

## **How I got rid of the gas chamber in Maryland and other execution stories.**

**H. Mark Stichel**

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You should not believe everything that you read in the newspapers. But, if you are willing to believe the New York Times, which aspires to be the United States' "newspaper of record," I was responsible for the push that caused Maryland to abolish lethal gas as its means of execution and substitute lethal injection in its stead.<sup>1</sup> This evening I plan to talk about executions in general, my experience with the Maryland gas chamber and where things stand currently with respect to execution methods in the United States.

First, you may ask how someone who started out practicing antitrust law in a large firm and then evolved into a litigator focusing on business-related cases, got involved with the gas chamber. The easiest answer is that it was the

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<sup>1</sup> See *Given a Push, Maryland Alters its Death Penalty*, New York Times, March 25, 1994 ([http://www.nytimes.com/1994/03/25/us/given-a-push-maryland-alters-its-death-penalty.html?\\_r=0](http://www.nytimes.com/1994/03/25/us/given-a-push-maryland-alters-its-death-penalty.html?_r=0))

culmination of a series of unrelated coincidences and connections. Freud would have us blame our parents for how we have turned out. When it comes to the macabre, I need to skip a generation. My maternal grandmother was an aficionado of horror films and we spent many hours watching them together when I was growing up. My other familial connection to the macabre and crime was less direct. My father and the late Elsbeth Levy Bothe, who served as a judge of the Circuit Court for Baltimore City, were law school classmates. To say that Elsbeth loved stories of true crime and the macabre would be an understatement. Although I had heard many stories about Elsbeth from my father, I really did not come to know her until after she retired from the bench. More than once Elsbeth and I regaled each other with execution stories at lunch while others at the lunch table were turning green at the gills listening to us. I will try to keep the gore to a minimum in my presentation this evening. But, be

warned, my presentation is not for the faint of heart or those with weak stomachs.

More directly related to how I came to challenge the gas chamber, was through my representation of Donald Thomas, who was an inmate sentenced to death by Baltimore County Circuit Court Judge Cullen H. Hormes, Jr., on December 13, 1982. Thomas' double murder convictions, rape conviction and death sentence were affirmed by the Court of Appeals of Maryland in 1984 and the Supreme Court of the United States denied certiorari on his direct appeal in 1985.<sup>2</sup> At that point, Thomas needed new counsel to investigate and pursue post conviction/habeas corpus remedies. Thomas' new counsel was none other than Piper & Marbury. Decatur Miller later claimed not to remember how the firm came to represent Thomas. But, the story I had heard was that Alan

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<sup>2</sup> *Thomas v. State*, 301 Md. 294, 483 A.2d 6 (1984), *cert. denied*, 470 U.S. 1088 (1985).

Murrell, Maryland's legendary first head of the Public Defender's Office, saw Deke Miller, then Piper's Managing Partner, at some bar event, buttonholed him and said that Piper should take on a death row inmate's case. Without hesitating, or claiming a need to consult the firm, Deke supposedly said: "Send one over." Deke may not have remembered the exchange, or wanted to remember it when his partners were not too thrilled about the time and resources that the Thomas case took, but Deke did protect me when, over the course of the eight year period that I represented Thomas, I spent many more hours on a pro bono case than was healthy for my career at the firm. I always will be grateful to him for his support.

I was not Thomas' initial lawyer at Piper. David McManus, who had clerked for Judge Harry A. Cole on the Court of Appeals of Maryland and, thus, was knowledgeable about capital litigation, was Thomas' first lawyer. When Dave left the firm at the end of 1986, the case was in limbo. I had worked

on a death penalty case from North Carolina<sup>3</sup> when I clerked for Judge Francis D. Murnaghan, Jr. on the United States Court of Appeals for the Fourth Circuit, and had written a proposed law review note on federal habeas corpus procedure. Thus, I knew something about capital litigation. I offered to “help” the associate who had taken over the case. Within about a month it was MY CASE, and remained so for the next eight years.

