each of these factors counsel that this Court enjoin Defendants, in the event of Mr. Workman's execution, from obtaining, retaining, inspecting in a disrobed stated, or performing any investigative or forensic procedure on his body that would violate its physical integrity, this Court should issue an injunction barring them from doing so. Rather, as stated in the complaint, under the First, Ninth, and Fourteenth Amendments, this Court should issue an order requiring that, in the event he is executed, Mr. Workman's body be immediately released to his next-of-kin and personal representative, Terry Lee Workman, while barring Defendants from conducting any and all forensic, investigative, or other physically violative procedure(s) on Mr. Workman after his death. This restriction on Defendants' conduct should include, but not be limited to, any and all forensic,

pathological, or other action or procedures whatsoever on his body or any part of his body (whether or not considered part of an autopsy or pathological investigation), including, but not limited to, any invasive procedure which in any way would penetrate any orifice, penetrate the skin or any other organ, any procedure or action whereby any tissue, body fluid, or material from Workman's body is removed or sampled or tested or examined in any manner whatsoever, including, but not limited to, incision or scraping of his skin; cutting through his skull and handling his brain; sticking needles into or through his skin to extract fluids or any other tissue; collapsing his eyeballs by sticking needles into them to draw fluids or tissue; touching, dissecting and/or removing his organs, fluids, or other tissue; scientific or histological or chemical or any other type of analysis of any tissue, fluid, or organ.

I.

PHILIP WORKMAN HAS A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS  
BECAUSE HE HAS CONSTITUTIONALLY PROTECTED INTERESTS  
THAT WOULD BE VIOLATED BY THE DEFENDANTS'  
PERFORMANCE OF PHYSICALLY INVASIVE PROCEDURES ON  
OR POST-MORTEM RETENTION OF HIS BODY

A.

Philip Workman Is Entitled To An Injunction  
On First Amendment Grounds

The free exercise clause of the First Amendment prohibits the government from placing a substantial burden on a sincerely held religious belief without having a compelling interest justifying the burden Wilson v. National Labor Relations Board, 920 F.2d 1282, 1289-90 (6th Cir 1990). Here, Philip Workman has a sincerely held religious belief that performing any procedures on his

body that violate its physical integrity and are not for his medical treatment, or having his body inspected in a disrobed state, would amount to the desecration of a Temple of God. See Ex. 1: Declaration of Philip Workman. Conversely, Defendants have absolutely no interest in “investigating” any aspect of Mr. Workman’s death by execution. See section V A., *infra*. Under these circumstances, not only do Defendants lack a compelling state interest for their actions, they lack any legitimate interest whatsoever that could overbear Philip Workman’s sincerely-held religious beliefs.

This Court has already once recognized the imbalance of the parties’ interests when it ruled that “Workman’s religious beliefs . . . outweigh Defendants’ interest in conducting an autopsy” and entered a preliminary injunction prohibiting Dr. Levy from performing an autopsy on Mr. Workman in 2001. Workman v. Levy, 136 F.Supp 2d 899, 900 (M.D.Tenn 2001). See also Id. at 901 (Finding Philip Workman faced irreparable harm, there was no substantial harm to others, and the public interest was advanced by respecting Workman’s First Amendment rights.); Order Denying Defendants’ Motion To Terminate Preliminary Injunction, Workman v. Levy, 01:00296 (M.D.Tenn. 2001)(entered May 3, 2007), R. 22; Alley v. Levy, 06-0645, 2006 WL 1804605, \*2 (M.D.Tenn., June 28, 2006) (“[b]ecause desecration of corpses runs counter to a wide range of religions,” Sedley Alley was “very likely” to demonstrate that an autopsy would burden his practice of his religion.). The relief Mr. Workman now seeks, and the manner in which the state intends to violate his right to exercise his religious beliefs, is different only in degree and specificity. The state maintains it is free to do all sorts of other cutting, injecting, piercing, withdrawing, sampling, and probing even while it is barred from conducting an autopsy on Mr. Workman. See McIntyre v. Levy, 3:06-cv-00645 (M.D. Tenn.). Mr. Workman submits that these actions also constitute the

desecration of the holy temple that he believes his body is in name only: Thus, the infringement on his exercise of his religious beliefs, which this Court has already acknowledged, is the same.

