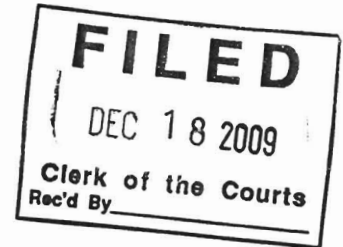


IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

SARAH ANN JOHNSON, FOR HERSELF AND ON BEHALF OF THE
LATE CECIL JOHNSON v. DR. BRUCE LEVY

Chancery Court for Davidson County
No. 09-2339-IV

No. M2009-02596-COA-R7-CV



OPINION AND ORDER

This matter is before the court upon the Motion of Dr. Bruce Levy for an emergency stay of the ruling of the Chancery Court and for an expedited hearing pursuant to Rule 7 of the Tennessee Rules of Appellate Procedure.

The matters in dispute arise from the fact that since the death of Cecil C. Johnson, a condemned prisoner who was executed on December 2, 2009, the Medical Examiner of Davidson County, Tennessee has attempted to perform a post-mortem autopsy on Mr. Johnson, which has been vigorously opposed by his widow, Sarah Ann Johnson.

This appeal by the Medical Examiner, Dr. Bruce Levy, and his motion for an emergency stay arises from a ruling in the Chancery Court of Davidson County, wherein the defendant, the Medical Examiner of Davidson County, Tennessee, was ordered to not perform an autopsy on Cecil C. Johnson and to turn the body of Mr. Johnson over to the plaintiff, Sarah Ann Johnson, by 4:00 p.m. on December 18, 2009, which is today. The action in Chancery Court was preceded by a similar action commenced by Mrs. Johnson and Cecil Johnson, who was alive when the action was commenced, but who was executed five hours thereafter, in the United States District Court of Middle Tennessee. That court initially restrained Defendants from performing the autopsy on Mr. Johnson pending a hearing. The temporary restraining order was dissolved following the hearing; thus, the Medical Examiner was authorized to perform the autopsy on Mr. Johnson but for the immediate commencement of this action. *See Cecil Johnson, et ux. v. Dr. Bruce Levy, et al.*, 2009 WL _____ (M. D. Tenn. Dec. 17, 2009).

Rule 7 requires that relief be first sought at the Trial Court under Tenn. R. Civ. Pro. 62. Pursuant to Rule 62, the defendant orally moved the Davidson County Chancery Court to stay its order that the defendant turn over the body of Cecil Johnson to the plaintiff, his widow, on or before 4:00 p.m., Friday, December 18, 2009 (today). Grounds for the motion were that the release of the

body would change what Defendant described as “the status quo” and prejudice Defendant. The Chancellor denied the motion on December 17, 2009.

The focus of this appeal is the tension between two Tennessee statutes. One is Tennessee Code Annotated § 38-7-106, which authorizes the county medical examiner to perform an autopsy of an inmate executed in Davidson County, Tennessee. The other is Tennessee Code Annotated § 4-1-407(c)(1) & (2), which provide “[n]o government entity shall substantially burden a person's free exercise of religion unless it demonstrates that application of the burden to the person is: (1) Essential to further a compelling governmental interest; and (2) The least restrictive means of furthering that compelling governmental interest.”

Defendant seeks a stay pending the appeal to maintain the status quo. The status quo, as Defendant describes it, is that the body of Mr. Johnson remain at the Medical Examiner’s facilities, where the body has been since his execution on December 2, 2009, and that no autopsy be performed while this matter is being resolved. If this ruling stands and is not stayed, Defendant asserts, the opportunity to perform a meaningful autopsy of Mr. Johnson will be lost. As Defendant explains it, once the body is out of the medical examiner’s custody, it will add uncertainty to and prejudice any autopsy that might be later allowed. Defendant also contends the ruling of the Chancery Court must be overturned because the ruling will have a “potentially devastating effect on the work of the medical examiners in Tennessee – where the next of kin may now argue that they are empowered to make religious objections and prevent autopsies in all kinds of deaths – creating the possibility, for example, that evidence of child abuse or poisoning could be hidden from law enforcement officials.”¹ For these and other reasons, Defendant asks that a stay be entered to maintain the status quo in this litigation until the Court of Appeals can review the Chancery Court’s decision to prevent an autopsy.