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<sup>3</sup> *Hutchins v. Garrison*, 724 F.2d 1425 (4th Cir. 1983), cert. denied, 464 U.S. 1065 (1984). James Hutchins was the first post-Furman execution in North Carolina and the 15th post-Furman execution in the United States. He was the third person to be executed in the United States by lethal injection. See Cynthia F. Adcock, *The Twenty-Fifth Anniversary of Post-Furman Executions in North Carolina: A History of a Southern State’s Evolving Standards of Decency*, 1 ELON L. REV. 113, 121 n.41 (2009).

When I was a young lawyer, I once asked a senior member of the bar how he had come to practice in a certain area of the law. His response was: “You go where your clients take you.” Donald Thomas took me to the gas chamber.

Judge Joseph F. Murphy, Jr., then a Baltimore County Circuit Court Judge, twice granted post conviction relief in favor Thomas and vacated his death sentence. Both times the Court of Appeals of Maryland reversed him.<sup>4</sup>

I had not raised any issues with respect to Maryland then-mandated means of execution, the gas chamber. Maryland and federal cases had held that execution by means of lethal gas was not cruel and unusual punishment.<sup>5</sup>

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<sup>4</sup> *State v. Thomas*, 328 Md. 541, 616 A.2d 365 (1992); *State v. Thomas*, 325 Md. 160, 599 A.2d 1171 (1992), *cert. denied*, 508 U.S. 917 (1993). Judge J. Frederick Motz of the United States District Court for the District of Maryland later granted habeas relief to Thomas, vacating his death sentence. *Thomas-Bey v. Smith*, 869 F. Supp. 1214 (D. Md. 1994). The United States Court of Appeals for the Fourth Circuit affirmed Judge Motz’s decision in one of the very few cases in which it has ruled in favor of a death row inmate. *Thomas-Bey v. Nuth*, 67 F.3d 296, 1995 WL 561296 (4th Cir. 1995). The State’s Attorney for Baltimore County elected not to seek the death penalty on resentencing. Thomas was sentenced to three life sentences and remains in the custody of the Maryland Department of Corrections.

<sup>5</sup> See *Calhoun v. State*, 297 Md. 563, 612-17, 468 A.2d 45, 68-7 (1980), *cert. denied sub nom Tichnell v. Maryland*, 466 U.S. 993 (1984); see also *Gray v. Lucas*, 710 F.2d 1048 (5th Cir. 1983), *cert. denied*, 463 U.S. 1237 (1983).

However, subsequent to the last evidentiary hearing before Judge Murphy, proceedings incident to the execution of Robert Alton Harris by the State of California suggested that prior case law on the issue may have been incorrect.

Robert Alton Harris was executed in San Quentin's gas chamber on April 21, 1992. His lawyers had attempted to stop his execution on the ground that the gas chamber was cruel and unusual punishment. Although his lawyers were not able to stop the execution, they convinced Judge Marilyn Hall Patel of the United States District Court for the Northern District of California to allow a videotape to be made of the execution for potential use in continuing litigation regarding California's gas chamber. The California lawyers had brought a class action on behalf of all California death row inmates in an action that was known as *Fierro v. Gomez*.

Based on voluminous evidence that the lawyers in *Fierro* had collected, I then filed a second state post conviction petition on behalf of Thomas in the

Circuit Court for Baltimore County in 1993.<sup>6</sup> At that point in time only Arizona, California and Maryland had the gas chamber as a means of execution. Arizona and California had amended their execution statutes to allow an inmate to elect lethal injection instead of the gas chamber. Only Maryland retained the gas chamber as its only means of execution. Also, at that point in time, Donald Thomas was the Maryland death row inmate closest to having exhausted all of his potential challenges to being executed. He had the oldest sentence on Maryland's death row because he had been sentenced by a judge; all of the persons who had pre-1987 jury-imposed death sentences, had their sentences vacated by the Supreme Court's decision in *Booth v. Maryland*.<sup>7</sup> In other words, he was in the on deck circle.

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<sup>6</sup> I was and am especially indebted to Michael Laurence, who represented Robert Alton Harris and was one of primary lawyers in *Fierro*, for his assistance with the second Thomas post conviction petition.

<sup>7</sup> 482 U.S. 496 (1987).