Under the circumstances, therefore, this Court should enjoin on First Amendment grounds any and all forensic, investigative, and any other procedures that would violate the physical integrity of the body whatsoever upon Philip Workman after his death, including any possible procedures specifically or non-specifically identified in the complaint.

B.

Philip Workman Is Entitled To An Injunction  
On Ninth And Fourteenth Amendment Grounds

1.

Philip Workman Has An Interest In  
Personal Autonomy And Bodily Integrity  
That Is Protected By The Fourteenth Amendment

Just as Defendants have no interest – let alone a compelling one – in handling Mr. Workman’s body post-mortem in ways that would infringe on his First Amendment protections, they also lack any such interests that could outweigh his fundamental rights to personal autonomy, bodily integrity, and privacy guaranteed by the Ninth and Fourteenth Amendments. The Supreme Court has ruled that “[i]t is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State's right to interfere with a person's . . . bodily integrity.” Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 849,(1992), *citing* Washington v. Harper, 494 U.S. 210, 221-222 (1990), Winston v. Lee, 470 U.S. 753 (1985), and Rochin v. California, 342 U.S. 165 (1952). Though the Court has frequently rendered decisions on the

protection of personal autonomy by the Due Process clause in the context of a person's right to die<sup>1</sup> (See, Washington v. Harper, 494 U.S. 210 (1990); Vacco v. Quill, 521 U.S. 793 (1997); Washington v. Glucksberg, 521 U.S. 702 (1997); Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990)), or contraception and abortion (See Planned Parenthood, 505 U.S. 833; Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972)), the fundamental principle from all of these opinions has been plain and unequivocal: There are "clear and well established rights to bodily integrity and freedom from unwanted touching." Vacco v. Quill, 521 U.S. at 807, *citing with approval* Cruzan, 497 U.S. at 278-279; Id. at 287-288 (O'Connor, concurring). This protection, so articulated, leaves no room for the state to perform investigative or forensic procedures on Mr. Workman that would violate the physical integrity of his body or require handling of his body

If the execution is carried out, the state intends to retain possession of Mr. Workman's body. They will place it in a plastic body bag and load it into the state medical examiner's vehicle. See "Execution Procedures for Lethal Injection", 4/30/07, prepared by Tennessee Department of Corrections pursuant to Governor Bredesen Executive Order #43, at 51, 65 (Ex. 2). Defendants will then transport his body to the Davidson County Forensics Science Center. Ex. 2 at 66. There, they will strip it naked; inspect it; insert needles into it; withdraw blood and fluids from it; puncture his eyeballs; and engage in any other unknown activities they wish that they argue do not constitute an autopsy.<sup>2</sup> See Response Of Defendant Bruce Levy, M.D. In His Individual Capacity To Plaintiff's

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<sup>1</sup> Mr. Workman asserts that these rights survive after death through testamentary instructions. See section I B 2, *infra*. Cf., Swidler & Berlin v. United States, 524 U.S. 399 (1998)(ruling that the attorney-client privilege survives the client's death).

<sup>2</sup> See Response To Motion Clarify Injunctive Order, Workman v. Levy, 01-0296 (M.D. Tenn. filed May 4, 2007), R. 28 ("This Court's order only prohibits the performance of an autopsy," and arguing that withdrawal of fluids and insertion of needles are permitted by statute and not prohibited by this Court's existing injunction.)

Motion For Contempt, Alley v. Levy, 06-0645 (M.D.Tenn., file July 17, 2006), R. 21. These procedures are no less blatant or extreme violations of an individual's personal autonomy and bodily integrity than those involved in an autopsy.

