

Exhibit 4

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

SEDLEY ALLEY,)	
Plaintiff,)	
v.)	No. 3:06-0645
)	TRAUGER
DR. BRUCE LEVY, et al.,)	
Defendants.)	

MOTION TO ALTER OR AMEND

The defendants respectfully move the Court to alter or amend its Order granting the plaintiff's motion for preliminary injunction. Dr. Bruce Levy, as Medical Examiner for the Metropolitan Government of Nashville and Davidson County, did not receive notice of the motion for preliminary injunction and thus, was unable to respond thereto prior to the Court's ruling. Dr. Levy's affidavits regarding the autopsy and his statutory authority and duty to conduct the same, are attached hereto for the Court's consideration.

Dr. Levy has the authority and duty, under state law, to perform the autopsy, pursuant to I.C.A. § 38-7-106, as the case involves an unnatural death. *Dunbar v. Strimas*, 632 S.W.2d 558, 561 (Tenn.Ct.App. 1981) (quoting *Hale v. Johnston*, 203 S.W. 949 (Tenn. 1918)). Mr. Alley did not die by natural causes. Further, I.C.A. § 38-7-108(a)(1) and I.C.A. § 38-7-109(a) apply as Mr. Alley's death by execution is an "unusual or unnatural circumstance."

Further, an execution is a homicide. Black's Law Dictionary, 5th ed. defines justifiable homicide, "Such as is committed intentionally, but without any evil design, and under such circumstances of necessity or duty as render the act proper, and relieve the party from any shadow of blame; as where a sheriff lawfully executes a sentence of death upon a malefactor..."

See also, United States v. Lee, 1953 WL 2392 (CMA), 13 C.M.R. 57, 3 USCMA 501 at 506

(copy attached), "A homicide committed in the proper performance of a legal duty is justifiable. Thus, executing a person pursuant to a legal sentence of death...are cases of justifiable homicide." Thus, Dr. Levy has the duty and authority to perform an autopsy under T.C.A. § 38-7-106, as Mr. Alley's execution was a justifiable homicide.

Mr. Alley claimed that an autopsy would violate his religious beliefs. Cases cited by the Court do not show a strict prohibition against an autopsy that would violate the decedent's religious beliefs, but, rather, that the Court must weigh the medical examiner's purposes for dissecting the body in light of those religious beliefs.¹ See *Atkins v. Med Examiner of Westchester Co.*, 100 Misc.2d 296, 297, 418 N.Y.S.2d 839, 841 (1979); *Weberman v. Zugibe*, 90 Misc.2d 254, 255, 394 N.Y.S.2d 371, 372 (1977). In *Weberman*, the court found that the family's religious beliefs outweighed the medical examiner's interest merely to determine whether the decedent died by reason of injury to one vital organ as opposed to another. See 90 Misc.2d at 255, 394 N.Y.S.2d at 372. Similarly in *Atkins*, that court held that curiosity as to cause of death was not a sound reason to override religious beliefs. 100 Misc. 2d at 297, 418 N.Y.S.2d at 841. However, the opinion agrees that an "individual's rights must yield to the greater good of the larger number." *Id.* An example of when an autopsy could be justified would be to uncover criminal acts. *Id.*

Dr. Levy's affidavit shows that there is a significant difference in the interests in autopsying Mr. Alley in the present case and those of the medical examiners in *Weberman* and *Atkins*. Dr. Levy has attested that he would be unable to determine the cause of Mr. Alley's

¹*Workman v. Levy*, 136 F. Supp. 2d 899 (M.D. Tenn. 2001) was cited by the Court in its Order granting the preliminary injunction--however it should be noted that the *Workman* decision relied on *U.S. v. Hammer*, 121 F. Supp. 2d 794 (M.D. Pa. 2000)--which involved a Pennsylvania law that specifically prevented a county coroner from choosing to conduct an autopsy if the inmate had sincerely held religious beliefs opposing autopsies. *Hammer* at 800. Further, the only state interest set forth for performing the autopsy in *Hammer* was avoiding a lawsuit by the prisoner's relatives. *Id.* at 802.

death without performing an autopsy. Further, he would be unable to determine whether the sentence imposed on Mr. Alley was carried out according to State law and the order of the state court.

The important public interest in favor of performing the autopsy was recognized in *Robison v. Maynard*, 857 P.2d 817 (Okla.App. 1992). In that case Robison, a death row inmate, sought to prevent an autopsy and to direct the manner in which his body was to be disposed. The Oklahoma statute at issue, like the Tennessee statute, required investigation by the medical examiner. *Id.* at 820. The Medical Examiner testified that it was in the public interest to perform an autopsy on any death that occurs in penal incarceration. *Id.* at 820.

The Court found that it was in error for the trial court to enjoin the autopsy of the death row inmate after execution. It held that the medical examiner would have breached his duty if he had not performed the autopsy, in order to (a) affirmatively establish the cause of death, (b) rule out any possibility that the state failed to protect the rights of the inmate during incarceration, and (c) establish that execution had been carried out in the manner prescribed by law. *Id.* at 821.

Similarly in *Montgomery v. County of Clinton*, the court found that a mother's free exercise rights, which were implicated because she claimed her religion prohibited autopsies, were not violated by the autopsy of her son. 743 F.Supp. 1253 (W.D.Mich. 1990). In that case the mother objected to her son's autopsy; however the court upheld the medical examiner's decision to authorize the autopsy, in accordance with a Michigan law that was very similar to Tennessee law, was reasonably related to a neutral, legitimate government purpose. *Id.* at 1260; *see also Yang v. Sturner*, 750 F.Supp 558 (D.R.I. 1990).

Dr. Levy has the authority and duty to conduct this autopsy to gather scientific data to confirm the cause of death and that the execution was performed properly. This is a compelling

public interest. The compelling government interest outweighs Mr. Alley's First Amendment assertions. Further, that information regarding lethal injection might be gathered from sources outside of the State does not further the State of Tennessee's interest in and Dr. Levy's duty to inquire as to whether the executions conducted in Tennessee are performed properly and humanely. In order to answer this inquiry, the autopsy should be performed before Friday morning, June 30, 2006. (Second Affidavit of Dr. Levy).

Wherefore, for all of the foregoing reasons, the defendants respectfully move the Court to reconsider its order and lift the preliminary injunction. If the Court desires a hearing on this matter before June 30, 2006, the defendants are ready and able to attend the same, at the Court's convenience.

Respectfully submitted,

/s/ Mark A. Hudson
MARK A. HUDSON
Senior Counsel
Attorney General's Office
PO Box 20207
Nashville, TN 37202
(615) 532-2500

/s/ Arthur Crownover II
ARTHUR CROWNOVER II
Senior Counsel
Attorney General's Office
PO Box 20207
Nashville, TN 37202
(615) 532-2500

/s/ Pamela S. Lorch
PAMELA S. LORCH
Senior Counsel
Attorney General's Office
PO Box 20207
Nashville, TN 37202
(615) 532-2500

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
KARL F. DEAN, #10419
DIRECTOR OF LAW

/s/ Lora Fox
LORA BARKENBUS FOX, #17243
Metropolitan Attorney
225 Polk Avenue, Suite 210
Nashville, Tennessee 37203
(615) 862-6380

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered via facsimile at (615) 736-5265 to Paul R. Bottei, Kelley J. Henry, Christopher M. Minton and Gretchen Swift, Officer of the Federal Public Defender Middle District of Tennessee, 810 Broadway, Suite 200, Nashville, TN 37203, this 28th day of June, 2006.

/s/ Pamela S. Lorch

doc no 144143