For her part, the plaintiff, Sarah Ann Johnson, Mr. Johnson’s widow, contends an autopsy would violate her husband’s religious beliefs, his right to the free exercise of religion, and Tenn. Code Ann. § 4-1-407(b) & (c). The Chancellor agreed, finding that Mr. Johnson had a sincere religious view that an autopsy would desecrate his body and that the performance of an autopsy on Mr. Johnson would substantially burden the free exercise of his religion. The Chancellor made several findings of fact including the following:

1. When the State of Tennessee executed Mr. Johnson, he was 53 years old. Shortly before his execution, he appeared to be in good health and/or excellent condition.
2. During the 72-hour period that Mr. Johnson was on death watch, he seemed fine, with no reported concerns about his health.

¹Defendants also contended the appeal would not be moot if this court declined to grant a stay and the body is released because, referring to three previous and similar actions by persons on behalf of executed prisoners, “[e]ach time the lawsuit is filed only hours before the execution is scheduled to take place, resulting in a situation where the Trial Court enters an emergency TRO to maintain the status quo (prevent the autopsy) until the matter can be briefed fully.” Defendant further asserted that this repeated action “puts it squarely into the category of ‘capable of repetition yet evading review,’” citing *State v. Rodgers*, 235 S.W.3d 92, 97 (Tenn. 2007).

3. Mr. Johnson executed a will on November 30, 2009 that designated Plaintiff as his personal representative.
4. On December 1, 2009, Mr. Johnson executed a sworn notice objecting to his body being autopsied and reciting his religious view that an autopsy would desecrate his body.
5. Additionally, Mr. Johnson's pastor signed a sworn statement on December 1, 2009, confirming the genuineness of Mr. Johnson's religious view that an autopsy would amount to desecrating his body.
6. Plaintiff also made a sworn statement reciting her view that an autopsy would desecrate Mr. Johnson's body.
7. When Mr. Johnson was administered the three injections under Tennessee's lethal injection protocols, he reacted as anticipated upon external observation and died as expected.
8. It has been two weeks since Mr. Johnson died. An autopsy may not yield as accurate of results now as it would have within a day or so of his death.

Following a legal analysis, the Chancellor then made further findings in narrative form and stated his conclusions:

It is undisputed that Plaintiff has, and Mr. Johnson had, a genuine belief that an autopsy would desecrate Mr. Johnson's body in violation of their religious beliefs. Consequently, Defendant's intention to perform an autopsy on Mr. Johnson's body has to be viewed in light of the factual record and this Court's analysis of Tenn. Code Ann. §§ 38-7-106 & 4-1-407.

Dr. Levy testified credibly and forthrightly that an autopsy was needed to determine, within a reasonable degree of medical certainty, the actual, medical cause of Mr. Johnson's death and whether the State's lethal injection protocol was followed. Dr. Levy also testified that in his view, a prisoner's death by execution is "homicide" or an "unnatural death." Under the current state of Tennessee law, execution of an inmate probably does not amount to homicide. It may, however, be an "unnatural" death. In any event, it is undisputed that the medical examiner's statute permits the county medical examiner to conduct autopsies on "executed prisoners." Tenn. Code Ann. § 38-7-106(a).

. . . Under Tenn. Code Ann. § 38-7-106(a), the county medical examiner is directed to give notice of the proposed autopsy to the decedent's next of kin using service of process. . . . The statute's notice requirement, however, suggests that the county medical examiner's discretion to perform autopsies is subject to limitations and oversight.

Tenn. Code Ann. § 4-1-407 contemplates that a court will review these claims on a case-by-case basis to determine whether cognizable religious beliefs are at issue.