In a similar case, Sell v. United States, 539 U.S. 166 (2003), the Supreme Court considered whether forced administration of antipsychotic drugs to a criminal defendant to make him competent to stand trial deprived him of the liberty interest to reject medical treatment.<sup>3</sup> The Court considered four questions: whether there was "*important* governmental interests at stake"; whether the involuntary medication would "*significantly* further those interests"; whether the medication was "*necessary* to further those interests"; and that the medication was in the patient's best medical interest in light of his medical condition. Sell, 539 U.S. at 180-181 (2003)(italics in original); See also Riggins v. Nevada, 504 U.S. 127, 134 (1992)(only "essential" or "overriding" state interest will overcome constitutionally protected liberty interest in avoiding involuntary administration of antipsychotic drugs); Washington v. Harper, 494 U.S. 210, 225 (1990)(state had a "legitimate" and "important" interest in forcefully medicating prisoners who were a "significant danger to themselves or others"). Here, Defendants can show no interests whatsoever in conducting these procedures. See section V.A., *infra*. It follows, plainly, then, that Mr. Workman's rights to bodily integrity or personal autonomy can not be overborne by state interests that do not exist.

Ultimately, therefore, Mr. Workman's entitlement to an injunction depends upon his entitlement to relief on the merits of his claims under the Ninth and Fourteenth Amendments. He

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<sup>3</sup> Though the analysis is similar, it is an important distinction in the facts that the Petitioner in *Sell* stood to gain some medical benefit from the administration of the drugs. Mr. Workman does not stand to receive any benefit from the violation of his body. That is only something that the state could claim. But, as explained *infra*, the Defendants are not entitled to that benefit.

will succeed: Defendants' retention, inspection, and performance of procedures on Mr. Workman's body that desecrate it would violate his personal rights to personal autonomy, bodily integrity, and personal privacy guaranteed by the Ninth and Fourteenth Amendments without any countervailing state interest. Because Defendants have no interest that could be deemed either legitimate and important or essential and overriding in conducting these procedures, they should be prohibited from doing so.

2.

Philip Workman Has A Right  
To Prohibit Defendants From Retaining And Handling His Body  
And Grant Custody Of It To His Brother

In the exercise of his rights to personal autonomy, bodily integrity, and personal privacy, Philip Workman has declared, through testamentary documents, that upon his death, his remains should immediately be turned over to his brother, Terry Lee Workman. See Ex. 3. Under the Ninth and Fourteenth Amendments, Workman has the right to will this. Defendants have no power to take that away, as these rights are protected by the Ninth and Fourteenth Amendments. See, Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 48 (1944) ("Rights to succession by will are created by the state . . . ") Cf., Dibrell v. Morris' Heirs, 15 S.W. 87 (Tenn. 1891)(When the Tennessee Constitution was formed, the right to devise and to transmit property by inheritance to descendants was "enjoyed to the fullness and perfection of absolute right," and one of the objects of the Constitution was to protect and preserve that right )

As the Supreme Court has recognized, "Family members have a personal stake in honoring and mourning their dead . . . [T]his well-established cultural tradition acknowledg[es] a family's control over the body . . ." Nat'l. Archives and Records Admin. v. Favish, 541 U.S. 157, 168 (2004)



Thus, Mr. Workman's Ninth and Fourteenth Amendment guarantees of personal autonomy, bodily integrity and privacy protect both Philip Workman's rights as well as Terry Lee Workman's rights to have Mr. Workman's body handled in the manner *they choose* should he be executed. Defendants are interlopers here who lack the authority to override Philip and Terry Workman's fundamental and cherished rights to treat Mr. Workman with the respect and dignity he deserves upon death.

Especially where Mr. Workman's killing would end his incarceration, the state has no interest in transferring his body to any of the Defendants or maintaining his body in prison that would override Mr. Workman's and his brother's fundamental liberty interests to dictate how his body should be handled in death. See Defendants' Motion To Alter or Amend Order, *Workman v. Levy*, 01:00296 (M.D.Tenn. 2001)(entered May 3, 2007)("Should Dr. Levy take custody of Mr. Workman's body subsequent to his death . . . Mr. Workman would not be an institutionalized inmate. He would be a corpse, subject to the same rules and privileges as deceased members of the general public."), R. 24. Nor should Terry Workman be subjected to someone – against Philip's and Terry's will – holding on to the body for one minute longer than after an execution is completed.

