

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION**

CAPITAL CASE

JASON MCGEHEE, *et al.*

PLAINTIFFS

v.

Case No. 4:17-cv-00179-KGB

ASA HUTCHINSON, *et al.*

DEFENDANTS

ORDER

Before the Court is plaintiffs' emergency motion for preservation of evidence (Dkt. No. 78). Plaintiffs seek blood and tissue samples from the body of Kenneth Williams, who was a plaintiff in this challenge to Arkansas's lethal injection protocol. Defendants responded to plaintiffs' motion (Dkt. No. 81). The Court held a hearing on plaintiffs' motion on April 28, 2017, and made the following rulings:

1. Plaintiffs' request for blood and tissue samples is within the scope of discovery. *See* Fed. R. Civ. P. 26(b)(1). The Court notes that Dr. Daniel Buffington, who testified as an expert witness for defendants during the Court's evidentiary hearings in this action, has stated that these blood samples would be highly relevant to the issues presented in this action (Dkt. No. 28-4, at 11) ("Further pharmacokinetic and pharmacodynamic studies should be performed with midazolam 500 mg IV doses, in order to demonstrate actual dose to concentration data. Any attempt to state that this type of study cannot be performed is disregarding the ability to obtain and analyze serum concentration results from individuals receiving lethal injection protocols."). The Court also heard testimony from Dr. Joel Zivot, who testified as an expert witness for plaintiffs, who relied on autopsy results conducted on inmates executed under Florida's midazolam lethal injection protocol (Dkt. No. 35, at 69-72).

2. Based on the exigent circumstances at issue in this case, plaintiffs are entitled to seek discovery of blood and tissue samples from, and an autopsy of, Kenneth Williams' body despite the fact that the parties have not conferred as required by Rule 26(f) at this time. *See* Fed. R. Civ. P. 26(d)(1) ("A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.").

3. To the extent that the Arkansas State Medical Examiner's Office is not a party to this action, plaintiffs are permitted to subpoena under Federal Rule of Civil Procedure 45 the Arkansas State Medical Examiner's Office regarding the blood and tissue samples, and request for an autopsy, at issue.

4. The Court orders Director Wendy Kelley to request that the Arkansas State Medical Examiner's Office collect by 8:00 p.m. tonight blood and tissue samples from Kenneth Williams' body as provided for in plaintiffs' emergency motion, and to conduct an autopsy consistent with the Medical Examiner's normal practice at the appropriate time. Under Federal Rule of Civil Procedure 35, this Court "may order a party whose mental or physical condition--including blood group--is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody *or under its legal control*." Fed. R. Civ. P. 35(a)(1) (emphasis added). The Court has the authority to order an autopsy under Rule 35. *See Belkow v. Celotex Corp.*, No. 89 C 3049, 1989 WL 56976, at *2 (N.D. Ill. May 22, 1989) ("This court concurs with the analysis set forth in *In re Certain Asbestos Cases*, 112 F.R.D. 427, 432-433 (N.D. Tex. 1986), that upon proper showing Rule 35(a) permits the court to order an autopsy."). An Order directing a physical examination "may be made only on motion for good cause and on notice to all parties and the

person to be examined.” Fed. R. Civ. P. 35(a)(2)(A). The Order “must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.” Fed. R. Civ. P. 35(a)(2)(B).

The Court finds that plaintiffs have demonstrated that the blood and tissue samples are relevant to and in controversy in this action, and that plaintiffs’ motion is supported by good cause. The Court also finds, on the record before it, that the Arkansas State Medical Examiner’s Office is under the Arkansas Department of Correction’s (“ADC”) legal control for the purposes of conducting an autopsy on Kenneth Williams’ body. Under Arkansas law, the Arkansas State Crime Laboratory:

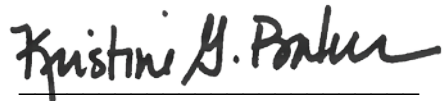
[S]hall make examinations, investigations, or perform postmortem examinations to determine the cause of death as the Executive Director of the State Crime Laboratory or his or her staff deems necessary or as may be requested by the . . . Board of Corrections or its designee, or the Director of the Department of Correction or his or her designee if the person was in the care, custody, or control of the Department of Correction at the time of death.

Ark. Code Ann. § 12-12-318. The Arkansas State Medical Examiner’s Office is within the State Crime Laboratory. *See* Ark. Code Ann. § 12-12-306. Mr. Williams was in the ADC’s control at the time of his death, meaning that if Director Kelley requested an examination of Mr. Williams’ body, the medical examiner would be compelled to examine, investigate, or perform a postmortem examination to determine the cause of Mr. Williams’ death. The Court also notes that Director Kelley testified under oath that in the past, the medical examiner only conducted an autopsy on executed inmates upon a request from the ADC (Wendy Kelley Testimony, April 13, 2017, Vol. 4, at 1215). During the Court’s expedited hearing, the defendants did not offer evidence that the past practice had changed.

The Court orders Director Kelley to request that the Arkansas State Medical Examiner’s Office collect by 8:00 p.m. tonight blood and tissue samples from Kenneth Williams’ body as

provided for in plaintiffs' emergency motion, and to conduct an autopsy consistent with the Medical Examiner's normal practice at the appropriate time. The blood and tissue samples must be preserved until further order of this Court.

It is so ordered this the 28th day of April, 2017.

Handwritten signature of Kristine G. Baker in black ink.

Kristine G. Baker
United States District Judge