The Circuit Court for Baltimore County held a one-day evidentiary hearing on my new petition on August 9, 1993. Judge Thomas J. Bollinger presided. I introduced many affidavits that the California lawyers had collected. My primary fact witness was Dr. Sylvan Shane, a dentist who had witnessed Maryland's last lethal gas execution, the execution of Nathaniel Lipscomb on June 9, 1961. I had tried to find other witnesses to any of the four executions that had been held in Maryland's gas chamber between 1957 and 1961, including writing to then Chief Judge Robert C. Murphy to inquire whether he had witnessed an execution while he was serving in the Attorney's General Office. Judge Murphy politely responded that he had not witnessed the execution of Lipscomb nor had he ever witnessed an execution. I also called Dr. Richard Traystman, then Vice-Chairman of the Department of Anesthesiology and Director of Research in the Department at Johns Hopkins Hospital. The State called Dr. Stephen I. Baskin, a pharmacologist and

toxicologist who worked at Aberdeen for the Federal Government. Dr. Baskin challenged the accuracy of the eyewitness reports of gas chamber execution on the grounds that the witnesses were not good historians, their recollections were emotionally charged and the only way that one really could know whether someone in the gas chamber was conscious was to have a videotape and/or an electroencephalograph test (EEG) running on the person while he was being executed.

In *Fierro* the State of California recognized the dearth of hard, scientific evidence regarding the effect of a lethal gas execution when it unsuccessfully attempted to commission a test involving rats to prove its theory that cyanide gas was painless and, in fact, was an analgesic. The proposed test involved inserting tubes into the anuses of rats, inflating the tubes, measuring the decibel level of the rats' screams, and rerunning the test after the rats had been injected

with a non-lethal dose of cyanide.<sup>8</sup> The test never was performed due to protests from animal rights advocates.

Although the affidavits and other testimony collected by the California lawyers ultimately convinced Judge Patel and the Ninth Circuit *Fierro v. Gomez* that the gas chamber was unconstitutional,<sup>9</sup> I would note that the same eyewitness reports were introduced in a Maryland case after *Thomas* and received the following comment from Judge Frederic Smalkin:

*Many of the affidavits submitted by petitioner have the look of having been recycled from a 1992 California case. Their graphic descriptions of the death throes of inmates executed by gas are full of prose calculated to*

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<sup>8</sup> See *Sunday San Francisco Examiner & Chronicle*, October 24, 1993, at A1; *San Francisco Examiner*, October 25, 1993 at A4; *The Recorder*, October 26, 1993, at 1.

<sup>9</sup> See *Fierro v. Gomez*, 865 F. Supp. 1387 (N.D. Cal. 1995), *aff'd*, 77 F.3d 301 (9th Cir. 301), *vacated*, 519 U.S. 918 (1996).

*invoke sympathy, but insufficient to demonstrate that execution by the administration of gas involves the wanton and unnecessary infliction of pain.*<sup>10</sup>

Ten days after the hearing before Judge Bollinger, I moved on behalf of Thomas to intervene in *Fierro v. Gomez* and obtain access to the Robert Alton Harris videotape. Judge Marilyn Hall Patel initially “continued” my motion until after she ruled on the admissibility of the videotape in the case before her.<sup>11</sup> Then, in February 1994, after the videotape had not been used in the evidentiary hearing in *Fierro*, Judge Patel had the videotape destroyed, without any notice to me.<sup>12</sup> Supposedly no one ever had viewed it.

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<sup>10</sup> *Hunt v. Smith*, 856 F. Supp. 251, 260 (D. Md. 1994), *aff’d*, 57 F.3d 1327 (4th Cir. 1995), *cert. denied*, 516 U.S. 1054 (1996).

<sup>11</sup> *See Fierro v. Gomez*, 1993 WL 414673 (N.D. Cal. 1993).

<sup>12</sup> *Videotape of a California Execution is Destroyed*, N.Y. TIMES, Feb. 13, 1994.

