

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

ABU-ALI-ABDUR'RAHMAN, LEE)
HALL, a/k/a LEROY HALL, BILLY)
RAY IRICK, DONNIE JOHNSON,)
DAVID EARL MILLER, NICHOLAS)
TODD SUTTON, STEPHEN MICHAEL)
WEST, CHARLES WALTON)
WRIGHT, EDMUND ZAGORSKI,)
JOHN MICHAEL BANE, BYRON)
BLACK, ANDRE BLAND, KEVIN)
BURNS, TONY CARRUTHERS,)
TYRONE CHALMERS, JAMES)
DELLINGER, DAVID DUNCAN,)
KENNATH HENDERSON, ANTHONY)
DARRELL HINES, HENRY HODGES,)
STEPHEN HUGUELEY, DAVID IVY,)
AKIL JAH, DAVID JORDAN, DAVID)
KEEN, LARRY MCKAY, DONALD)
MIDDLEBROOKS, FARRIS MORRIS,)
PERVIS PAYNE, GERALD POWERS,)
WILLIAM GLENN ROGERS,)
MICHAEL SAMPLE, OSCAR SMITH,)

Plaintiffs,)

vs.)

No. 18-183-II(III)

TONY PARKER, in his official capacity)
as Tennessee Commissioner of)
Correction, TONY MAYS, in his official)
capacity as Warden of Riverbend)
Maximum Security Institution,)
JOHN/JANE DOE EXECUTIONERS)
1-100, JOHN/JANE DOE MEDICAL)
EXAMINER(S) 1-100, JOHN/JANE)
DOE PHARMACISTS 1-100,)
JOHN/JANE DOE PHYSICIANS 1-100,)
JOHN/JANE DOES 1-100,)

Defendants.)

**MEMORANDUM AND ORDER GRANTING IN PART CERTAIN PLAINTIFFS’
MOTION TO SECURE, RETAIN AND PRESERVE PHYSICAL INFORMATION
BASED UPON TENN. CIV. PRO. RULES 27.02, 34 AND 35**

Ruling

The motion of Plaintiffs Abu-Ali Abdur’Rahman, John Michael Bane, Byron Black, Andre Bland, Kevin Burns, Tony Carruthers, Tyrone Chalmers, James Dellinger, David Duncan, Lee Hall, Kennath Henderson, Anthony Darrell Hines, Henry Hodges, Stephen Hugueley, Akil Jahi, David Ivy, Donnie Johnson, David Jordan, David Keen, Donnie Middlebrooks, Farris Morris, Pervis Payne, Gerald Lee Powers, William Glenn Rogers, Michael Sample, Oscar Smith, Charles Wright, and Edmund Zagorski (“Certain Plaintiffs”) for an order “to retain and preserve any and all physical, audio, and video evidence relating to any lethal injection execution of Billy Ray Irick on August 9, 2018, and for the Office of the State Medical Examiner to secure and preserve appropriate blood and tissue samples should an autopsy be performed,” is granted in part as follows.

It is ORDERED that all the Defendants, and all persons or entities acting in concert with them including, but not limited to, the Office of the State Medical Examiner, shall retain, preserve and secure,

1. All audio and video relating to the lethal injection execution scheduled for August 9, 2018, of Billy Ray Irick;
2. The drug packaging and labels and instructions, drug containers, materials and objects used to prepare any drugs, plungers and tubing, needles, and the gurney used in the execution, and the clothing of the inmate, and;

2. If the temporary restraining order entered in Case No. 18-878-IV, *Billy Irick v. Dr. Feng Li*, filed in the Chancery Court of Davidson County, prohibiting an autopsy is not converted to a temporary injunction and the autopsy is allowed by Chancellor Perkins to proceed, in that autopsy the Office of State Medical Examiner shall secure and preserve blood from the left and right femoral veins, left and right subclavian veins, left and right ventricles, and shall secure and maintain tissue samples from the brain (including the hippocampal area), lung, liver, and muscle not near any IV site.