In the face of a challenge to whether a county medical examiner will be permitted to perform an autopsy under the statute, Tenn. Code Ann. § 38-7-106(a) contemplates a case-by-case determination, as reflected in the notice provisions and the use of the word “may” in the statute. Here, the Court concludes that Defendant's interest in conducting Mr. Johnson's autopsy is a legitimate state interest, but it is not a compelling state interest that has been demonstrated by clear and convincing evidence. This conclusion is supported by the fact that Mr. Johnson died two weeks ago on December 2, 2009 making the efficacy of an autopsy at this time questionable and by the fact that it appears clear that Mr. Johnson died from the three lethal injections administered to him by the State of Tennessee. Given Ms. Johnson's waiver of any challenge to the procedures used in Mr. Johnson's execution, there is nothing to investigate that would trump Plaintiff's free exercise of her religious beliefs.

The Court concludes, therefore, that Plaintiff has shown a likelihood of success on the merits on her claim under Tenn. Code Ann. § 4-1-407 and that the Court's intervention is necessary to prevent irreparable harm. Given the Court's conclusion that the relevant statutes require a case-by-case consideration of the medical examiner's interest in performing an autopsy in a particular case and a case-by-case determination of whether someone's religious freedom may be violated, the Court concludes that the balance of harms to Defendant is within acceptable limits. Also, there is a public interest in knowing that the courts will afford a person's religious beliefs some weight when legitimate public interests by governmental officials are implicated. The Court concludes, therefore, that Plaintiff's rights are being or will be violated by [Defendant] and [Plaintiff] will suffer immediate and irreparable injury, loss or damage” if the Court declines to grant a temporary injunction under the particular circumstances of this case. Tenn. R. Civ. P. 65.04(2).

Based on the foregoing findings of facts and the applicable law, the Chancellor temporarily enjoined Defendant from performing an autopsy on the body of Cecil Johnson and ordered “Defendant [Dr. Bruce Levy] to release the body of Cecil C. Johnson to Plaintiff, Sarah Ann Johnson (or to a funeral home or mortician designated by Plaintiff), on December 18, 2009 at 4:00 p.m., absent an Order to the contrary from a state or federal court.” The Chancellor also denied Defendant's motion for a stay, stated there was no just reason for delay and directed entry of judgment pursuant to Tenn. R. Civ. P. 54.02. This Emergency Motion To Stay followed immediately.

ANALYSIS

The issue of autopsying executed prisoners has been a recurring subject of litigation in the United States District Court of Middle Tennessee since 2001. Three such actions include those brought by or on behalf of Phillip Workman in 2001, Sedley Alley in 2006, and a second action by

or on behalf of Phillip Workman in 2007. All three were executed at the Tennessee State Prison in Davidson County, Tennessee.

The rulings in these three cases and the progression of the relevant law was succinctly analyzed by United States District Court Judge Robert Echols in the very recent dispute between the same parties involving some of the same issues as are presented here. *See Johnson v. Levy*, 2009 WL _____, at * _____. In that proceeding like here, the Federal Court was asked to enjoin Dr. Levy from performing an autopsy on Mr. Johnson “after he is executed.”² The plaintiff’s contention was that “such an autopsy would violate his rights under the First Amendment to the United States Constitution.” *Id.* at *1. The defendants³ opposed the injunction on substantially the same grounds as they assert in this action.

In pertinent part, Judge Echols noted in his analysis that

two judges of this Court have issued temporary restraining orders against invasive post-execution autopsies because of inmate claims that such autopsies would violate their free exercise of religion. *See Workman v. Levy*, 2007 WL 1521000 (M.D. Tenn.2007); *Alley v. Levy*, 2006 WL 1804605 (M.D. Tenn. 2006) (Trauger, J.). *Those decisions, however, have been cast into some doubt because the Tennessee legislature on July 1, 2008 revised T.C.A. § 38-7-106(a) by specifically adding that a “county medical examiner may perform or order an autopsy on the body of any person in a case involving . . . executed prisoners.” Tenn.Code Ann. § 38-7-106(a). This is a clear indication of legislative intent to expand the right of the county medical examiner to conduct autopsies on prisoners following their execution.* (Emphasis added).

With that background, the district court judge continued:

There now may be some question as to the strength of likelihood of Plaintiff’s success on the merits, and the first factor is more evenly balanced between the parties. However, that is something which can be given due consideration if a temporary restraining order is issued which will maintain the status quo until the Court can address the request for a preliminary injunction on the merits.