Judge Bollinger denied my petition and I had applied for leave to appeal to the Court of Appeals of Maryland when another inmate jumped ahead of Thomas in the line to the gas chamber. John Thanos, who had been sentenced to death for killing three teenagers in two separate incidents, waived his appeals and became in capital litigation parlance “a volunteer.” He initially was scheduled for execution in November 1993. I then moved in the United States District Court for the District of Maryland pursuant to Rule 27 of the Federal Rules of Civil Procedure, for an order allowing me to videotape Thanos’ execution and have an EEG conducted as he was being executed.<sup>13</sup> Just prior to that time, the United States District Court for the Western District of

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<sup>13</sup> At that time, it was not clear whether a habeas petition pursuant to 28 U.S.C. §2254 or an action pursuant to 42 U.S.C. §1983 was the proper vehicle to challenge a method of execution. *Cf. Hill v. McDonough*, 547 U.S. 573, 576-81 (2006) (decided as matter of first impression that Section 1983 action is proper vehicle to challenge method of execution). I had anticipated bringing Thomas’s challenge to the gas chamber as a federal habeas action. Given that a habeas action requires state court exhaustion, I could not then have filed a federal habeas petition because the Court of Appeals of Maryland had not ruled on Thomas’ application for leave to appeal Judge Bollinger’s decision. Thus, I was able to use the rarely invoked Rule 27 of the Federal Rules of Civil Procedure, which requires that the petitioner pursuant to the rule expects to be a party to a federal court action but cannot presently bring it.

Washington and the Ninth Circuit had denied a motion to videotape a hanging in a challenge to that method of execution on the ground that it violated the condemned person's privacy rights since he had not consented to it.<sup>14</sup> However, I was able through contacts with John Thanos' attorneys to obtain his consent to the videotaping of his execution and having an EEG performed while he was being executed.

Judge Garbis ultimately held that I could videotape Thanos' execution and have an EEG performed on him.<sup>15</sup> The General Assembly of Maryland, which had dragged its feet for years with respect to various bills to substitute lethal injection for the gas chamber, passed emergency legislation to provide for lethal injection as a means of execution and Governor William Donald

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<sup>14</sup> See *Campbell v. Blodgett*, 982 F.2d 1356 (9th Cir. 1993).

<sup>15</sup> See *Petition of Thomas*, 155 F.R.D. 124 (D. Md. 1994).

Schaefer signed the bill into law on March 25, 1994.<sup>16</sup> My videotape was mooted. But, the litigation was not without any benefit.

The State objected to the videotaping of John Thanos' execution on various grounds, including that it would be impracticable to videotape in the vicinity of the gas chamber. Consequently, I had two tours of the gas chamber and the death suite at the Maryland Penitentiary. The first visit was for counsel only, the second visit was with Judge Garbis. The first visit is significant for part of tonight's discussion.

For years there had been a legend among death row lawyers that former Maryland Penitentiary Warden Vernon L. Pepersack had collected a scrapbook of information about the gas chamber. I had requested that the Attorney General's Office produce the scrapbook and was told that no such

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<sup>16</sup> See 1994 Md. Laws ch. 5.

thing existed. As we were finishing the first visit, lawyers from the Attorney General's Office and I were in the administrative office of the Penitentiary with the Warden and one of his assistants. Off the cuff, I said that I had heard about this scrapbook and did anyone know anything about it. The Warden's assistant went over to a battered metal desk in the corner, pulled out a sheaf of papers and said: "Is this what you are talking about?" Everyone else in the room had a look of horror and surprise on their faces. Needless to say, I eventually got a copy of the scrapbook from the Attorney General's Office. Here it is.<sup>17</sup>

Warden Pepersack's scrapbook begins with a list of all executions carried out at the Maryland Penitentiary between 1923 and 1961. Prior to 1923 executions were carried out in county seats by local sheriffs. The most

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<sup>17</sup> The Death Penalty Information Center's website recounts a similar discovery of information about executions in the military: "In December 2003, a document was discovered at the Pentagon that listed the executions under United States military jurisdiction from 1945 through 1961. The handwritten list, entitled 'Executed Death Cases before 1951,' was discovered behind a filing cabinet during a cleanup of offices."

<https://deathpenaltyinfo.org/executions-military>

remarkable thing about the list is the speed with which people were executed after they were sentenced. The typical death row inmate was executed within a year of being sentenced and several were executed within 60 days of being sentenced. The second to the last person executed in the pre-*Furman* era was Leonard Schockley, who was sentenced on April 8, 1958, and executed on April 10, 1959. He was 17 years old at the time he was executed.

