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Volume 30
Number 1 *Symposium: Responsibilities of the
Criminal Defense Attorney*

Article 13

11-1-1996

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Recommended Citation

Charles M. Sevilla, *April 20, 1992: A Day in the Life*, 30 Loy. L.A. L. Rev. 95 (1996).
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APRIL 20, 1992: A DAY IN THE LIFE

*Charles M. Sevilla**

The day after Easter Sunday was sunny and clear as we drove over the Golden Gate Bridge to the old fortress-like prison at San Quentin. We were going to see our client, Robert Alton Harris. The State planned to take his life at midnight.

Everything was different this day. We were tense and filled with dread as we entered through the west gate, the opposite end of the prison from where we usually entered. Getting processed for entry into the prison required a visit to an outhouse for a physical pat down by a no-nonsense guard with a hand-held magnetometer. Security, always tight at the institution, was incredible. The place was overrun with Department of Corrections guards, California Highway Patrol officers, civilian-dressed control officers, and other police, all busily engaged in directing traffic, searching and questioning visitors, or maneuvers. It was as if they were preparing to defend the place from an invasion.

Hundreds of media people, reporters, camera people, and technicians were camped out at the front entrance. Scores of trucks containing sophisticated electronic uplink equipment were jammed together. It looked like a base of the mobile Strategic Air Command. But the only story at the moment was the demonstrators who came to the gate to voice their opposition or support for the execution.

The media was not doing a very good job covering the complicated multifront litigation battles then being waged in the federal courts for a stay of execution. They never did.¹ Habeas corpus procedure and death penalty law are complex, and when pleadings

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1. For a description of the legal battles, see Charles M. Sevilla & Michael Laurence, *Thoughts on the Cause of the Present Discontents: The Death Penalty Case of Robert Alton Harris*, 40 UCLA L. REV. 345 (1992). Charles M. Sevilla, the author of this Essay, and Michael Laurence served as co-counsel to Robert Alton Harris.

are quickly generated and sent to the court by fax and then ruled upon within hours, the result is a story difficult to make comprehensible. Most of the media did not try. They were there to cover something far easier to understand, a black or white issue: does he live or does he die?

Robert had been very close to execution in 1982 and then again in 1990. The 1990 experience was especially nerve-wracking as we did not know whether he would live or die until the day he was to be executed. That afternoon we received a call from the clerk of the court stating that the U.S. Supreme Court denied the State's request to lift a stay of execution. It was a day to remember. In thirteen years of litigation, it was the only favorable ruling Robert received from that Court.

Now, the State had its court-ordered execution date of April 3, 1992, and it had to kill him that day or face going back to court for another date. That could take weeks, and the State was not about to let that happen if it could prevent it. Thus, the final day and night would be spent in a struggle to beat the clock: us seeking a court stay of the execution to allow consideration of our pending legal claims, the State seeking to get a higher court to dissolve the stay as soon as possible. It was thus no secret why the execution was scheduled for the first minute of April 3rd. It was a way for the State to lessen the opportunity for a judge to issue a last-minute stay.

Earlier that morning I finished my work on a pleading for another potential petition. This would be filed to stop the execution if Robert had a mental collapse during the final, grueling hours of his life. One of the law's peculiarities is that a condemned man must be legally sane at the moment the State straps him into one of the two chairs in the gas chamber. This is so the prisoner fully understands the purpose of the punishment in the moments the cyanide gas is filling his lungs. Such is the law. One of my tasks, which I felt inadequate to handle, would be monitoring Robert through the night to see if he was holding together. The pressures on him were already enough to break the strongest of minds.

In preparing the legal pleading, I thought about the prison's seven-day and twenty-day psychiatric evaluation reports. Written by prison staff psychiatrists seven and twenty days prior to the execution, the reports contained findings that Robert was sane

enough to be executed. We called these interviews "drive-bys," because the doctor's interaction with the condemned man is about as lengthy and thorough as a drive-by shooting. We were not about to depend on them for the determination of whether to file the writ that night—thus my job as monitor.