For all of the foregoing reasons, there are no state interests that would be served by retaining Mr. Workman's body or handling it in any way body post-mortem. To permit Defendants to do so would be a violation of his Ninth and Fourteenth Amendment rights to personal autonomy and bodily integrity, and, therefore, this Court should grant an injunction.

## II

### MR. WORKMAN WILL SUFFER IRREPARABLE INJURY IF AN INJUNCTION DOES NOT ISSUE

If Philip Workman is executed, and an injunction has not been issued prohibiting Defendants' post-mortem handling of his body, there will be no opportunity to remedy the violation of his constitutional rights. Defendants' conduct in the execution of Sedley Alley indicates that barring a clear, preliminary court order, they will not hesitate to act unilaterally as they see fit, without any regard for Mr. Workman's and his next of kin's rights and wishes<sup>4</sup>. Therefore, this Court should issue an injunction prohibiting Defendants from retaining, inspecting, or performing any and all investigative or other physically violative procedures on his body and ordering that Mr. Workman's body be immediately turned over to Terry Lee Workman.

## III.

### AN INJUNCTION PROHIBITING DEFENDANTS FROM HANDLING MR. WORKMAN'S BODY POST-MORTEM WILL NOT CAUSE SUBSTANTIAL HARM TO OTHERS

Because Defendants have no legitimate interests in retaining Mr. Workman's body or performing integrity-violating experimental, investigative, or physically violative procedures on it, see section V.A., *infra*, no harm will flow from the issuance of an injunction prohibiting them from doing so. Further, the general public has no interest in such procedures being performed. The only interests for this Court to consider are the constitutionally protected rights of Mr. Workman and his brother. Because only those interests stand to be harmed if an injunction does not issue, and no interests will be harmed if one does, this Court should issue the order sought by Mr. Workman.

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<sup>4</sup> See McIntyre v. Levy, 3:06-cv-00645 (M.D. Tenn.).

IV.

THE PUBLIC'S INTERESTS WOULD BE SERVED  
BY THE ISSUANCE OF AN INJUNCTION PROTECTING  
MR. WORKMAN'S CONSTITUTIONAL RIGHTS

The public does have an interest in this Court's issuing an injunction protecting Mr. Workman. Such an injunction would be an assurance to the public that the state may not infringe on their constitutionally protected rights to determine how their bodies will be handled in death without a showing of some legitimate interest. The injunction Mr. Workman seeks from this court does not stand in the way of any state policy that is carried out for the public welfare. To the contrary, it seeks to prohibit the state from making a baseless, needless exercise of its discretion that would violate the right to exercise one's religious beliefs and choose who will tend to the body after a person has died. The public would benefit from the state being restrained from taking such actions. Therefore, this Court should issue the injunction.

V.

THE DEFENDANTS' ADMISSIONS AND ARGUMENTS  
BEFORE THIS COURT BELIE ANY INTEREST WHATSOEVER  
IN CONDUCTING EXPERIMENTAL, INVESTIGATIVE, OR PHYSICALLY INVASIVE  
PROCEDURES ON MR. WORKMAN

A.

The Defendants' Pleadings Before This Court Are Admissions  
That They Have No Interest In Conducting  
Any Post-Mortem Procedures On Mr. Workman

The defendants would argue, first, that post-mortem experimental, investigative, or physically invasive procedures are required by law. However, no state statute imposes such a mandate. This Court has already recognized that the Tennessee autopsy statute endows Defendant Levy with the discretion to conduct an autopsy ; it does not mandate it. Workman v. Levy, 136 F.Supp.2d at 900

(discussing Tenn Code Ann. §38-7-106 as being discretionary). Likewise, the other two statutes to which the Defendants point for their “authority” to experiment on and violate Mr. Workman’s body post-mortem are equally discretionary and make no requirement of such procedures. Tennessee Code Annotated § 38-7-108 provides, in relevant part,

Any . . . person having knowledge of the death of any person . . . when found dead, or in prison . . . shall immediately notify the county medical examiner or the district attorney general, the local police, or the county sheriff, who in turn shall notify the county medical examiner.