Maryland's traditional method of execution was hanging. Prior to the June 28, 1957, gas chamber execution of Eddie Lee Daniels, I can find only one account of a non-hanging execution in Maryland. On May 16, 1746, Esther Anderson, a slave was burned in Kent county for participating in the murder of her master. Her crime was "petit treason," the killing of someone to whom the person owed allegiance other than the king or queen.<sup>18</sup> It is not clear

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<sup>18</sup>C. Ashley Ellefson, *Seven Hangmen of Colonial Maryland* at 43 n.2 (2009).

whether she was burned while alive or afterward. The last burning of a live woman in England occurred in 1726, but she only was alive because the executioner lit the fire before she could be strangled beforehand, the usual practice. The woman's crime also was petit treason, the killing of her husband.<sup>19</sup>

The ritual mutilation of a corpse after execution has a long history in England.

For example, traitors were decapitated after they were hanged and their severed heads displayed to the spectators. Oliver Cromwell, who died of natural causes in 1658, was exhumed after the Restoration of the Monarchy, hung in chains and then decapitated.

Maryland's move from hanging to the gas chambers was prompted by the August 12, 1949, execution of Eugene H. James. Warden Pepersack's

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<sup>19</sup> V.A.C. Gatrell, *The Hanging Tree: Execution and the English People 1770-1868* 317 (1994).

scrapbook includes a typescript of an article from the Baltimore News Post regarding the botched hanging:

To spare the reader the more revolting details, it is sufficient to say that when the condemned man plunged through the trap at 12:21 A.M., the knot placed behind his ear, which was supposed to break his neck instantly, slipped around under his chin.

His body jackknifed and he screamed and uttered choking, guttural sounds for four minutes as his torso and limbs writhed convulsively.

About one minute after he fell through the trap, three guards seized his feet in an effort to keep him still.

At direction of Warden Swenson, the prison physician gave James an injection of morphine in a leg, but he

continued to scream and writhe for three more  
minutes.

He slipped the strap binding his arms to his side  
and reached one clutching hand nearly to his throat,  
almost succeeding in getting his fingers inside the  
noose.

At 12:30, nine minutes after the trap was sprung,  
he uttered his last guttural sounds. . . .<sup>20</sup>

There are letters and other materials in the scrapbook regarding  
Maryland's decision to change from hanging to the gas chamber. I have not  
seen any evidence that electrocution was considered seriously. On September

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<sup>20</sup> Vernon L. Peppersack, Warden, Maryland Penitentiary, *Capital Punishment*, August 24, 1954 (quoting *Gas Chamber or Electric Chair for Maryland*, BALTIMORE NEWS POST, August 16, 1949) (a copy of Warden Peppersack's Scrapbook is on deposit at the Library Company of the Baltimore Bar).

10, 1954, Warden Pepersack wrote to the Secretary of the Penitentiary Committee of the Mississippi House of Representatives:

We would be interested to know what prompted your survey in changing the method of execution from electrocution to lethal gas. This institution has been in the process of making surveys relative to other forms of execution and the tendency is toward lethal gas.

A.B. Wilson, a Maryland Penitentiary Custodial Officer, wrote the following in his July 6, 1954, report to Warden Pepersack of his recent visit to the North Carolina State Prison in Raleigh:

As Warden Bailey was not present I took Mr. O'Neil's word that they are very well pleased with this manner of execution and find it far better than their old method of the electric chair. This method has been

in use since 1935 and as many as five persons have been executed in one day.

Maryland purchased its gas chamber from the Eaton Metal Products Company of Denver, Colorado. It appears that most if not all of the gas chambers used around the United States were made by Eaton. Maryland's gas chamber was delivered at the end of February 1956.

Maryland executed a pig in the new gas chamber on March 8, 1956. Loyal B. Calkins, Criminal Psychologist, wrote the following in his March 9, 1956, report to Warden Peppersack:

As per your request, the following are my impressions of the experimental execution of the pig in

the testing of the new gas chamber on March 8, 1956.

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The fact that the pig could not be strapped down as a man would be made it a rather gruesome experience, and one wonders at this time what the contortions of a human being would be even though he was strapped down. My first impression was that hanging was much cleaner, quicker, and much less worrisome than the gas chamber. This opinion is strictly temporary, as a real execution may be much less gruesome than yesterday's experience.

