

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

FILED
 U.S. DISTRICT COURT
 MIDDLE DISTRICT OF TENNESSEE

MAR 29 2001

BY _____
 DEPUTY CLERK

PHILIP R. WORKMAN,)
)
 Plaintiff,)
)
 v)
)
 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, Reverend Maximum)
 Security Institution.)

3 01 0296

No.

CAPITAL CASE
 EXECUTION DATE
 1 A.M., MARCH 30, 2001

JUDGE CAMPBELL

MEMORANDUM IN SUPPORT OF PRELIMINARY INJUNCTION

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 Defendant Dr. Bruce Levy from performing an autopsy on Philip Workman's body, this Court should enjoin him from doing so.

I STRONG LIKELIHOOD OF SUCCESS ON THE MERITS

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).

Mr. Workman has a sincerely held religious belief that performing an autopsy on his body would amount to the desecration of a Temple of God. See 1/29/01 Declaration of Philip Workman, attached to Mr. Workman's Complaint as Exhibit 1.

There will be no question what caused Mr. Workman's death. The State of Tennessee has established a protocol for killing Mr. Workman. This protocol was developed with the help of a physician who has determined what chemicals and what quantity of those chemicals is necessary to accomplish the homicide of Mr. Workman. Therefore, Defendant Dr. Levy will know why Mr. Workman will be dead - the State of Tennessee killed him by injecting his body with lethal chemicals. Moreover, Dr. Levy's curiosity as to the manner in which said protocol causes death was satisfied by his autopsy of Robert Coe on April 19, 2000. Therefore there is no state interest whatsoever, let alone a compelling state interest in performing an autopsy on Mr. Workman's body.

Because Mr. Workman's sincerely held religious belief far outweighs any state interest in performing an autopsy on his body, Mr. Workman makes a strong showing that he will likely succeed on the merits of his lawsuit. See United States v. Hammer, 121 F.Supp.2d 794, 802 (M.D. Pa. 2000)(attached).

II IRREPARABLE HARM

If this Court does not enjoin Dr. Levy from performing an autopsy on Mr. Workman's body, he will do so, and a violation of Mr. Workman's sincerely held religious belief will occur.

Nothing could thereafter be done to rectify that violation. Thus, Mr. Workman would suffer irreparable harm if this Court did not enjoin Dr. Levy from performing an autopsy on his body.

III HARM TO OTHERS/PUBLIC INTEREST

Preventing Dr. Levy from performing an autopsy on Mr. Workman's body harms no one. There is no public interest in having the autopsy performed.

IV CONCLUSION

Each factor this Court considers in determining whether to enjoin Dr. Levy from performing an autopsy on Mr. Workman's body counsels that this Court enjoin Dr. Levy from doing so. This Court should therefore enter a preliminary injunction precluding Dr. Levy from performing an autopsy on Mr. Workman's body.

Respectfully submitted,

Donald E. Dawson by MAB

Donald E. Dawson
Post-Conviction Defender

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CERTIFICATE OF SERVICE

I certify that on March 29, 2001, I hand-delivered a copy of the foregoing to:

Paul Summers
ATTORNEY GENERAL AND REPORTER
500 Charlotte Avenue
Nashville, Tennessee 37243; and

Karl F. Dean
Director of Law
Law Department for the Metropolitan Government of
Nashville and Davidson County, Tennessee
204 Metro Courthouse
Nashville, Tennessee 37201

Donald E. Dawson by MMB
Donald E. Dawson

United States District Court,
M.D. Pennsylvania.

UNITED STATES of America

v.

David Paul HAMMER,

No. 4:CR-96-239.

Oct. 24, 2000.