The second factor favors the issuance of a temporary restraining order if you consider that Plaintiff will suffer irreparable harm if he learns his body will be autopsied and others, such as his family, may suffer thereafter.

²The application was filed five hours before the execution.

³The defendants in the federal court action were 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.

The third factor regarding the potential harm caused to the State if the temporary restraining order is issued would seem to favor the State because prohibiting the autopsy would prohibit the State from gathering medical and scientific evidence to support and defend the use of its designated lethal injection protocol for executing criminal defendants. This designated method of execution has been under attack with allegations that it is unconstitutional, because it constitutes cruel and unusual punishment. Finally, the fourth factor weighs the public's interest in conducting autopsies of executed prisoners. The public has an interest in insuring that the laws passed by their legislative representatives are enforced and that legally sanctioned executions are conducted in accordance with the law and individual constitutional guarantees.

On the other hand, it does not appear that Defendants will suffer any harm in maintaining the status quo until the Court can conduct a full hearing on Plaintiff's motion for a preliminary injunction because if the Court ultimately determines the matter in Defendants' favor, the State will be able to conduct the autopsy that it desires. For the same reason, the public interest will not be harmed by temporary injunctive relief pending a preliminary injunction hearing.

After balancing the factors and the equities on both sides, it is the opinion of the Court that the issuance of a temporary injunction will maintain the status quo until the Court can hear evidence on whether that temporary order should be transformed into an injunction. Under the circumstances of this case, no bond is required.

Id. at * 2-3. The federal court then granted Plaintiff's Motion For A Temporary Restraining Order and Preliminary Injunction "insofar as Plaintiff seeks a Temporary Restraining Order and the Defendants are HEREBY RESTRAINED from performing an autopsy on the body of Cecil C. Johnson pending further Order from this Court," and set a hearing to consider the request for a preliminary injunction.

Following the preliminary injunction hearing, the district court judge denied the plaintiffs' request for a preliminary injunction and dissolved the temporary restraining order in had entered on December 2, 2009, the result of which would have permitted Defendant, the Medical Examiner of Davidson County, to perform the autopsy on Cecil Johnson.

The decision to deny Sarah Ann Johnson's request for an injunction and to dissolve the restraining order was based in substantial part on *Workman v. Levy*, 2007 WL 1521000 (M.D. Tenn. May 15, 2007). In *Workman*, the court considered the constitutionally protected property interest in the body of a deceased, a person's First Amendment right to the free exercise of religion, and the 2008 amendment to Tennessee Code Annotated Sections 38-7-101 to 119, which governs the post-mortem examinations of deceased individuals. *Id.* at * 2-3. In relevant part the *Workman* court recognized the constitutionally protected property interest in the body of a deceased next-of-kin, citing *Whaley v. County of Tuscola*, 58 F.3d 1111, 1115-16 (6th Cir.1995) and the fact that

Tennessee recognizes that next-of-kin have the right to custody and burial of a deceased's body, absent an express desire of the deceased, citing *Estes v. Woodlawn Memorial Park, Inc.*, 780 S.W.2d 759, 762 (Tenn. Ct. App. 1989) and *Tinsley v. Dudley*, 915 S.W.2d 806, 807 (Tenn. Ct. App. 1995), and that due to the death of the inmate plaintiff, his next-of-kin had standing to oppose a post-mortem autopsy. *Id.* at * 2. The *Workman* court further reasoned:

As for the plaintiffs' First Amendment free exercise of religion claim, the court recognized that if the challenged law was "content neutral and of general applicability" it normally did not raise free exercise of religion concerns "even if they incidentally burden a particular religious practice or belief. If a law that burdens a religious practice is not neutral or generally applicable, however, the law violates the Free Exercise Clause unless the government shows that it is the least restrictive means of achieving a compelling governmental interest." *Id.* at * 3 (citing 110 S.Ct. at 1611). The *Workman* court then focused on Tennessee's post-mortem law in effect at the time and stated:

The laws at issue here, Tennessee Code Annotated Sections 38-7-101 to 119, govern the post-mortem examinations of deceased individuals. The parties appear to agree Section 38-7-109 requires that the county medical examiner perform an investigation of the circumstances of a death reported to him under certain circumstances, and that Section 38-7-106 gives the medical examiner discretion in determining whether to perform an autopsy.

