

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

PHILLIP R. WORKMAN,	)	
Plaintiff,	)	
v.	)	No. 3:01-0296
	)	JUDGE CAMPBELL
DR. BRUCE LEVY, et al.,	)	
Defendants.	)	

**MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANTS' RESPONSE IN OPPOSITION TO  
MOTION FOR PRELIMINARY INJUNCTION**

The defendants hereby respectfully object to the plaintiff's motion for a preliminary injunction to prevent the autopsy of the plaintiff's body following execution. Dr. Bruce Levy has the authority, pursuant to Tenn. Code Ann. § 38-7-106(a) to order and perform the autopsy. Tenn. Code Ann. § 38-7-106 is of general applicability and neutral as to religious beliefs. If the statute impacts the plaintiff's sincere religious beliefs, such does not constitute a violation of the plaintiff's First Amendment right to freedom of religion and said assertion cannot interfere with the statutory authority. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595 (1990); *Montgomery v. County of Clinton, Michigan*, 743 F.Supp. 1253 (W.D. Mich. 1990), *aff'd without opinion*, 940 F.2d 661 (6th Cir. 1991); *Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F. Supp. 2d 644 (W.D. Tex. 1999); *Combs v. Corrections Corp. of America*, (W.D. La. 1997); *Yang v. Sturner*, 750 F. Supp. 558 (D. R.I. 1990).

In ruling on a motion for preliminary injunction, the Court determines whether the plaintiff has shown a strong or substantial likelihood or probability of success on the merits, whether the plaintiff has shown irreparable injury, whether the issuance of a preliminary injunction would

cause substantial harm to others, and whether the public interest would be served by issuing the preliminary injunction. *Mason County Medical Association v. Knebel*, 563 F.2d 256 (6th Cir. 1977); *North Avondale Neighborhood Association v. Cincinnati Metropolitan Housing Authority*, 464 F.2d 486 (6th Cir. 1972). Because the plaintiff, as a matter of law, does not have a strong likelihood of success on the merits, will not suffer a violation of a constitutional right and an injunction would negatively impact the public interest, the plaintiff's motion for a preliminary injunction should be denied or terminated.

**I. PLAINTIFF FAILS TO STATE A CLAIM AS A MATTER OF LAW AND THEREFORE, CANNOT ESTABLISH A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS.**

“In order to be entitled to a preliminary injunction a party must demonstrate a substantial likelihood of success on the merits when the case is tried.” *Blaylock v. Cheker Oil Company*, 547 F.2d 962, 965 (6th Cir. 1976). If the plaintiff fails to state a claim for which relief may be granted, he cannot demonstrate a substantial likelihood of success on the merits and his motion for injunctive relief should be denied. *See, Boles v. Bradley*, 103 F.3d 128, 1996 WL 690150 (6th Cir. (Tenn.))(copy attached).

“‘Laws,’ we said, ‘are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.’” *Employment Division, Department of Human Resources of Oregon v. Smith*. 494 U.S. 872, 879, 110 S.Ct. 1595, 1600 (1990). “[T]he right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” *Id.* (citations omitted).

In *Employment Division*, the Supreme Court stated that the *Sherbert* test (wherein

governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest) is only applied in unemployment compensation cases. *Id.* at 883, 1602. The Court found that, “The government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, ‘cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.’ To make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is ‘compelling’--permitting him, by virtue of his beliefs, ‘to become a law unto himself,’ contradicts both constitutional tradition and common sense.” *Id.* at 885, 1603 (citations omitted).

“In direct response to the decision in *Employment Division*, Congress enacted the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to -bb-4. Under RFRA, any federal or state law that substantially burdened the free exercise of religion was deemed unconstitutional unless the Government could demonstrate that it furthered a compelling government interest and was the least restrictive means for doing so. *See id.* § 2000bb-1(b). But in its recent decision in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), the Supreme Court struck down RFRA as unconstitutional as applied to state law because Congress exceeded its powers under Section 5 of the Fourteenth Amendment.” *Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F. Supp. 2d 644 (W.D. Tex. 1999). Thus, although Federal laws must comply with the RFRA test, the RFRA test is not applicable to State law (such as Tenn. Code Ann. § 38-7-106). Instead, the *Employment Division* test is applied to State law. *Kickapoo* at 653. *See also, Combs v. Corrections Corp. of America*, 977 F. Supp.