. . . Whenever a death occurs under the circumstances as set forth in this chapter, the body shall not be removed from its position or location without authorization by the county medical examiner, except to preserve the body from loss or destruction or to maintain the flow of traffic on a highway, railroad, or airport. No body subject to post-mortem examination as provided by this chapter shall be embalmed without authorization by the county medical examiner.

The following section, 38-7-109, states,

When a death is reported as provided in § 38-7-108 . . . the county medical examiner is authorized to remove from the body of the deceased a specimen of blood or other body fluids, or bullets or other foreign objects, in lieu of performing an autopsy, *if in the county medical examiner's judgment these procedures are justified in order to complete the county medical examiner's investigation.* (Emphasis added.)

Neither of these sections mandates the retention of the body by Defendant Bell nor the performance of experimental or investigative forensic procedures by Defendant Levy.

Section 108 merely requires the notification of state and county authorities. See, Alley, at \*1 (“the plain language of the statute's heading mandates that it not be read to include deaths planned by the state, but rather deaths that require an investigation”). Given that Mr. Workman is to be killed in the presence and at the hands of state authorities, presumably that would be adequate notification that his death has occurred. Further, given that Defendants have published the means by which they intend to kill Mr. Workman, see Ex. 2, there is no justification to conduct any post-mortem investigation. Finally, where there is no need for investigation because Defendants have already

authored the cause of death, and where Defendants predetermined the time and place of Mr. Workman's death and so they can give advance notice to the medical examiner, there is no reason for the medical examiner not to authorize the removal of Mr. Workman's body by those whom he has empowered to do so.

The Defendants' resolute determination to get their hands on Mr. Workman's body is driven by what they deem the necessity of post-mortem investigative procedures. In their pleadings in Alley, the state argued that the state medical examiner "would be unable to determine the cause of [an executed person's] death without performing" such procedures. See, Motion To Alter Or Amend, Alley v. Levy, 3:06-0645, R. 11-1, pp. 2-3 (Ex. 4). This assertion is frivolous.<sup>5</sup> Defendants know the precise identity and quantity of the chemicals that the state proposes to pump into Mr. Workman. Ex. 2, pp. 38-39. Precise details of the manner in which Workman would be killed and the means of causing his death have just been released by George Little, the Commissioner of Correction. See Ex. 2, pp. 34-44. Defendants would thus know exactly how Mr. Workman would have died: He would have been injected with 5 grams of sodium thiopental, 100 mg of pancuronium bromide, and 200 mEq. of potassium chloride. Id., pp. 38-44. Furthermore, Dr. Levy has testified that the chemicals used in executions "depress the central nervous system and . . . render a person unconscious"; "block nerve impulses from getting the muscles to actually contract"; and "depress respirations and cause death by respiratory failure." See, Transcript of Bruce Levy's testimony in

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<sup>5</sup> Dr. Levy asserted on his own behalf that it is in the public interest for an authority that is independent of the agency that conducts executions to perform a post-mortem investigation "any time the state takes a person's life by legal execution." See, Affidavit of Bruce Levy, M.D. (Ex. 5). While Dr. Levy's concern for the public interest may be laudable, it is not clear how the state medical examiner conducting a review of an execution conducted by the state department of corrections affords any such agency independence. Indeed, the very same attorneys who represented the prison warden in Mr. Alley's petition for habeas corpus also represented the medical examiner in the suit to prohibit the autopsy.

Abdur'Rahman v. Sundquist, No 02-2236-III (Davidson County Chancery Court), at 336-339 (Ex.