After date was set for implementation of death sentence imposed under federal death penalty statute, inmate filed document requesting that his execution be carried out between 10:00 a.m. and 4:00 p.m. and that he be provided with 30 days' notice of the tentative time selected for conducting the execution, and inmate later moved to preclude autopsy of his body. The District Court, Muir, J., held that: (1) Pennsylvania law relating to implementation of sentence of death, including method and time of execution, applied to sentence imposed under federal death penalty statute in the Commonwealth of Pennsylvania, even though execution would take place at United States penitentiary in Indiana where the inmate was incarcerated, and (2) inmate's religious belief opposing autopsies outweighed federal government's interest in protecting itself from lawsuit by inmate's next of kin, and thus, court would grant inmate's motion to preclude autopsy, and would instead permit an external examination of inmate by medical doctor prior to and after the execution and would permit the taking of photographs and videotaping the execution.

Motions granted in part and denied in part.

West Headnotes

[1] Sentencing and Punishment ☞ 1797
350Hk1797

Federal district court in Pennsylvania, which imposed sentence of death under federal death penalty statute, was the appropriate forum for considering all claims of the inmate regarding the details of his scheduled execution in United States penitentiary in Indiana. 18 U.S.C.A. § 3596.

[2] Sentencing and Punishment ☞ 1795
350Hk1795

[2] Sentencing and Punishment ☞ 1796

350Hk1796

Pennsylvania law relating to implementation of sentence of death, including method and time of execution, applied to sentence imposed under federal death penalty statute in the Commonwealth of Pennsylvania, even though execution would take place at United States penitentiary in Indiana where the inmate was incarcerated. 18 U.S.C.A. § 3596.

[3] Sentencing and Punishment ☞ 1795
350Hk1795

Term "imposed," as used throughout federal death penalty statute, relates to adjudication by the court, not to the actual infliction of the punishment; in contrast, the statute's use of term "implementation" refers to the actual infliction of punishment, and "implementation of death sentence" involves a process that includes more than just the method of execution utilized. 18 U.S.C.A. §§ 3591-3598.

[4] Sentencing and Punishment ☞ 1795
350Hk1795

"Is" means "was" in federal death penalty statute provision on implementation of death sentence, which provides that when sentence will be implemented, the Attorney General must release person sentenced to death to custody of a United States marshal, "who shall supervise implementation of the sentence in manner prescribed by law of State in which sentence is imposed," and if law of State does not provide for implementation of sentence of death, court shall designate another State that does. 18 U.S.C.A. § 3596.

[5] Sentencing and Punishment ☞ 1795
350Hk1795

Although federal government indicated it had no objection to inmate's request that his execution not take place before 7:00 a.m., federal government would be required to comply with the federal death penalty statute, which provides that death sentence must be implemented consistent with law of state in which the death sentence was imposed. 18 U.S.C.A. § 3596.

[6] Sentencing and Punishment ☞ 1795
350Hk1795

Federal district court that had imposed death sentence

under federal death penalty statute would not set time frame or specific time of day for execution, despite inmate's request that his execution be carried out between 10:00 a.m. and 4:00 p.m. and that he be provided with 30 days' notice of the tentative time selected for conducting the execution, where the federal statute did not direct the court to do so, federal government was required to comply with that statute, and federal Court of Appeals had specified only that the federal district court "fix an early new date" for the execution. 18 U.S.C.A. § 3596.

[7] Constitutional Law ↻ 84.5(1)
92k84.5(1)

[7] Coroners ↻ 14
100k14

Inmate's religious belief opposing autopsy of his body following his execution outweighed federal government's interest in protecting itself from lawsuit by inmate's next of kin; thus, federal district court, which had imposed the death sentence under federal death penalty statute, would grant inmate's motion to preclude autopsy, and would instead permit an external examination of inmate by medical doctor prior to and after the execution and would permit the taking of photographs and videotaping the execution in order to protect the government from lawsuit. 18 U.S.C.A. § 3596; 61 P.S. § 3007.