To be clear, this Order only retains, preserves and secures the information listed above, and such information shall remain in the custody of the State until further order.

To be decided at a later date is whether (1) the information is discoverable, i.e., calculated to lead to the discovery of admissible evidence and/or (2) whether any or all of the foregoing information can be produced without compromising the confidentiality required by Tennessee Code Annotated section 10-7-504(h). *See West v. Schofield*, 460 S.W.3d 113, 128 (Tenn. 2015).

Basis in Law

This Court has jurisdiction over this issue and the authority to order the preservation of information pursuant to Tennessee Civil Procedure Rules 27.02, 34 and 35. Quoting as follows, Rule 27.02 provides,

If an appeal has been taken from a judgment or before the taking of an appeal of the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the trial court. In such case the party who desires to perpetuate the testimony may make a motion in the trial court for leave to take depositions, upon the

same notice and service thereof as if the action was pending in that court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the trial court.

TENN. R. CIV. P. 27.02 (West 2018).

Case law interpreting Rule 27.02 provides,

The Advisory Commission's Comments note that the law prior to the Rules of Civil Procedure limited the use of depositions to perpetuate testimony to cases involving either death, insanity or departure to a place unknown of the witness at the time the trial took place.

Tennessee Practice, Vol. 3, Rules of Civil Procedure Annotated, makes the following observation as to the purpose of this Rule:

The purpose of Rule 27 is to enable a prospective litigant or party to perpetuate testimony in limited circumstances at a time when the party is unable to commence appropriate litigation (or when a case is on appeal) and there is a likelihood that the opportunity to obtain the testimony will be lost before litigation is commenced (or further proceedings are resumed after the appeal is completed). There is no absolute right to take a deposition under Rule 27; the decision whether to authorize such a deposition is discretionary with the trial court.

Yater v. Wachovia Bank of Georgia, N.A., 861 S.W.2d 369, 374 (Tenn. Ct. App. 1993)

Analogous federal case¹ law provides,

Rule 27(b) of the Federal Rules of Civil Procedure in turn permits litigants to use discovery procedures pending appeal if judicial leave is granted. Thus, Rule 27(b) creates an exception to the general principle that the filing of the appeal divests the trial court of all authority over a case. Rule 27(b) contemplates that a district court with existing subject matter jurisdiction retains sufficient jurisdiction of a case under appeal to issue an extraordinary discovery order pending that appeal.

* * *

Rule 27(b) permits a court to order discovery pending appeal if it finds that the perpetuation of evidence is “proper to avoid a failure or delay of justice” in the event of further proceedings in the district court. Fed.R.Civ.P. 27(b).

* * *

To merit discovery in a case that is already pending on appeal, [the Movant] must demonstrate that this discovery is “proper to avoid a failure or delay of justice.” Fed.R.Civ.Pro. 27(b). In other words, [the Movant] must show that the loss of this evidence could result in a failure of justice.

Campbell v. Blodgett, 982 F.2d 1356, 1357; 1358; 1359 (9th Cir. 1993).

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

cc by U.S. Mail, email, or efileing as applicable to:

Kelley J. Henry

Attorney for Plaintiffs Abdur’Rahman, Bane, Black, Bland, Burns,
Carruthers, Chalmers, Dellinger, Duncan, Henderson, Hines, Hodges,

¹ “It has long been recognized by the courts of this state that the T.R.C.P. were patterned in large measure after the Federal Rules of Civil Procedure, and therefore federal case law interpreting the federal rules has been accepted as persuasive authority for the intent and application of these rules. *See generally, Andrews v. Bible*, 812 S.W.2d 284, 287 (Tenn.1991); *Wagner v. Frazier*, 712 S.W.2d 109, 113 (Tenn.App.1986).” *Bradhurst v. Pearson*, No. 01-A-9106-CV-00226, 1992 WL 41701, at *3 (Tenn. Ct. App. Mar. 6, 1992).

Hugueley, Jahi, Ivy, Johnson, Jordan, Keen, Middlebrooks, Miller, Morris,
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