Because the medical examiner is vested with discretion in determining whether to perform an autopsy, it is arguable that the statute is not "generally applicable." See *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649-55 (10th Cir.2006)(Discussing case law relevant to the issue of whether a regulation is "generally applicable.") Thus, the exercise of discretion would permit the decision-maker to make decisions based on their own religious animus. *Id.*; *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1990) (Government employees were given considerable discretion in assessing applications for unemployment benefits and denied application of plaintiff who refused to work on Saturdays due to her religious beliefs). As such, the government action would be subject to a strict scrutiny analysis in which the government must show a compelling interest for taking the action, and that the action is the least restrictive means of furthering that interest. *Sherbert*, 83 S.Ct. at 1795.

Several circuit courts have held, however, that the exercise of discretion alone does not automatically require the application of strict scrutiny. *Grace United Methodist Church*, 451 F.3d at 650-55. These courts have looked to whether there is evidence that the exercise of discretion in the application of a system of individualized exceptions has been based on religious animus. *Id.*

Id. at * 3. Then, the *Workman* court commented on the specific facts of that case, which are substantially similar to the relevant facts here, and concluded that:

Based on this testimony that the basis for the exercise of discretion is for a reason or reasons other than the religious beliefs or practices of Mr. Workman, and in the absence of any evidence to the contrary, the Court concludes that application of this discretionary autopsy statute does not implicate free exercise of religion concerns in this case, and is not subject to strict scrutiny.

Even if the Court applies strict scrutiny, however, Dr. Levy's testimony indicates that the State and Metropolitan governments have a compelling interest in assessing the effects of the lethal injection protocol that has been the subject of widespread constitutional challenge in recent years. While Mr. Workman's religious beliefs are sincere and worthy of consideration, they do not outweigh the medical examiner's interest in confirming that the manner of death complied with the requirements of the law. Philip Workman, moreover, put the issue of the efficacy of the lethal injection protocol in question (*Philip Workman v. Governor Phil Bredesen, et al.*, 3:07-0490). At this time, the least restrictive means of assessing the effects of the lethal injection protocol is an invasive post-mortem examination by Dr. Levy. Accordingly, the Court concludes that the Plaintiffs do not have a strong or substantial likelihood of success on the merits regarding their First Amendment claim.

The Court also is not persuaded that the Plaintiffs have a strong or substantial likelihood of success on the merits regarding their Ninth and Fourteenth Amendment claims. The parties have not cited any persuasive authority in support of these novel claims.

Id. at * 4.

As Judge Echols noted in the federal action preceeding the filing of this action in the Chancery Court of Davidson County, the post-mortem statute was amended in a significant manner after Judge Campbell penned his opinion in *Workman* above. Specifically, the General Assembly of Tennessee added "executed prisoners" to the list of persons a county medical examiner may perform or order an autopsy on. The relevant provision, being the first sentence of Tennessee Code Annotated § 38-7-106(a), now provides.

A county medical examiner may perform or order an autopsy on the body of any person in a case involving a homicide, suspected homicide, a suicide, a violent, unnatural or suspicious death, an unexpected apparent natural death in an adult, sudden unexpected infant and child deaths, deaths believed to represent a threat to public health or safety, *and executed prisoners.* (Emphasis added).

We find this amendment, the added authority of the medical examiners, very relevant and material

to this dispute, as did Judge Echols. As for the free exercise clause, we are further influenced by his analysis of that issue, which reads:

The free exercise clause of the First Amendment, which is applicable to the states through the Fourteenth Amendment, “means, first and foremost, the right to believe and profess whatever religious doctrine one desires.” *Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878 (1990). “The First Amendment does not, however, prevent the government from regulating behavior associated with religious beliefs” and “the ‘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).’” *Mount Elliot Cemetery Ass’n v. City of Troy*, 171 F.3d 398, 403 (6th Cir. 1999)(quoting, *Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990)).