[8] Sentencing and Punishment ↻ 1795
350Hk1795

Under federal death penalty statute, death sentence must be implemented consistent with law of state in which the sentence was imposed. 18 U.S.C.A. § 3596

[9] Federal Courts ↻ 404
170Bk404

Pennsylvania procedures for implementation of death sentence would take precedence over any inconsistent federal regulations promulgated by the United States Attorney General, with regard to sentence of death imposed by federal district court in the Commonwealth of Pennsylvania under federal death penalty statute, which provides that death sentence must be implemented consistent with the law of the state in which the sentence was imposed. 18 U.S.C.A. § 3596; 61 P.S. §§ 3001-3008.

[10] Prisons ↻ 17(1)
310k17(1)

Issues relating to inmate's conditions of confinement in Indiana while awaiting implementation of death sentence under federal death penalty statute were not within jurisdiction of federal district court in Pennsylvania that imposed the sentence of death. 18 U.S.C.A. § 3596.

[11] Coroners ↻ 14
100k14

[11] Sentencing and Punishment ↻ 1796
350Hk1796

[11] Sentencing and Punishment ↻ 1797
350Hk1797

Federal district court in Pennsylvania, which imposed death sentence under federal death penalty statute, would retain jurisdiction over any matter relating to implementation of the death sentence, including date, time, method of execution, and whether autopsy was conducted, until the sentence was carried out and the United States Marshal filed a return certifying that inmate was executed in accordance with court's order and in manner consistent with law of Commonwealth of Pennsylvania, which was state in which sentence was imposed. 18 U.S.C.A. § 3596; 61 P.S. §§ 3004, 3006, 3007.

[12] Coroners ↻ 14
100k14

Under Pennsylvania law, decision to conduct autopsy following execution is at discretion of county coroner, and absent compelling reasons that discretion should not be disturbed. 61 P.S. § 3007.

[13] Coroners ↻ 14
100k14

Under Pennsylvania law, one reason to disturb county coroner's discretion concerning whether to conduct autopsy following execution is if inmate has sincerely held religious belief opposing autopsies. 61 P.S. § 3007.

[14] Constitutional Law ↻ 84.5(1)
92k84.5(1)

[14] Coroners ↻ 14

100k14

Under Pennsylvania law, federal death row inmate who opposed autopsy of his body on religious grounds was not required to establish that his religious belief was central to his religion in order for court to find that his religious belief constituted a compelling reason for disturbing county coroner's discretionary decision about whether to conduct autopsy; rather, the basic question was whether inmate had a sincerely held religious belief opposing autopsies. 61 P.S. § 3007.

[15] Constitutional Law ☞ 84.5(14)
92k84.5(14)

When 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.

[16] Coroners ☞ 14
100k14

Neither county in Indiana or the state of Indiana had any valid interest in conducting an autopsy following execution of inmate at United States penitentiary in Indiana; only warden of the federal penitentiary and the United States Marshal supervising the implementation of the death sentence, which was imposed under federal death penalty statute, were the only parties who could argue that they had interest in conducting an autopsy. 18 U.S.C.A. § 3596; 61 P.S. § 3007.

*796(Cite as: 121 F.Supp.2d 794, *796) Timothy E. Fears, Terre Haute, IN, for Vigo County, Indiana.

Frederick E. Martin, Office of the U.S. Attorney, Williamsport, for United States of America.

David A. Ruhnke, Ruhnke & Barrett, Montclair, NJ, Ronald C. Travis, Rieders, Travis, Humphrey, Harris, Waters & Waffenschmidt, Williamsport, PA, stand-by counsel for David Paul Hammer.

ORDER

MUIR, District Judge.

THE BACKGROUND OF THIS ORDER IS AS

FOLLOWS:

On November 4, 1998, this court sentenced David Paul Hammer to die by lethal injection for the first degree murder of Andrew Marti. On November 12, 1998, Mr. Hammer appealed that sentence to the Court of Appeals for this circuit. By opinion of August 31, 2000, the Court of Appeals dismissed Mr. Hammer's appeal and remanded the case to this court "to fix an early new date for the implementation of the sentence of death." *United States v. Hammer*, 226 F.3d 229, 237 (3d Cir.2000). On September 20, 2000, we received a memorandum from the government regarding the date of the execution. On September 21, 2000, we received a certified copy of the Court of Appeals' judgment in lieu of a formal mandate.