Warden Pepersack and the officers assigned as the operator and chemical officer for the new gas chamber traveled to the Mississippi State Penitentiary on April 4 and 5, 1956, to witness an execution and how to clear the gas chamber

after the execution. The final paragraph of Warden Pepersack's report of the visit, seems very incongruous given the nature of the visit:

Our stay at Parchman Wednesday evening and until 4:00 p.m. Thursday was most delightful and we were given the utmost consideration and courtesy by Superintendent Wiggins, Mrs. Wiggins and the many members of his staff with whom we came in contact.

The Maryland gas chamber was tested again on May 17, 1956, and used to execute an inmate for the first time on June 28, 1957. The execution took 17 minutes.

The next day, the Baltimore News Post had a long and critical article about the first gas execution. The article concluded:

After the first test, did the warden prefer gas to hanging. “It’s hardly a question of preference,” he said, “but gas is more socially accepted.

He added, sadly, that there is no humane way of making capital punishment palatable – or preferable.

Warden Peppersack’s distaste for capital punishment and execution was not uncommon among those who were tasked with carrying it out. In 1924, when Texas centralized executions at Huntsville Prison, the warden resigned effective the day before the first execution was to take place.<sup>21</sup> The warden said: “It just could not be done, boys. A Warden can’t be a warden and a killer too. The penitentiary is a place to reform a man, not to kill him.” Donald Cabana, the former warden of the Mississippi Penitentiary at Parchman, wrote a

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<sup>21</sup> James W. Marquart, Sheldon Ekland-Olson and Jonathan R. Sorensen, *The Rope, The Chair, and the Needle: Capital Punishment in Texas, 1923-1990* at 15 (1994).

memoir in 1998 titled “Death at Midnight: The Confession of an Executioner.”

Cabana, who presided over several executions, became an outspoken opponent of capital punishment. To hark back to Colonial Maryland, more than once persons who were sentenced to die had their sentences commuted on the condition that they agree to serve as the colony’s hangman.<sup>22</sup>

Maryland’s abolition of the gas chamber came with a price – the substitution of lethal injection for gas. Five Maryland inmates were executed by lethal injection between 1994 when John Thanos became Maryland’s first post-Furman execution and 2005 when Maryland executed Wesley Baker, the last Maryland execution.

Means of execution were discussed at length in the 1953 Report of the Royal Commission on Capital Punishment, still to this day one of the most

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<sup>22</sup> See generally C. Ashley Ellefson, *Seven Hangmen of Colonial Maryland* (2009).

thorough and authoritative studies on Capital Punishment. The Commissioners not only looked at execution methods in the United Kingdom, but traveled to the United States to examine electrocution and lethal gas. The Commissioners rejected both methods and recommended that the UK retain hanging as its method of execution. However, the Report includes a discussion of lethal injection, then just a theoretical method, rather than one actually in use. The Commissioners reported the strong opposition to the method by the British Medical Association.<sup>23</sup>

No medical practitioner should be asked to take part in bringing about the death of a convicted murderer. The Association would be most strongly opposed to any proposal to introduce, in place of

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<sup>23</sup> Report ¶743 at 258.

judicial hanging, a method of execution which would require the services of a medical practitioner, either in carrying out the actual process of killing or in instructing others in the technique of the process.

When lethal injection became more than a theoretical possibility in the United States, the American Medical Association had a similar reaction. Beginning in 1980, and continuing to the present day, the American Medical Association's medical ethics opinions have forbidden physicians from participating in executions.<sup>24</sup> The lethal injection protocols used in the United States have been developed by people without the knowledge or training to administer painless anesthesia or death. Lethal injection is administered by people who do not have

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<sup>24</sup> See AMA Opinion 2.06. See also Deborah W. Denno, *The Lethal Injection Quandary: How Medicine has Dismantled The Death Penalty*, 76 Fordham L. Rev. 49 (2007); Alison J. Nathan, *Baze-D and Confused: What's the Deal with Lethal Injection?*, 156 U. Pa. L. Rev. 312 (2008).

medical training. Thus, lethal injection has not been the painless alternative that many of us thought that it would be back in the early 1990s.