799, 802 (W.D. La. 1997).

“In *Employment Division*...the Supreme Court ...(held) 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. As long as the burden imposed is not the object, but merely the incidental effect of a generally applicable and otherwise valid law, the First Amendment is not offended.” *Montgomery v. County of Clinton, Michigan*, 743 F. Supp. 1253, 1259 (W.D. Mich., 1990), *aff’d without opinion*, 940 F.2d 661 (6th Cir. 1991). In *Montgomery*, the mother of a boy killed in a high speed police chase sued the Medical Examiner and Deputy Medical Examiner, alleging that the boy’s subsequent autopsy violated her religious beliefs.

The Court stated the applicable Michigan law as follows:

FN2. Under Michigan law, the county medical examiner must investigate the cause of death in all cases of persons who have come to their death by violence. M.C.L § 52.202. In discharging this responsibility, the medical examiner may direct an autopsy to be performed. M.C. L. § 52.205(3). After diligent effort to notify the next of kin of the deceased, the medical examiner may order the autopsy with or without their consent. M.C.L. § 52.205(4).

*Id.* at 1258.

Thus, under Michigan law (as under Tennessee law)<sup>1</sup>, the medical examiner’s duty to investigate is mandatory and his authority to order an autopsy is discretionary. The Court found that the plaintiff’s claim failed to rise to the level of a First Amendment violation, as the laws which authorized the autopsy were generally applicable, religion-neutral laws. *Id.* at 1259.

Further, there was “no contention that the authorization itself was other than religion-neutral.

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<sup>1</sup>Tenn. Code Ann §§ 38-7-109, 38-7-108, 38-7-106. “The duty to investigate the circumstances of a death where a death is reported under suspicious, unusual or unnatural circumstances, devolves upon the county medical examiner and is ministerial in nature.” *Dunbar v. Strimas*, 632 S.W.2d 558, 561 (Tenn. App. 1981), *perm. to appeal denied*.

The religion of the decedent and of his next of kin played no role in the decision and actions of the defendants.” *Id.*

In *Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F. Supp. 2d 644 (W.D.Tex. 1999), an Indian tribe brought suit to enjoin the state from exhuming an Indian’s body and conducting an autopsy, stating that the autopsy would violate its religion. The Court accepted as true the plaintiffs’ claim of violation of sincerely held religious beliefs. *Id.* at 652. The Court found that the State may constitutionally implement its laws regarding disinterment and autopsy even though the implementation substantially impaired the Tribe’s ability to freely exercise its beliefs, because the law was on its face and in its implementation, religion- neutral and of general application. Therefore, the substantial impairment to the plaintiffs’ religious beliefs did not rise to the level of a First Amendment violation. *Id.* at 653-54.

In *Yang v. Sturner*, 750 F. Supp. 558 (D. R.I. 1990), the plaintiffs brought suit against Rhode Island’s chief medical examiner for performing an autopsy on their son in violation of their sincerely held religious beliefs. While acknowledging that the autopsy violated their religious beliefs, the Court dismissed the case because the statute authorizing the autopsy was of general application and religion-neutral on its face and in its enactment. The impact upon an individual’s religious beliefs did not constitute a constitutional violation. *Id.* at 560.

The statute authorizing autopsy in this case is Tenn. Code Ann. § 38-7-106(a). It is of general application and religion-neutral on its face and in its application. That the plaintiff alleges an autopsy would violate his sincerely held religious beliefs is of no consequence, as such an allegation fails to state a constitutional violation. Tenn. Code Ann. § 38-7-106(a) states:

(a) A county medical examiner may perform or order an autopsy on the body of any person in a case involving a homicide, a

suspected homicide, a suicide, a violent, unnatural or suspicious death. When the county medical examiner decides to order an autopsy, the county medical examiner shall notify the district attorney general. The district attorney general may order an autopsy in such cases on the body of a person in the absence of the county medical examiner or the failure of the county medical examiner to act. The authority ordering the autopsy shall notify the next of kin about the impending autopsy if the next of kin is known or reasonably ascertainable. The sheriff or other law enforcement agency of the jurisdiction shall serve process containing such notice and return such process within twenty-four (24) hours.