In this case, there is no indication that the Tennessee law governing autopsies is not neutral, that it is directed against an identifiable suspect class or group, or that it is intended to impinge on anyone’s religious beliefs. Instead, it is a law of general applicability and therefore, Johnson’s First Amendment Rights are not violated by enforcement of that law, notwithstanding that the statute gives the medical examiner discretion in whether to perform an autopsy. See, *Workman II*, 2007 WL 1521000 at *4. Therefore, the Court concludes that Plaintiffs fail to show a strong likelihood of success on their First Amendment claim.

* * * *

The people of the State of Tennessee, through its state legislature, have made clear that autopsies may be performed in certain circumstances, including where the deceased is an executed prisoner. While the decision on whether to perform an autopsy in such circumstances is discretionary, that discretion is placed squarely and solely in the hands of the county medical examiner, not the courts. Dr. McMaster testified it is the normal policy of her office to conduct autopsies after investigation of homicides, even if surviving family members request that an autopsy not be performed because of their or the deceased’s religious beliefs or for other reasons. She testified that autopsies in such circumstances are necessary to fulfill the medical examiner’s statutory duty to independently determine the cause and manner of death.

In this case, the medical examiner intends to exercise his discretionary duty by performing an “in situ” autopsy, believing that such a modified autopsy is the least restrictive way in which the exact cause of death can be determined and other causes ruled out. It is also the position of the medical examiner’s office that such a modified autopsy is the least intrusive way it can fulfill its statutory duties and comply with the applicable professional standard of care. This Court cannot say that this

determination is an abuse of the discretion allowed by statute, assuming that the Court even has the power to review that discretion.

Further, the statute allowing for the autopsy of executed inmates presumably was changed in direct response to earlier decisions which were critical of the absence of such language, including Judge Trauger's decision in *Alley*. Regardless of the reason for the statutory change, the statute is a clear expression of the will of the people as expressed by their duly appointed representatives and it would harm the Defendants if they were not allowed to perform their statutory duties.

Johnson, 2009 WL _____, at * __.

As for the public interest, the court explained:

Dissolving the TRO and declining to issue an injunction prohibiting an autopsy of Johnson's body is in the public interest. The public has the right to expect that its duly enacted laws will be enforced, at least to the extent that those laws do not violate constitutional rights. Additionally, the public at large has a right to know whether the executions which are carried out on its behalf are done in a humane way and do not result in the type of cruel and unusual punishment which is contrary to law and not condoned by a civilized society. Autopsies serve that purpose if for no other reason than they may provide scientific and anecdotal evidence, one way or the other, as to whether inmates suffer during the execution process and, if so, to what extent. This interest remains even where, as here, the condemned inmate is not challenging the procedures utilized during his execution.

Id.

Leaving Judge Echols' analysis, we return our focus to the issue asserted by Mrs. Johnson, that of the free exercise of religion. The statute provides in pertinent part, that "no government entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability." Tenn. Code Ann. § 4-1-407(b). Further, no government entity "shall *substantially burden* a person's free exercise of religion *unless* it demonstrates that application of the burden to the person is . . . essential to further a compelling governmental interest," and unless the "least restrictive means of furthering that compelling governmental interest" is employed. Tenn. Code Ann. § 4-1-407(c)(1)-(2). "Substantially burden" is statutorily defined to mean "to inhibit or curtail religiously motivated practice." Tenn. Code Ann. § 4-1-407(a)(7).

The Chancellor found that Mr. Johnson had a sincere religious view that an autopsy would desecrate his body, which finding is supported by the record. Therefore, for purposes of this emergency motion to stay, we will presume that the performance of an autopsy on Mr. Johnson would substantially burden the free exercise of his religion.

In our view, Tenn. Code Ann. § 4-1-407 was intended by the legislature to apply to every action of state government. We gather this intent primarily from the words used in the statute because the statute is written in broad, general terms. Thus, in order to exercise his discretion under Tenn. Code Ann. § 38-7-106(a) to perform an autopsy on an executed prisoner who has religious objections to an autopsy, Dr. Levy must show a compelling state interest and perform the procedure by the least restrictive means possible in furthering that compelling governmental interest.