By order of September 21, 2000, we complied with the direction of the Court of Appeals by issuing an order setting November 15, 2000, as the date for the implementation of the sentence of death. Mr. Hammer is incarcerated at the United States Penitentiary, Terre Haute, Indiana ("USP-Terre Haute"), and the execution will take place at that facility. Terre Haute is located in Vigo County, Indiana.

After we issued the order on September 21, 2000, setting November 15, 2000, as the date for the implementation of the sentence of death, we received on September 21, 2000, a document from Mr. Hammer entitled "Pro Se Defendant's Response to Government's Memorandum on Setting Execution Date." In that document Mr. Hammer requests that the execution be carried out between 10:00 a.m. and 4:00 p.m. and that he be provided with 30 days' notice of the tentative time selected for conducting the execution.

By order of September 22, 2000, we directed the government to file a response *797 to Mr. Hammer's requests. On October 10, 2000, the government filed a memorandum regarding the setting of a particular time frame for the execution. On October 11, 2000, at 4:08 p.m., the Clerk of Court was advised by Mr. Hammer through the law office of stand-by counsel, Ronald C. Travis, that he would not be filing a reply memorandum. On October 5, 2000, Mr. Hammer filed a motion entitled "Pro Se Motion to Preclude Autopsy of David Paul Hammer" and brief in support thereof. Mr. Hammer also filed a motion for expedited briefing. By order of October 6, 2000, we

authorized the government to file an expedited brief in opposition. We also authorized the Coroner of Vigo County, Indiana, to file a brief in opposition by October 18, 2000. On October 11, 2000, the government [FN1] filed a brief in which it argues that we do not have jurisdiction to act on Mr. Hammer's motion to preclude an autopsy. On October 16, 2000, Mr. Hammer filed a reply brief. On October 18, 2000, Assistant United States Attorney Frederick E. Martin filed a document entitled "Government's Supplemental Response to Order of October 6, 2000" and the Coroner of Vigo County, Indiana, filed a brief in opposition to Mr. Hammer's motion to preclude an autopsy. The government also filed a declaration under penalty of perjury of Harry G. Lappin, Warden of USP-Terre Haute, and Vigo County filed an affidavit of Dr. Susan S. Amos, the Coroner of Vigo County. On October 20, 2000, Mr. Hammer responded by filing reply briefs, exhibits and his own declaration under penalty of perjury relating to his sincerely held religious beliefs opposing autopsies. Therefore, both issues--whether we should set a time frame or a specific time of day for the execution to take place and whether we should preclude an autopsy--are ripe for disposition.

FN1. Throughout this order we will use the word "government" to refer to the federal government.

[1][2] We will first respond to a footnote in the government's memorandum filed on October 10, 2000, regarding the setting of a particular time frame for the execution. That footnote states in relevant part that "the United States does not believe that this Court is the appropriate forum for considering all claims by Hammer regarding the details of his confinement or proposed execution in Indiana." We reject that position in part. This court is the appropriate forum for considering all claims of Mr. Hammer regarding the details of the scheduled execution in Indiana. It is clear also that the sentence of death must be implemented in a manner consistent with the law of the Commonwealth of Pennsylvania. 18 U.S.C. § 3596; see also H.R. Report No. 467, 103rd Cong., 2nd Sess.1994, 1994 WL 107578 (Leg.Hist.).

[3] Section 3596 entitled "Implementation of a sentence of death" states in relevant part as follows:

When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in

which the sentence is imposed. If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in that latter State in the manner prescribed by such law. [FN2]

FN2. Section 3597 entitled "Use of State Facilities" provides in relevant part as follows:

(a) In general.--A United States marshal charged with supervising the implementation of a sentence of death may use appropriate State or local facilities for the purpose, may use the services of an appropriate State or local official or of a person such an official employs for the purpose, and shall pay the costs thereof in an amount approved by the Attorney General.