6). Given this knowledge attributable to Defendants, why, then, would they disingenuously assert a need to desecrate Mr. Workman's body in order to determine the cause of death? There simply is no such need. And, thus, there is no state interest, much less a compelling one, that would warrant the infringement on Mr. Workman's bodily integrity and personal autonomy that any other handling of his body would constitute.

The only argument that the Defendants can offer for violating the physical integrity of Mr Workman's body that has any basis in truth is their need to carry out a frightening state experiment. The Defendants want to pick at Mr. Workman's body in order to try to prove that his execution comports with state law and the Eighth Amendment protections against cruel and unusual punishment. According to the same pleading in *Sedley Alley's* case, Dr Levy has the authority and duty to carry out post-mortem investigative and forensic procedures that intrude on the body's physical integrity "to gather scientific data to confirm . . . that the execution was performed properly." Ex. 4, p. 3. In his affidavit, attached to that pleading, Dr. Levy also stated that such procedures are "the only way I can rule out any possibility that the state failed to protect the rights of the inmate during incarceration and establish that the execution was carried out in the manner prescribed by law." Ex. 5. In *Alley*, Defendants also argued that effective updates or modifications of the lethal injection protocol require continued monitoring of the effects of the lethal injection process through post-mortem physical examinations. According to the state, such procedures are "vital to the state's continuing effort to ensure that the lethal injection protocol complies with the law." See, Response To Plaintiff's Motion For Preliminary Injunction, Alley, 3:06-0645 (filed June 27, 2006), R. 4-1 at 5 (Ex. 7). These assertions point to one of two equally frightening conclusions.

The first unsettling conclusion is that the state's repeated assertions in its pleadings before the state and federal courts that its previous execution protocols complied with the United States Constitution were affirmative misrepresentations. In Dr. Levy's testimony before the state court in Abdur'Rahman, he stated that a condemned prisoner would not feel any pain in the process of execution as it was conducted at that time. Ex. 6, p. 340. Further, the state has repeatedly relied on the Tennessee Supreme Court's determination, based in large part on Dr. Levy's testimony, that the state's previous execution protocols did not constitute cruel and unusual punishment. Abdur'Rahman v. Bredeesen, 181 S.W.3d 292 (Tenn. 2005). See, e.g., Response of Defendants Little and Bell to Plaintiff's Motion for Preliminary Injunction, Alley, 3:06-0340 (filed May 8, 2006), R. 24-1 at 4 (Ex. 8); Memorandum In Support of Motion to Dismiss of Defendants Little and Bell, Payne v. Little, 3:06-0825 (M.D. Tenn.) (filed Sept. 25, 2006), R. 8 at 3 (Ex. 9); Memorandum In Support of Motion to Dismiss of Defendants Little, Bell and IDOC John Does, Harbison v. Little, 3:06-01206 (M.D. Tenn.) (filed Jan. 10, 2007), R. 16-1 at 9-11 (Ex. 10). Most recently, Tennessee's governor, himself, asserted that "since 2000, two inmates sentenced to death have been executed in Tennessee by lethal injection, and both executions *were completed professionally in a constitutional and appropriate manner.*" Tennessee Governor Executive Order Number 43, February 1, 2007 (Ex. 11) (emphasis added). In view of all of Defendants' assurances that the state is killing inmates in accord with the United States Constitution, what possible reason is left for Defendants to desecrate the body of Mr. Workman? If the Defendants were assured of the constitutionality of the protocols, there would be no need to perform withdraw any fluid samples, probe or puncture his body, or retain it for any length of time. Such misrepresentation before federal courts should not be rewarded by permission to violate Mr. Workman's constitutional rights.