Tenn. Code Ann. § 38-7-106(a) is of general application. The medical examiner may perform or order an autopsy in any case involving homicide, suspected homicide, suicide, violent death, unnatural death or suspicious death. Further, the law is facially neutral. “ A law lacks facial neutrality if it refers to a religious practice, without a secular meaning discernible from the language or context.” *Kickapoo, supra* at 653 (quoting *church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 at 553, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993)). Tenn. Code Ann. § 38-7-106(a) does not refer to any religious practices, thus it is facially neutral. Further, the statute is applied in a religious neutral manner.

The plaintiff’s execution is a justifiable homicide. Justifiable homicide is, “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...” BLACK’S LAW DICTIONARY 661 (5th ed. 1979). *See also, United States v. Lee*, 1953 WL 2392 (CMA), 13 C.M.R. 57, 3 USCMA 501 at 506 (“A homicide committed in the proper performance of a legal duty is justifiable. Thus, executing a person pursuant to a legal sentence of death (is a) case... of justifiable homicide.”)(copy attached).

Further, the plaintiff's death is an unnatural death. The plaintiff will not die from natural causes but by execution. Therefore, under Tenn. Code Ann. § 38-7-106(a), Dr. Levy has the discretion and authority to order and/or perform an autopsy on the plaintiff's body, which will expire as a result of homicide and constitute an unnatural death.

The statute grants the discretionary authority to the medical examiner. No one can dispute that the statute gives the medical examiner the power to order and/or perform an autopsy. The authority to order or conduct an autopsy to ascertain cause of death is not a subject within the jurisdiction of a federal court. *Watson v. Manhattan and Bronx Surface Transit Operating Authority*, 487 F. Supp. 1273, 1277 (D. N.J. 1980). Just as a federal court has no jurisdiction to probate a will, administer an estate or grant a divorce, alimony, or custody, it has no subject matter jurisdiction over the performance of autopsies. *Id.* These subjects are matters reserved exclusively to the States. *Id.*

“The underlying correctness of that (autopsy) order is not before the Court; in fact, it has no jurisdiction to consider whether an autopsy should or should not be ordered. The Court's job in this case is to merely assume that such an order exists, and to determine whether it can be executed without violating...First Amendment rights.” *Kickapoo, supra* at 649. Because Tenn. Code Ann. § 38-7-106(a) is of general application and religion-neutral on its face and in its application, Dr. Levy can execute his authority pursuant to said statute regardless of its impact on the plaintiff's religious beliefs because, as a matter of law, the impact does not rise to the level of a First Amendment violation.

In this case, the Court has erroneously granted a preliminary injunction to prevent the autopsy of Phillip Workman's body upon execution. Instead of following the Supreme Court

*Employment Division* rule and *Montgomery v. County of Clinton, Michigan, supra*, this Court erroneously followed *United States v. Hammer*, 121 F. Supp. 2d 794 (M.D. Pa. 2000). The *Hammer* plaintiff, sentenced to death under the federal death penalty statute, moved to preclude an autopsy of his body, claiming that it violated his religious beliefs. The Court found that the federal government's interest in protecting itself from a lawsuit by the inmate's next of kin was compelling, but that an autopsy was not the least restrictive means to further that interest. *Id.* at 802. Therefore, the Court granted the plaintiff's motion.

*Hammer* and the cases it cites in support, *In re the Grand Jury Empaneling of the Special Grand Jury*, 171 F.3d 826, 828-29 (3rd Cir. 1999); *Adams v. C.I.R.*, 170 F.3d 173, 175-76 (3rd Cir. 1999); and *In Re Young*, 141 F.3d 854, 860-61 (8th Cir.), cert. denied, 525 U.S. 811, 119 S.Ct. 43, 142 L.Ed.2d 34 (1998), must comply with the Religious Freedom Restoration Act (RFRA). RFRA only applies to the federal government, it does not apply to the states. The *Hammer* Court held that, "When an inmate has a sincerely held religious belief, before the federal government may substantially burden the exercise of that belief, it must demonstrate that the action to be taken which will infringe the religious belief is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest." *Hammer, supra* at 802. This is the RFRA rule. *See, Kickapoo* at 653; *In re the Grand Jury Empaneling of the Special Grand Jury, supra* at 828-29; *Adams v. C.I.R., supra* at 175-76; *In re Young, supra* at 856-58. In 1997, in *City of Boerne, supra*, the Supreme Court struck down RFRA as unconstitutional as applied to the states. *Id.* Thus, the RFRA rule, applied in *Hammer* and erroneously applied in this case, is not applicable to Tenn. Code Ann. § 38-7-106(a).