There have been several challenges to the constitutionality of lethal injection executions. In 2015, the Supreme Court of the United States addressed the issue in *Glossip v. Gross*.<sup>25</sup> The Court rejected the challenge to Kentucky's execution protocol because the petitioners failed to establish that any risk of harm was substantial when compared to a known and available alternative method of execution. The Court reasoned that because "it is settled that capital punishment is constitutional, "[i]t necessarily follows that there must be a [constitutional] means of carrying it out."<sup>26</sup>

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<sup>25</sup> 135 S. Ct. 2726 (2015).

<sup>26</sup> See *Baze v. Rees*, 553 U.S. 35, 47 (2008).

As the Royal Commission's report noted, historically there were four methods of execution, other than hanging, used in the "Western World" in 1953: electrocution, lethal gas, the guillotine and the firing squad.

In 2014, Judge Alex Kozinski dissented from the Ninth Circuit's decision not to hear *en banc* a panel's decision that an inmate should have been granted a preliminary injunction delaying his execution until he received information from the state department of corrections regarding the method of his execution.

Judge Kozinski wrote:

If some states and the federal government wish to continue carrying out the death penalty, they must turn away from this misguided path and return to more primitive—and foolproof—methods of execution. The guillotine is probably best but seems inconsistent with our national ethos. And the electric

chair, hanging and the gas chamber are each subject to occasional mishaps. The firing squad strikes me as the most promising. Eight or ten large-caliber rifle bullets fired at close range can inflict massive damage, causing instant death every time. There are plenty of people employed by the state who can pull the trigger and have the training to aim true. The weapons and ammunition are bought by the state in massive quantities for law enforcement purposes, so it would be impossible to interdict the supply. And nobody can argue that the weapons are put to a purpose for which they were not intended: firearms have no purpose *other* than destroying their targets. Sure, firing squads can be messy, but if we are willing to carry out

executions, we should not shield ourselves from the reality that we are shedding human blood. If we, as a society, cannot stomach the splatter from an execution carried out by firing squad, then we shouldn't be carrying out executions at all.<sup>27</sup>

I think Judge Kozinski got it right in *Wood v. Ryan*. I wrote to judge Kozinski soon after he penned his opinion. I recounted that one of the experts that I had used in the Thomas evidentiary hearing on the gas chamber was the same expert that had been used in *Fierro v. Gomez*, the California challenge.

Dr. Richard Traystman, then the Vice Chair of the Department of Anesthesiology at Johns Hopkins, testified as an expert witness at the Thomas hearing regarding the painful effects of cyanide gas. When I was preparing Dr.

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<sup>27</sup> *Wood v. Ryan*, 759 F.3d 1076, 1102-03 (9th Cir. 2014), *vacated*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 21 (2014).

Traystman for his testimony, I asked him what the best method of execution would be. He said, without hesitation, the guillotine. Dr. Traystman stressed that his opinion about the guillotine was “off the record” and specifically requested that I not ask him any questions in court about how executions should be carried out that would be better than lethal gas. I did not ask him about the firing squad.<sup>28</sup>

The guillotine and firing squad present interesting issues. To the best of my knowledge, the guillotine has not been used in North America other than for one execution conducted on French-controlled territory off the coast of Canada. The guillotine used for that execution had been shipped from

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<sup>28</sup> See Letter dated July 28, 2014, from H. Mark Stichel to the Honorable Alex Kozinski.

Martinique, was covered with rust and had a dull blade. What should have been a swift beheading turned into a much grizzlier affair.<sup>29</sup>

Insofar as the firing squad is concerned, it has been used by Utah and the United States Military. In 2015, the Washington Post had an article about the military's last use of the firing squad in 1945, when Eddie Slovik was executed for desertion.<sup>30</sup> Utah has had three post-*Furman* executions and there is current interest in the firing squad both by states other than Utah and academics.<sup>31</sup> Fordham Law School Professor Deborah Denno, who has written extensively about executions and been cited many times by the Supreme Court

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<sup>29</sup> Kristen Majewski, *Joseph Neel: The Only Person in North America Executed by Guillotine*, Modern Notion (<http://modernnotion.com/joseph-neel-person-north-america-executed-by-guillotine/>)

<sup>30</sup> Thomas Gibbons-Neff, *Why Sgt. Bergdahl never will face an Army firing squad*, WASHINGTON POST, December 16, 2015. Cf. <https://deathpenaltyinfo.org/executions-military> (lists executions by firing squad that post date Slovik's execution).