***798** The term "imposed" throughout the federal death penalty statute relates to the adjudication by the court and not the actual infliction of the punishment. See, e.g., 18 U.S.C. § 3595(a) and (c) ("(a) Appeal.-- In a case in which a sentence of death is imposed, the sentence shall be subject to review by the court of appeals upon appeal by the defendant.... (c) Decision and disposition.--(1) The court of appeals shall address all substantive and procedural issues raised on the appeal of a sentence of death, and shall consider whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor ... (2) Whenever, the court of appeals finds that--(A) the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor:")(emphasis added). Furthermore, the term "imposed" is commonly used in legal opinions with respect to the court's adjudication of punishment. In contrast with respect to the actual infliction of the punishment the federal death penalty statute uses the term "implementation." "Implement" is defined as "to give practical effect to and ensure of actual fulfillment by concrete measures." Webster's Third New International Dictionary (1961). "Implementation" is defined as "the act of implementing or the state of being implemented." Id. The implementation of the death sentence involves a process which includes more than just the method of execution utilized. Congress was no doubt aware of the usage of the terms "imposed" and "implementation" when it passed the federal death penalty statute.

[4] House of Representatives Report 467 of the 103rd Congress in the section-by-section analysis of the statute states that § 3596 "provides that when a

(Cite as: 121 F.Supp.2d 794, *798)

sentence of death is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise the implementation of the death sentence in the manner prescribed by the law of the State in which the sentence was imposed." (emphasis added). This legislative history reveals that the "is" in the statute in fact means "was."

The sentence of death was imposed on Mr. Hammer in the Commonwealth of Pennsylvania on November 4, 1998, and thus the law of Pennsylvania relating to the implementation of a death sentence applies, including the method of execution and the time of execution.

[5] The government states in its memorandum that it has no objection to this court authorizing that the execution not take place before 7:00 a.m. on November 15, 2000. The government is required to comply with the federal death penalty statute. [FN3]

FN3. It has come to the court's attention that the time of executions in the Commonwealth of Pennsylvania is 10:00 p.m. This conclusion is based on a review of materials received from the Federal Judicial Center and has not been verified although an attempt to do so was made by way of a Westlaw search.

[6] We will not set a time frame or a specific time of day because (1) the federal death penalty statute does not direct the court to do so, (2) the government is required to comply with the federal death penalty statute, and (3) the Court of Appeals only specified that we "fix an early new date" for the execution.

[7][8][9] We will now address Mr. Hammer's motion to preclude an autopsy. The government argues that once Mr. Hammer is pronounced dead by medical personnel we have no further interest in what occurs in Indiana. The government also argues that we should transfer Mr. Hammer's request to the United States District Court for the Southern District of Indiana because of that court's greater familiarity with Indiana law and to promote consistency or uniformity in the implementation of death sentences imposed by district courts in other states. The government contends that uniformity would be promoted by having *799 the federal district court in Indiana decide all issues regarding the implementation of death sentences.

The states that still have death penalty statutes are not uniform in the implementation of death sentences,

including the method of execution [FN4] and the time of execution. [FN5] It would be preferable to have uniformity in the implementation of federal death sentences. However, uniformity is contrary to the process which Congress devised.

FN4. See Kenneth Williams, *The Deregulation of the Death Penalty*, 40 Santa Clara L.Rev. 677, 697 (2000) ("There are five execution methods presently employed in the United States: electrocution, lethal gas, hanging, firing squad, and lethal injection.").

FN5. The materials received from the Federal Judicial Center reveal that the time of executions is 12:01 a.m. in Alabama, California, Illinois, Indiana, Kentucky, Missouri, Montana, Nevada, Oklahoma, Oregon, Washington and Wyoming; 12:01--3:00 a.m. in Delaware; 12:05 a.m. in Utah; 1:00 a.m. in Tennessee; 2:00 a.m. in North Carolina; 8:00 a.m. in Idaho; 10:00 a.m. in Nebraska; 3:00 p.m. in Arizona; 6:00 p.m. in Florida, Mississippi, South Carolina and Texas; 6:00 p.m.--11:59 p.m. in Louisiana; 7:00 p.m. in Georgia; 7:00 p.m.--9:00 p.m. in Arkansas; 9:00 p.m. in Virginia; and 11:00 p.m. in Maryland.