Likewise, in *Alley v. Levy*, 2006 WL 1804605 (M.D. Tenn. 2006)(copy attached), the



district court erroneously followed the RFRA standard. The Court erroneously found that upon the plaintiff demonstrating a substantial burden to a sincere religious belief, the state government must show that its intended autopsy upon the plaintiff's body is in furtherance of a compelling governmental interest and is the least restrictive means to do so. *Id.* at \*2. Further, the cases cited by the court in support of its ruling are not controlling law. *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995) was decided when RFRA applied to the states. In 1997, the Supreme Court held that RFRA was unconstitutional as applied to the states. *Weberman v. Zugibe*, 394 N.Y.S.2d 371 (N.Y. Sup. Ct. 1977) and *Atkins v. Medical Examiner of Westchester County*, 418 N.Y.S.2d 839 (N.Y. Sup. Ct. 1979) predate the U.S. Supreme Court decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595 (1990).

The rule set forth in *Employment Division* controls this case. When a statute is of general application and religion-neutral, on its face and in its implementation, its effect upon an individual's religious beliefs does not rise to the level of a First Amendment violation. Wherefore, the federal court cannot interfere with the implementation of the state law, as the state law does not offend the federal constitution.

As the plaintiff fails to state a claim as a matter of law, his complaint should be dismissed and his motion for preliminary injunction denied or vacated.

## **II. PLAINTIFF WILL NOT SUFFER CONSTITUTIONAL VIOLATION.**

That an autopsy will conflict with the plaintiff's sincerely held religious beliefs does not state a First Amendment constitutional violation. Therefore, the plaintiff fails to present a claim over which the Federal Court has jurisdiction to grant relief. Therefore, the plaintiff cannot claim irreparable harm from the autopsy and cannot establish the second prong basis for

preliminary injunctive relief.

### **III. THE PUBLIC WILL BE HARMED BY A PRELIMINARY INJUNCTION.**

Tenn. Code Ann. §§ 38-7-109 and 108 direct the Medical Examiner to immediately investigate the circumstances of the death of any person “in prison...or in any unusual, or unnatural manner.” Tenn. Code Ann. § 38-7-109 states in pertinent part:

(a) When a death is reported as provided in § 38-7-108, it is the duty of the county medical examiner to immediately make an investigation of the circumstances of the death and record the county medical examiner’s findings in triplicate on a form provided by the division of post-mortem examination for this purpose....”

Tenn. Code Ann. § 38-7-108 states in pertinent part:

(a)(1) Any ...person having knowledge of the death of any person .... in prison, or in any ...unusual, or unnatural manner...shall immediately notify the county medical examiner....

Tenn. Code Ann. § 38-7-106 grants the Medical Examiner the discretionary authority “to perform or order an autopsy on the body of any person in a case involving a homicide...(or)...unnatural death.”

An execution is a homicide and an unnatural death. The Medical Examiner has the statutory duty to investigate the death of a person executed in Davidson County and the statutory discretion to perform or order an autopsy of the person as part of said investigation.

The Tennessee Code contains no provision for a person to object to a legally authorized medical examiner autopsy for any reason, including but not limited to religious beliefs or prohibitions against autopsy. To allow a person or legal next-of-kin to prevent the Medical Examiner from conducting a legally authorized autopsy directly conflicts with the State’s legislative authority providing the medical examiner the power to perform or order the autopsy.

It is against the public interest to allow an individual to circumvent laws created for the public's general welfare. As the Supreme Court found in *Employment Division*, the government must be able to carry out public policy regulating all of the public and an individual may not be permitted to exempt himself from the generally applicable law and "become a law unto himself" by virtue of his religious beliefs. See *Employment Division, supra* at 885, 1603.

Enforcement of state law designed for the general public welfare is in the public's interest.

### CONCLUSION

Wherefore, for the foregoing reasons, the defendants respectfully move the Court to deny preliminary injunctive relief to the plaintiff in this case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 11, 2007, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

/s/ Pamela S. Lorch  
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