The alternative, and more frightening, conclusion is that the state is developing its execution protocols by trial and error and seeks to use Mr. Workman's body for purposes of a Stalag-esque penal science experiment. The autopsy of Mr. Coe may have revealed that more of one chemical than was actually necessary was applied, and so less needed to be used for Mr. Alley. Was the reason for the state's persistent attempt to perform an autopsy – even to the point of doing an end run around a court order prohibiting as the Defendants now intend to do again<sup>6</sup> – to be sure that they had used *enough* of the chemicals? If this is the case, that the state's means of execution cannot be assured to comply with Constitutional guarantees until *after* it has been carried out, then it is most assuredly a violation of those guarantees.<sup>7</sup> Not knowing whether the process will be cruel and unusual before it begins is cruel and unusual. Moreover, this is a genuine concern given that the state intends to execute Mr. Workman by means of a method that was announced only seven days ago and is unexamined and unproven.

This scenario rises beyond the level of a constitutional violation to an intrusion on personal autonomy that shocks the conscience. See United States v. Lanier, 73 F.3d 1380, 1411 (Daughtrey, dissenting)(urging criminal liability for a state actor on the ground that “the Supreme Court has clearly and consistently proclaimed that the constitution’s due process clause protects an individual from interference with bodily integrity under color of law under circumstances that would shock the

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<sup>6</sup> See McIntyre v. Levy, *supra*.

<sup>7</sup> Judge Trauger's succinct analysis about the legitimacy of the Defendants proposed efforts to use Workman's body as a litigation tool is especially insightful:

The only interest advanced by the state in performing an autopsy on Mr. Alley's body is to use the evidence thus gathered in future litigation brought by other death penalty inmates challenging the state's . . . lethal injection procedure. This interest does not outweigh Mr. Alley's substantial interest in avoiding what he believes to be the desecration of his corpse.

Alley v. Little, p. \*5.



conscience”), *rev’d by United States v. Lanier*, 520 U.S. 259 (1997). The Supreme Court stated as much in *Rochin v. California*, 342 U.S. 165 (1952). There, they considered the mistreatment of a criminal suspect at the hands of police that involved jumping upon him and attempting to extract capsules he had swallowed; taking him to a hospital in handcuffs; and directing a doctor to force an emetic solution through a tube into his stomach against his will to produce vomiting. Notwithstanding the right of a state to enforce its laws - an argument the state relies on - the Court found that “[t]his is conduct that shocks the conscience. . . . They are methods too close to the rack and the screw to permit of constitutional differentiation.” *Rochin*, 342 U.S. at 172 (1952). The state’s wish to needlessly conduct post-mortem examinations of Mr. Workman – or to do so as part of an experiment to hone its means of killing – are no less shocking.

Plainly, Defendants have no interests in performing any forensic or investigative procedures that would violate the physical integrity of Mr. Workman’s body – certainly none that could be deemed legitimate or rational, much less compelling. Such procedures are not required by law; they are merely discretionary based on need. Their pleadings before this Court demonstrate that they fully understand already what would be the cause of Mr. Workman’s death should he be executed. And the state’s power to execute is not a power to experiment. Thus, for the reasons stated at the outset, Mr. Workman has a likelihood of success on the merits of this action, and the court should grant the injunction.

#### B.

#### The State’s Analysis of Caselaw Is Erroneous And Does Not Support Their Position

In their recent submissions to this Court in regard to the previous suit by Mr. Workman to prohibit an autopsy in the event of his execution, Defendants rely on case law that they say supports

the proposition that any impact on Mr. Workman's religious beliefs of the statute permitting post-mortem physical examinations does constitute a violation of his First Amendment right to freedom of religion. See, Memorandum of Law in Support of Motion To Dismiss Complaint, and Memorandum of Law in Support of Defendants' Response In Opposition To Motion For Preliminary Injunction, Workman, 01-0296, R. 12, 14-1 (M.D. Tenn.). This reading of the law is misguided.