During the 104th Congress, legislation was introduced to amend that process to achieve such uniformity. Specifically, Representative McCollum of Florida introduced H.R. 2359 which would have amended 18 U.S.C. § 3596 to provide that "the Attorney General will proscribe by regulation a uniform method of execution for any person sentenced to death in federal court." Congressional Testimony, Subcommittee on Crime of the House Committee on the Judiciary, September 28, 1995, 1995 WL 10731955. The Subcommittee received written testimony from Assistant Attorney General Andrew Fois regarding the proposed legislation as follows:

H.R. 2359 would allow Federal executions to be carried out at Federal facilities pursuant to uniform Federal regulations. The Department strongly supports this proposal. This position has previously been taken by the Administration and was detailed in the June 13, 1994, letter from the Attorney General to the House and Senate Conference Committee, detailing the Administration's views on various sections of the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA).

* * * * *

[T]he only execution for offenses under the VCCLEA [FN6] that could occur at Terre Haute

are those for which lethal injection was permissible in the State in which the inmate was convicted.

FN6. The federal death penalty statute was part of the Violent Crime Control and Law Enforcement Act of 1994 and is codified at 18 U.S.C. §§ 3591 through 3598.

We believe that it is highly desirable to have a uniform system for implementing Federal death penalties in a Federal institution.

From a policy as well as a practical perspective, it makes no sense to burden States with this clearly Federal responsibility, particularly when the Bureau of Prisons has a facility already built specifically for this task. H.R. 2359 would remedy this situation by amending 18 U.S.C. § 3596 to allow for the implementation of Federal death sentences pursuant to Federal regulations promulgated by the Attorney General. In addition, 18 U.S.C. § 3597 would, (sic) be modified to provide for the use of Federal Facilities in carrying out Federal executions.

Congressional Testimony, Subcommittee on Crime of the House Committee on the Judiciary, September 28, 1995, 1995 WL 10731957. Kathleen M. Hawk, Director of the Federal Bureau of Prisons similarly testified before the Subcommittee. Congressional Testimony, Subcommittee on Crime of the House Committee on the Judiciary, June 8, 1995, 1995 WL 352705 *800 (F.D.C.H.). The Subcommittee also heard testimony in opposition to the legislation from Marvin D. Miller, Director of the National Association of Criminal Defense Lawyers. *Id.*, September 28, 1995, 1995 WL 10732000.

The proposed legislation died in the 104th Congress. See H.R.Rep. No. 879, 104th Cong., 2nd Sess.1997, 1997 WL 9288 (Leg.Hist.)("On September 28, 1996, the Subcommittee held a mark-up of H.R. 2359 and ordered it reported favorably to the full Committee, amended. No further action was taken on H.R. 2359 in the 104th Congress."). On March 17, 1997, Representative McCollum introduced in the 105th Congress, 1st Session, a similar bill, H.R. 1087, which was referred to the Committee on the Judiciary. The 105th Congress, however, did not pass that bill. [FN7]

FN7. The text of that bill states in relevant part as follows:

A BILL

To clarify the method of execution of Federal prisoners.

Be it enacted by the Senate and House of Representatives of the United States of America in

Congress assembled,

Section 1. IMPLEMENTATION OF SENTENCE OF DEATH.

Subsection (a) of Section 3596 of title 18, United States Code, is amended to read as follows:

'(a) IN GENERAL--A person who is sentenced to death shall be committed to the custody of the Attorney General. At the time the sentence is to be carried out, it shall be implemented pursuant to regulations proscribed by the Attorney General.'

Sec. 2. USE OF FEDERAL FACILITIES.