Dr. Levy has stated the justification for the autopsy in an affidavit filed this morning, and he testified in the preceding federal court action as well. In that action, Judge Echols described the rationale for performing the autopsy as follows:

The medical examiner's office has an independent duty to make the determination as to the cause of death, as well as an independent duty to determine whether the medical evidence shows that the lethal injection protocol was followed. . . . The State has set forth legitimate reasons for the need for an autopsy in this case, including to confirm the cause and manner of death, to determine whether the lethal injection protocol, which is Tennessee's officially designated method of execution, was administered as planned, whether the chemicals had the designated effect on Johnson, whether there is a medical basis to claim the lethal injection protocol cause pain and suffering, whether any other event may or may not have contributed to the cause of death, and to rule out the possibility that the State failed to protect the rights of the inmate in carrying out the death sentence.

Johnson, 2009 WL _____, at * ____.

The description expressed by Judge Echols is supported by Dr. Levy's Affidavit filed in this appeal, which as it did in the federal action, lists a variety of reasons for the autopsy, including the fact that "the only way in which I can independently determine that the execution did not violate the condemned prisoner's constitutional rights under the United States and Tennessee Constitutions is to perform an autopsy."

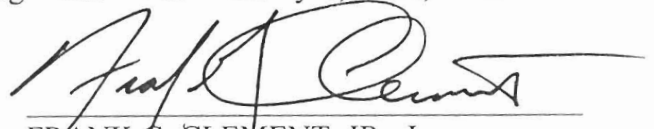
The Chancellor found that Defendant has a legitimate interest but that Defendant failed to establish by clear and convincing evidence that its interest is compelling. We are unable, at this stage of the proceedings, to reach that conclusion; instead, we have concluded that Defendant's interest in this matter may be compelling. A constitutional provision may provide a governmental entity with a compelling interest for its actions. *See Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 904 (Tenn. 1987) ("That the State's interest [in campaign disclosure] is compelling is shown by the State's Constitutional provisions protecting the integrity and fairness of the political process."). In this case a compelling interest may arise, in part, from the responsibility of governmental entities stated in the Tennessee Constitution, Art. I, Sec. 16: "That excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*" (emphasis added). The mandate of Art. I, Sec. 16 is for the present and the future and, thus, governmental entities need to ensure that executions of prisoners are done in a humane fashion consistent with constitutional


mandates, both now and in the future. Analysis of an executed prisoner's body may be one of the only ways to achieve scientific confirmation of this goal and to ensure that future executions are conducted within constitutional parameters.⁴ Due to the importance of this determination upon the parties respective rights in this action, we have determined that the parties should be afforded the opportunity to further brief this issue, as well as other pertinent issues, and that they be afforded an opportunity to present oral arguments before we make a final determination concerning whether Defendant has or can establish a compelling interest.


It is therefore ordered that the part of the Chancellor's order that requires Dr. Levy to release the body of Mr. Johnson to the plaintiff is hereby stayed pending further orders of this court. In the interim, the body of Cecil Johnson shall remain at the Medical Examiner's Office until this appeal is resolved. It is further ordered that no autopsy or other procedures shall be performed upon the body of Mr. Johnson until such time as this court may order otherwise.

As for the request that we expedite these proceedings, it is ordered that the appeal shall be expedited pursuant to the following schedule:

- 1) The appellant shall file the transcript or statement of the evidence with the trial court clerk on or before December 22, 2009.
- 2) The trial judge shall approve the transcript or statement of the evidence and authenticate the exhibits on or before December 23, 2009. Otherwise the transcript or statement of the evidence shall be deemed to have been approved in accordance with Tenn. R. App. P. 24(f).
- 3) The trial court clerk shall file the record on appeal on or before December 29, 2009.
- 4) The appellant shall file his brief on or before January 1, 2010.
- 5) The appellee shall file her brief on or before January 6, 2010.
- 6) Any reply brief shall be filed by 11:00 A.M. on January 8, 2010.
- 7) The case shall be scheduled for oral argument on the January 8, 2010, P.M. docket.


FRANK G. CLEMENT, JR., J.


ANDY D. BENNETT, J.


RICHARD H. DINKINS, J.

⁴The fact that Ms. Johnson has waived any challenge to the procedures used in Mr. Johnson's execution does not make the State's interest less than compelling.