I carried with me two draft declarations for Robert. One was to assert his wish that his cousin Leon Harris be his spiritual adviser for the execution. The spiritual advisor is the only nonprison person permitted to be with the condemned in the antechamber during the hours just prior to the execution. Leon, a minister and volunteer deputy sheriff from Alabama, was a delightful man, full of good spirit, humor, and wisdom. He was a perfect choice to help Robert in his final hours. But the prison officials thought differently. They wanted the prison chaplain, not Leon, to perform that function. As a result, a minor legal skirmish was being played out in court that day over the issue of who would attend to Robert.

The second and more difficult declaration for Robert was the one authorizing the videotaping of his execution. Defense team attorney Michael Laurence and the Northern California ACLU filed a civil rights class-action suit the previous week seeking to declare the gas chamber cruel or unusual punishment. The federal district court had issued a stay of execution to allow the suit to be heard with a living plaintiff, Robert, but the appellate court overturned it by a divided vote. Pleadings were now flying in the appellate court over whether to issue a stay allowing Robert to live and litigate the case. Taping the execution would provide trial evidence of the cruel nature of the gas chamber in snuffing out life. For Robert the taping would be an enormous sacrifice of what little dignity the State left him at the moment of his death agony, but he agreed.

These are among the tasks the condemned's lawyer must perform as execution looms. Days before, Robert dealt with the necessary issues relating to his will, giving most of his meager property to other inmates. He also chose the five people to be his witnesses to his death and the method of disposition of his remains.

Robert was lucky in one respect. As the first person to be executed by the State in twenty-five years, his case attracted support from a number of fine lawyers, law firms, paralegals, and

other professionals who volunteered to help the defense team with the myriad of legal and administrative issues needing attention.

That afternoon Robert was in a small, smoke-filled, and overcrowded visiting room. Dividing the room was a table holding cigarettes and ash trays with Robert on one side and his visitors on the other. Modest refreshments were off to the side of the room against a wall. Robert was remarkably calm, and when his visitors showed their distress, he sought to ease their pain with comforting words. Everything was all right, he'd say. Don't worry. He was ready.

Presiding over the room was a team of huge men, the biggest guards San Quentin employed. They politely made the rules clear. The first was a "no touching Robert other than one hug" rule. The second was the "rule of five"—no more than five visitors in the room at a time. Robert's sisters, niece, friends, and the members of the defense team took turns in and out.

The length of family visitation this day had to be negotiated. Originally, Robert's family and friends were to be removed at 3 p.m., but after some negotiations with the defense team, the warden agreed to extend this to 6 p.m. The three extra hours made a difference to the family. They lost touch with Robert during his thirteen years at San Quentin. There was a lot to catch up on. One sister said sadly, "Seems like we only get together as a family for funerals."

Unlike the treatment given the visiting families of the Baker and Mayeski boys, Robert's two teenage victims, the Harris family members would not be dining with the warden that night. There would be no tour of the prison grounds, no spending the night, and no receipt of professional counseling for what was about to happen. The State tolerated their presence. That was all.

For years we had been trying to convince the courts that the jury had not been given full access to Robert's tortured upbringing and mental deficits. Our opponents said it was too late for that. Meanwhile, the media dehumanized him with a monster image. The guards in the room did not share that view. They saw in Robert wounded humanity. I saw the goodness that had emerged over the last decade. He had just written a nine-year-old girl in Santa Rosa in answer to her letter to him. He told her to be a good girl, obey her parents, and lead a good life, a life he never had a chance to live.

Outside the visiting room I spoke with the prison chaplain

about the Robert Harris he had known for the last nine years. He recalled a Bible study group he was leading with a group of prisoners. During the session Robert spoke of his crimes and did something that would have been inconceivable a decade earlier. He wept openly in front of the other prisoners, asking, "Will God ever be able to forgive me?"