Subsection (a) of section 3597 of title 18, United States Code, is amended to read as follows:

'(a) IN GENERAL--A United States marshal charged with supervising implementation of a sentence of death shall use the appropriate Federal facilities for this purpose.'

A death sentence is to be implemented consistent with the law of the state in which the death sentence was imposed. The government's argument regarding uniformity has no merit in light of the language of the statute and its legislative history.

The government, Vigo County and Mr. Hammer appear to have overlooked the Pennsylvania procedures for the implementation of a death sentence. See 61 P.S. §§ 3001 through 3008. Those provisions take precedence over any inconsistent regulations promulgated by the Attorney General.

[10][11] We recognize that issues relating to Mr. Hammer's conditions of confinement while awaiting the implementation of the sentence of death are not within this court's jurisdiction. However, this court imposed the sentence of death. Until that sentence is carried out and the United States Marshal files a return as required by law [FN8] certifying that Mr. Hammer was executed in accordance with our order and in a manner consistent with the law of the Commonwealth of Pennsylvania this court retains jurisdiction over any matter relating to the implementation of the sentence of death, including the date, time, method of execution [FN9] and whether an autopsy is conducted. [FN10]

FN8. 28 C.F.R. §§ 26.2(b) and 26.4(g); 61 Pa.C.S.A. § 3006.

FN9. 61 Pa.C.S.A. § 3004.

FN10. 61 Pa.C.S.A. § 3007.

[12] The implementation of Mr. Hammer's sentence

(Cite as: 121 F.Supp.2d 794, *800)

of death is required to be consistent with the procedures set forth in §§ 3001 through 3008, Title 61 of the Pennsylvania Statutes, and those procedures include a section addressing whether an autopsy should be conducted. That section states that

[i]mmediately after execution, a postmortem examination [FN11] of the body of the *801 inmate shall be made at the discretion of the coroner of the county in which the execution is performed. The coroner shall report the nature of any examination made. This report shall be annexed to and filed with the certificate required under section [3006]. After the postmortem examination, unless claimed by a relative or relatives, the department shall be responsible for disposition of the body.

FN11. Webster's Third New International Dictionary (1961) defines "postmortem examination" as "an examination of the body after death usu. with such dissection as will expose the vital organs for determining the cause of death or the character and extent of changes produced by disease: autopsy."

61 P.S. § 3007. Under Pennsylvania law the decision to conduct an autopsy is at the discretion of the county coroner and absent compelling reasons that discretion should not be disturbed.

[13] One reason to disturb that discretion is if Mr. Hammer has a sincerely held religious belief opposing autopsies.

There are religious groups which oppose autopsies. See, e.g., Kickapoo Traditional Tribe of Texas v. Chacon, 46 F.Supp.2d 644, 645 (W.D.Tex.1999) ("The issue in this case is whether the Kickapoo Traditional Tribe of Texas (the 'Tribe') can prevent authorities of the State of Texas from disinterring the body of one of its tribe members, Ms. Norma Rodriguez, in order to conduct an autopsy to determine how she died. It brings into play the clash between the Tribe's sincerely held religious beliefs and the State's interest in assuring that the death was not the result of foul play."); Yang v. Sturner, 750 F.Supp. 558, 558 (D.R.I.1990) ("The Yangs are Hmong, originally from Laos, and believe that autopsies are a mutilation of the body and that as a result 'the spirit of Neng [their son] would not be free, therefore his spirit will come back and take another person in his family.'"); Montgomery v. County of Clinton, Michigan, 743 F.Supp. 1253, 1257-58 (W.D.Mich.1990) ("[P]laintiff Joan Montgomery, who is Jewish, alleges the performance of the autopsy without her prior notice and consent infringed her

First Amendment right to freely exercise her religion. She believes autopsies are offensive to the tenets of Judaism"); Kohn v. United States, 591 F.Supp. 568, 572-73 (E.D.N.Y.1984) ("Most religions in the world hold that the remains of a deceased must be treated with honor and respect. Judaism believes in the principle that body and soul are sacred because both are the handiwork of God and hence are entitled to reverence.").