<sup>31</sup> Andrew Jensen Kerr, *Facing the Firing Squad*, 104 GEO. L. J. ONLINE 74 (2015); P. Thomas Distanislao, *A Shot in the Dark: Why Virginia Should Adopt the Firing Squad as its Primary Method of Execution*, 49 U. RICHMOND L. REV. 779 (2015).

of the United States, wrote in 2016 that: “the firing squad could possible meet *Glossip*’s ‘alternative method’ requirements of being ‘known,’ ‘available’ and ‘entail[ing] a lesser risk of pain.’ ”<sup>32</sup> In February 2017, the Supreme Court of the United States denied Thomas Arthur’s petition for a writ of certiorari to review Alabama’s use of lethal injection.<sup>33</sup> Arthur had proposed use of the firing squad as an alternative. The Eleventh Circuit had held that the firing squad was not an available alternative because it was beyond the statutory authority of the state department of corrections.<sup>34</sup> Justice Sotomayor, joined by Justice Breyer, dissented from the Supreme Court’s denial of certiorari. She was very critical of the Eleventh Circuit’s decision and held that conditioning a federal constitutional rights on operation of state statutes contravenes basic

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<sup>32</sup> Deborah W. Denno, *The Firing Squad as “A Known and Available Alternative Method of Execution” Post-Glossip*, 49 U. MICH. J. L. REFORM 749,777 (2016).

<sup>33</sup> *Arthur v. Dunn*, 137 S. Ct. 725 (Feb. 21, 2017).

<sup>34</sup> *Arthur v. Dunn*, 840 F.3d 1268, 1320 (11th Cir. 2016).

constitutional principles.<sup>35</sup> Arthur was executed by means of lethal injection on May 25, 2017.<sup>36</sup>

There are other options for executing people. North Korea allegedly has used anti-aircraft guns to execute people.<sup>37</sup> Yemen this past summer televised the execution of a man convicted of raping and killing a toddler by means of shooting him with an automatic weapon at point blank range.<sup>38</sup> And, Saudi Arabia still beheads people by sword. However insofar as the United States is concerned, it appears that lethal injection and the firing squad will be the sole

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<sup>35</sup> *Arthur v. Dunn*, 137 S. Ct. at 729.

<sup>36</sup> A Virginia inmate, Ricky Gray, argued in the U.S. District Court for the Eastern District of Virginia that the firing squad was an available alternative to lethal injection in his challenge to the method of execution. The Eastern District of Virginia rejected the argument on the same grounds that the Eleventh Circuit used in *Arthur*. See *Gray v. McAuliffe*, 2017 WL 102970 (E.D. Va. Jan. 10, 2017). The Fourth Circuit declined to stay Gray's execution and he was executed by means of lethal injection on January 18, 2017.

<sup>37</sup> Adam Taylor, *Does North Korea execute people with anti-aircraft guns? New satellite images suggest the rumors may be true*, WASHINGTON POST, May 1, 2015.

<sup>38</sup> Shuaib Almosawa and Rick Gladstone, *In TV Spectacle, Man Convicted of Child Rape-Murder is Executed in Yemen*, NEW YORK TIMES, July 31, 2017.

methods of execution in the future. The last hanging was in Delaware in 1996; the last lethal gas execution was in Arizona in 1999. Although there have been 158 electrocutions in the United States since Furman, only five of those have occurred in the last decade, with the last one occurring in Virginia in 2013.

In 2013, Maryland abolished the death penalty prospectively and in 2015 Governor Martin O'Malley commuted the death sentences of the four men on death row in Maryland. Thus, Maryland's method of execution now is a moot subject. But, so long as other states and the federal government seek to execute people, the issues surrounding methods of execution will continue to persist.<sup>39</sup>

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<sup>39</sup> Cf. *Kirkpatrick v. Chappell*, No. 14-99001, slip op. at 32-22 (9th Cir. Oct. 10, 2017) (Kozinski, J., dissenting: "Nonetheless, California has no functional death penalty. How this came about is no mystery. As part of a nationwide campaign to have lethal injection declared unconstitutional, California death row inmates challenged the state's execution protocol in 2006. . . . But California officials haven't managed to come up with a workable protocol.").