Late in the afternoon, there was a surprise. Marin County Superior Court Judge Stevens arrived. We were going to have a court hearing in the tiny visiting room to settle the dispute as to whom Robert would have as his spiritual adviser. As the visiting room was cleared and turned into a courtroom, Robert and I kidded that when asked about his choice, he should tell the judge, "I'd like to have a couple of weeks to think about it." But Robert told the judge that he would like to have both men as his advisers with him behind the chamber. If limited to only one, it would be his cousin Leon—"He's family, judge." Judge Stevens told us he would tell the warden that Leon was to be with Robert and that he would also express Robert's desire that the chaplain be there too. "God bless you," said the judge as he left.

The clock continued its inexorable move toward six. Family and friends began the very difficult process of saying their good-byes. No one had experience in saying goodbye to a loved-one knowing he was to be executed in a matter of hours. Still, Robert attempted to assuage the pain of everyone. To members of his defense team, Robert reiterated his heartfelt thanks. He said he was proud of the people who worked for him, we had been good friends to him, and he appreciated the time he had been given to gain some insight as to how he could have perpetrated his crimes. Understanding gave him some measure of peace. We had our last hug. Then they took him to the room behind the gas chamber. It was a terrible moment. Nothing manifests the brute power of the State so dramatically as when it takes your client away to kill him. The feelings of powerlessness, failure, and loss were overwhelming.

Negotiations with the prison resulted in an agreed communications system whereby I was to have unlimited and unmonitored phone call access from the prison to Robert's cell behind the gas chamber to inform him of the progress of the litigation. The warden gave me a room in the Administration Building, which was

across the yard from the gas chamber. Outside the office window an asphalt yard led to the long front wall of the prison. Just behind the wall is the chamber. On the roof a smoke stack sat atop the gas chamber. A small green light appeared near the stack, perhaps the prison's signal that everything is "go" for the execution.

I started a phone log. These would be notes of the calls and conversations with the attorneys handling the stay litigation, with Robert's five waiting witnesses, one of whom was his brother Randall, but mostly with Robert. Some of the more notable moments are recorded in what follows, but looking at them in retrospect, they do not begin to convey the roller-coaster emotions of the night. They do chronicle one of the saddest and most bizarre nights in U.S. legal history.

6:15 p.m.: I call Robert. He says he is locked alone in a small, barred cell within a larger room behind the gas chamber. He has plenty of company. The prison chaplain is on the outside along with four guards, two state psychiatrists, and the warden. Leon is changing into his robe. I speak with the warden who promises that Robert will be treated properly.

6:50 p.m.: I tell Robert a stay of execution has been granted on one of our petitions with the federal courts. It is a good start to the evening, and we are hopeful.

8:12 p.m.: He is eating his last meal of fried chicken, pizza, jelly beans, and Pepsi. Outside, helicopters circle the prison, delivery vans go in and out of the yard separating my window from the prison wall containing the chamber, and security people are moving all around. Why, I don't know. Nothing is happening at San Quentin, except the waiting.

9:50 p.m.: The Ninth Circuit Court of Appeals grants another stay of execution, this time on the lethal gas suit with ten judges signing it. We now have two stays of execution in place. Robert has been playing chess with the chaplain. He is pleased, but we know the State will challenge the stays in a very friendly forum: the U.S. Supreme Court.

10:10 p.m.: A mortuary is mistakenly patched through to my number. The caller asks, "Should I still come pick up the body at midnight?"

11:27 p.m.: The U.S. Supreme Court overrules the first stay. I hear two law enforcement people outside my window, "That's it. It's gone. It's just a matter of time."

11:58 p.m.: Robert is frantic. Leon has been removed from

the room. Robert has been told he will be going into the gas chamber even though a stay of execution is still in place! The State must be thinking that the Supreme Court obligingly will vacate the stay to make sure the midnight execution goes off as planned. Robert and I say our goodbyes again as the witness vans line up outside the building I am in to take the witnesses to the chamber. We wait.

12:20 a.m.: The scheduled execution time comes and goes. Robert is still in his cell. Will he be able to call me before they take him to the chamber? He asks the guards, and they say they will allow it.

12:25 a.m.: A call comes from the law office. Another appellate judge signed on for a stay on the lethal gas suit. We wait.