[14] In the declaration filed by him, Mr. Hammer states as follows:

I have consistently opposed an autopsy on moral and religious grounds. These are my own personally held sincere religious beliefs based upon my reading, and understanding of the Holy Bible. Please see: 1 Corinthians 3:16-17 "Don't you know that you yourselves are God's Temple and that God's Spirit lives in you? If anyone destroys God's temple, God will destroy him; for God's Temple is sacred and you are that Temple." See also: 1 Corinthians 6:19 "Do you not know that your body is a temple of the Holy Spirit, who is in you, whom you have received from God." (New International Version of the Holy Bible).

Mr. Hammer is not required to establish that his religious belief is considered central to his religion. Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 713-14, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1980) ("[T]he determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task ... [T]he resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); Hernandez v. C.I.R., 490 U.S. 680, 689, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) ("It is not within the judicial ken to question the centrality of religious beliefs or practices to a faith or the validity of particular litigants' interpretation of those creeds."); Muslim v. Frame, 891 F.Supp. 226, 230 (E.D.Pa.1995) (Pollak, J.)("The Supreme Court has never required that a plaintiff *802 bringing a free exercise claim demonstrate the centrality of a religious practice or belief burdened by the government"). The basic question is whether Mr. Hammer has a sincerely held religious belief.

[15] The government has not contested that Mr. Hammer has a sincerely held religious belief opposing autopsies although it has had ample opportunity to do so. When an inmate has a sincerely held religious

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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. In re the Grand Jury Empaneling of the Special Grand Jury, 171 F.3d 826, 828-29 (3d Cir.1999); Adams v. C.I.R., 170 F.3d 173, 175-76 (3d Cir.1999); 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).

[16] Neither Vigo County nor the State of Indiana has any valid interest in conducting an autopsy on a federal inmate. The Warden of USP-Terre Haute and the United States Marshal supervising the implementation of the death sentence are the only parties who can argue that they have an interest in conducting an autopsy.

The government has made one basic argument for conducting an autopsy. It has argued that an autopsy is necessary to protect it from a lawsuit filed by Mr. Hammer's next of kin. This interest appears to be compelling. However, conducting an autopsy is not the least restrictive means of furthering that interest.

An external examination of Mr. Hammer by a medical doctor prior to and after the execution, including the taking of a series of photographs and videotaping the execution would protect the government from a lawsuit. Furthermore, Mr. Hammer has agreed to make a statement prior to the execution that he has not been physically abused by prison personnel. This statement could be taken under oath and in the presence of his stand-by attorneys. [FN12]

FN12. Vigo County also appears to argue that an autopsy is essential to create a legal document, the autopsy report, demonstrating that lethal injection is not cruel and unusual punishment.

The federal government has not made this argument. Assuming it is a compelling governmental interest to create a body of evidence indicating that lethal injection is not cruel and unusual, an autopsy is not the least restrictive means to create that body of evidence. Toxicologists and physicians are able to testify regarding the effects on the human body of the chemical substances used in carrying out an execution by lethal injection. Furthermore, the execution could be videotaped to provide additional evidence regarding the effect on the human body of death by lethal injection.

Mr. Hammer's religious belief far outweighs the government's interest in an autopsy. We will grant Mr. Hammer's motion to preclude an autopsy.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Mr. Hammer's request that the government be directed to execute him between 10:00 a.m. and 4:00 p.m., and his request that he receive 30 days notice of the exact time of execution are denied.
2. Mr. Hammer's motion to preclude an autopsy (Doc. 715) is granted.
3. The United States Marshal charged with supervising the implementation of the death sentence shall not permit the body of Mr. Hammer to be released to the Coroner of Vigo County, Indiana, for purposes of an autopsy. The United States Marshal may permit the Coroner or other medical professional to conduct an external examination of the body, including the taking of a series of appropriate photographs. The body shall be disposed of consistent with 61 P.S. § 3007.

END OF DOCUMENT