Defendants argue that the Supreme Court's decision in Employment Division, Dept. Of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), holding that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest, empowers them to conduct an autopsy on Mr. Workman under Tenn Code Ann. §38-7-106. Though that was the general holding of *Oregon v Smith*, Defendants brush aside, or confine too narrowly, the exception to this rule that the Court noted for its line of cases stemming from Sherbert v. Verner, 374 U.S. 398 (1963), which requires a compelling state interest to infringe on First Amendment exercises. See, Thomas v. Review Bd. of Indiana Security Div., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n. of Florida, 480 U.S. 136 (1987). According to the defendants, that exception was limited to unemployment benefits cases.

However, in *Oregon v Smith*, the Court distinguished the exception in the *Sherbert* line of cases according to the broader principle that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." 494 U.S. at 885, *citing Bowen v. Roy*, 476 U.S. 693, 708 (1986). This recognizes a distinct context where the state exercises discretion, as opposed to the "across the board criminal prohibition on a particular form of conduct" presented to the court in *Smith* 494 U.S. at

885. Thus, it is the exception recognized in *Smith*, not the rule, that governs the defendants' intentions here.

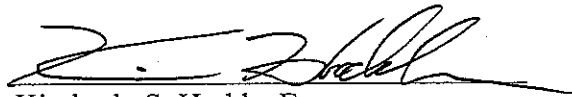
As discussed, *supra*, the statutes on which the defendants rely grant the medical examiner discretion to conduct post-mortem investigations. This court has already recognized that the autopsy component of such investigations "is discretionary, not mandatory." Workman, 136 F.Supp 2d at 900. See, Tenn.Code Ann. §38-7-106 ("A county medical examiner *may* perform or order an autopsy. . . .")(emphasis added). Therefore, in this case, where Defendants would exercise discretion in a manner that will infringe on Mr. Workman's constitutional guarantees, they must show a compelling reason to do so. As explained, *supra*, they have none. Therefore, this Court reached the proper conclusion when it previously granted an injunction barring autopsy and should now restrict any and all post-mortem physical examinations of Mr. Workman's body.

Defendants' misreading of *Smith* also leads them to misread the district court cases approving autopsies on which they rely. In Montgomery v. County of Clinton, Michigan, 743 F.Supp. 1253 (W.D. Mich. 1990), the court ruled that an autopsy on a 16 year old boy who had died in a car crash while fleeing police did not violate the boy's mother's First Amendment rights. However, in that case there was uncertainty as to the circumstances of that death that required investigation. Likewise, in Kickapoo Traditional Tribe of Texas v. Chacon, 46 F.Supp. 2d 644 (W.D. Texas 1999), the state had exhumed a body for purposes of an autopsy against the wishes of the plaintiff tribe based on the allegations of the mother of the deceased that she had been murdered. Thus, in each of these cases, the states had a compelling interest in investigating an unresolved death by means of an autopsy. Here, Defendants cannot claim any need to investigate Mr. Workman's death after having knowingly, methodically killed him.

Rather, this Court was proper to follow United States v. Hammer, 121 F.Supp 2d 794 (M.D. Penn. 2000) in its decision on Mr. Workman's 2001 motion for an injunction. In *Hammer*, a federal inmate who was to be executed sought to bar his autopsy by federal authorities. In ruling on the inmate's motion, the district court noted that neither the state nor county authorities had any valid interest in conducting an autopsy on the inmate. This conclusion rejects the logic of the Defendants here, that anytime a homicide occurs within the county, a post-mortem physical investigation is required. If this were so, the state and county officials in *Hammer* would have had a legitimate interest in conducting such an investigation on the inmate, notwithstanding that he was to be executed by the federal government. Clearly, the Defendants' theories are without merit.

For all of these reasons, Defendants can show no interest - compelling, legitimate, or rational - in conducting a post-mortem, physically violative investigation or, thus, in retaining the body of Mr. Workman. Their arguments have no merit and should be rejected, and the motion for preliminary injunction should be granted.

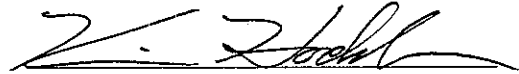
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on Defendants and their counsel via facsimile on May 8, 2007.

A handwritten signature in black ink, appearing to read "V. Stahl", is written over a horizontal line.