2:26 a.m.: I tell Robert that the U.S. Supreme Court said it will have a decision within the hour on the State's application to dissolve the recent stay on the gas suit.

2:47 a.m.: Judge Patel issues an order for videotaping the execution which sets off a mad scramble. A video camera person, an investigator for the California Appellate Project, is on his way to West Gate to record, for the first time anywhere, the State executing a human being. The State will not challenge the order as that would delay the execution. Instead, it does all it can to quickly get the investigator into the room with the witnesses and set up his taping equipment. I wonder if this man could possibly be emotionally prepared for what he is about to witness and record.

3:00 a.m.: I call Robert with bad news. All stays of execution have been dissolved by the U.S. Supreme Court. This is astounding. The Court stayed up all night to dissolve the lower court stays minutes after they were signed.

3:05 a.m.: Roll is called in front of the building I am in. Among the names called out are the familiar ones of the victims' family members. They enter vans to be taken the few yards to the door leading to the witness room which surrounds the chamber. Robert and I say goodbye again. He is taken to the chamber. I wait for the end. And wait.

3:46 a.m.: Someone from the warden's staff enters my room to announce that Judge Pregerson called in a stay to allow time for the lethal gas issue to be litigated in the state courts. She seeks my

confirmation, for what it is worth, that Pregerson is a judge on the Ninth Circuit Court of Appeals. Robert has been sitting in the gas chamber for over ten minutes waiting for the lethal pellets to drop. Finally, he is taken out. No condemned man has experienced this torment or such a narrow escape.

4:08 a.m.: Robert is on the phone, hyper-excited, hungry for the details of what has happened. He says while sitting in the chair he thought something had broken, maybe his chair, and when they came into the chamber, he thought it was to move him into the second chair. Then they told him he had a stay. I tell him that this stay is very fragile. Stays in his case have evaporated so quickly.

4:20 a.m.: I make a telephone call to Robert's friend, Michael Kroll, in the witness waiting room. He describes Robert's agonizing ten minutes in the chair waiting for death. I wonder how he is holding it together. We wait.

4:30 a.m.: I tell Robert that an effort is being made to file the lethal gas suit in state court. The adrenaline rush is completely gone now. He is exhausted, but still, amazingly, mentally strong and determined to face this night to the end without breaking. We wait.

5:48 a.m.: I tell Robert more bad news. The U.S. Supreme Court vacated the last stay on the lethal gas suit with the bottom line of the order reading that no further stays can be issued by any other federal court. Robert says they are getting ready to take him again. We say goodbye.

5:55 a.m.: There is another call from the office. The California Supreme Court now has the lethal gas suit, and an application for stay is being run over to them.

6:02 a.m.: I call the chamber, and a guard whispers, "It's over."

I spend the next hour numbly staring out the window watching the witnesses file out of the chamber while prison employees direct the human and vehicular traffic off the grounds. I feel violated. The innocence of my law career is gone. During a span of twenty-five years, no person has been killed by the State. Now blood has been drawn, and the killing will resume. I grieve for my client and his family and his friends. Another death. A new set of victims.

These feelings are not shared by most Californians and certainly not by most of the witnesses leaving the chamber. So many people believed Robert incapable of, and not deserving of, the slightest compassion or mercy. That was not the case with the

guards. Leon Harris told me those he was with, who treated Robert with respect this last day of his life, wept at his execution.

Now, with the end of the execution ritual, the chamber area empties of all but one of its participants. Dawn is breaking. The first golden rays of sunlight reflect off the old prison walls. Birds chirp and fly off in formation. We follow them out.²

2. In cruel irony the class-action suit continued after Robert's death with his name still on the case's full caption. After trial Judge Patel held that lethal gas was cruel or unusual punishment. *Fierro v. Gomez*, 865 F. Supp. 1387 (N.D. Cal. 1994). The State appealed to the Ninth Circuit, which upheld the trial court's ruling that the State's use of the gas chamber was cruel or unusual punishment. *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996).

