IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

EARL RINGO, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 2:09-cv-04095-NKL
	)	
GEORGE A. LOMBARDI, et al.,	)	
	)	
Defendants.	)	

MOTION TO INTERVENE

Comes now movant, Larry C. Flynt, pursuant to Federal Rule of Civil Procedure 24(b) and seeks to intervene in this case for the limited purpose of filing a motion to unseal certain judicial records based on the First Amendment and common law rights of access. Flynt's proposed motion to unseal and suggestions in support are attached hereto. For the reasons set forth in the suggestions in support of this motion, which are filed herewith, Flynt should be permitted to intervene and file his motion.

Respectfully submitted,

/s/ Anthony E. Rothert
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Attorneys for Movant

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and a copy was made available electronically to all counsel of record.

/s/ Anthony E. Rothert

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GEORGE A. LOMBARDI, et al.,	)	
	)	
Defendants.	)	

MOTION TO UNSEAL

Comes now movant, Larry C. Flynt, and moves this Court for entry of an order unsealing of Documents 211-3, 211-4, 211-5, 211-6, 214, 214-1, and 219 in this case. As explained in more detail in the accompanying suggestions in support of this motion, the First Amendment of the United States Constitution and the common law afford the public and the press a presumptive right of access to these judicial documents.

Respectfully submitted,

/s/ Anthony E. Rothert
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	)	
Defendants.	)	

Suggestions in Support of Motion to Unseal

I. Background.

This motion to unseal is about the public's right of access to judicial records.

Intervenor, Larry C. Flynt, has been in the publishing business since the early 1970's. Ex. A at ¶ 3. In 1978, he stood trial on obscenity charges in Georgia. *Id.* at ¶ 4. Flynt and one of his attorneys were shot by a sniper near the courthouse. *Id*. Flynt was left partially paralyzed with permanent spinal-cord damage. *Id.* at ¶ 5.

One of the intervening plaintiffs in this case, Joseph Franklin, confessed to shooting Flynt. *Id.* at ¶ 6. As a result, Flynt has a particular interest in Missouri's plans to execute Franklin. Missouri has scheduled Franklin to die on November 20, 2013. *Id*.

To express his opinion that Missouri should not execute Franklin, Flynt desires to petition the Governor of Missouri to commute Franklin's sentence and to share with the people of Missouri his concerns about the death penalty. *Id.* at ¶ 8. Flynt has advocated that Franklin should spend the remainder of his life in prison rather than be killed by the state. As he explained in a published commentary:

> Franklin has been sentenced by the Missouri Supreme Court to death by legal injection on Nov. 20. I have every reason to be

> overjoyed with this decision, but I am not. I have had many years in this wheelchair to think about this very topic. As I see it, the sole motivating factor behind the death penalty is vengeance, not justice, and I firmly believe that a government that forbids killing among its citizens should not be in the business of killing people itself.

Id. at ¶ 7.

Flynt has learned about the secrecy shrouding Missouri's execution process. *Id.* at ¶ 9.This includes recent revelations that Missouri appears to have used unsavory methods to secure and maintain execution drugs and tried to hide that and other information from the public. *Id*. In October, Missouri produced records about its drug-supply in response to Sunshine Law litigation. *Id.* at ¶ 10.After those records were made public, Missouri abandoned its execution protocol and cancelled the planned execution of Allen Nicklasson. *Id.* at ¶ 10.

Secrecy also abounds in this case. On August 15, 2011, this Court issued an opinion disposing of the parties' cross-motions for summary judgment. (Doc. # 263). In ruling, this Court "considered the parties' statements of undisputed fact which [were] supported by evidence." *Id.* at 1 fn.1. That evidence purports to show that:

> Defendant M3 is a board-certified anesthesiologist who is licensed to practice medicine in the state of Missouri, and he practices in a private group of anesthesia providers who serve a particular hospital. Defendant M3 has a controlled substances registration through the Missouri Bureau of Narcotics and Dangerous Drugs. M3 states that he has a similar registration through the federal Drug Enforcement Agency. M3 is under contract with the Department of Corrections to assist with Missouri executions, and, in that capacity, he participated in the execution of Dennis J. Skillicorn on May 20, 2009.

Id. at 2-3.

Flynt is skeptical that M3 is truly a board-certified anesthesiologist. Ex. A at ¶ 11. Anesthesiologists are certified by the American Board of Anesthesiology. *Id.*According to the organization's *2013 Booklet of Information*, § 5.06:

> [I]t is the ABA's position that an anesthesiologist should not participate in an execution by lethal injection and that violation of this policy is inconsistent with the Professional Standing criteria required for ABA Certification and Maintenance of Certification in Anesthesiology or any of its subspecialties. As a consequence, ABA certificates may be revoked if the ABA determines that a diplomate participates in an execution by lethal injection.

Id. On April 2, 2010, the ABA issued a Commentary announcing that "[e]ffective February 15, 2010, the American Board of Anesthesiology (ABA) has incorporated the AMA's position on capital punishment into its professional standing requirements[.]"*Id.* at ¶ 12.The Commentary made clear that "anesthesiologists may not participate in capital punishment if they wish to be certified by the ABA." *Id*. The purpose of the policy is "to uphold the highest standards of medical practice and encourage anesthesiologists and other physicians to honor their professional obligations to patients and society." *Id*.

In short, M3 is either lying about being board certified, or lacks the professional standing required to maintain certification. Missouri engages in hypocrisy by bolstering its claim that its executions satisfy Eighth Amendment standards by pointing to the inclusion of a certified anesthesiologist. Missouri knows that if M3 is, in fact, certified, then it is only because Missouri abets M3 in hiding his identity from those who certify him. Under these circumstances, the public can be excused for not taking Missouri's word for it that M3 is a competent, certified

anesthesiologist and for wanting to review the evidence he gave that this Court relied upon to check its veracity.

Flynt and other members of the public have a right to review the evidence upon which this Court relied in making its factual findings about M3. The evidence cannot be viewed by the public, however, because it is filed under seal. In particular, the following documents are of interest to Flynt: 211-3 (deposition of M3), 211-4 (alleged certification of M3), 211-5 (licensure of M3), 211-6 (BNDD licensure of M3), 214 (suggestions in support of Defendants' motion for summary judgment), 214-1 (an unidentified exhibit), and 219 (additional suggestions in support of Defendants' motion for summary judgment).

II. Argument.

Flynt has a keen interest in Missouri's efforts to kill the individual who shot him. But so, too, does the public-at-large, and Flynt makes this motion as member of the public concerned about the ethical and legal questions surrounding Missouri's insistence on continuing executions. He requests access, in whole or in part, to the evidence relied upon by this Court. He wishes to independently review the evidence to determine its veracity and to use it to advocate for the suspension of executions in Missouri.

Flynt has both a First Amendment and common-law right to access the records of this Court's proceedings.[1]

---

[1] This Court has jurisdiction to entertain this motion. "Every court has supervisory power over its own records and files." *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 598, 98 S.Ct. 1306 (1978). "The court's supervisory power does not disappear because jurisdiction over the relevant controversy has been lost. The records and files are not in limbo. So long as they remain under the aegis of the court, they are superintended by the judges who have dominion over the court." *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140-41 (2d Cir. 2004) (citations omitted).

A. There is presumptive First Amendment right of access to records that are part of a civil proceeding in federal court.

The sealed records identified by Flynt are part of the judicial record and, thus, publicly accessible under the First Amendment. The First Amendment right of public access to court records is governed by the "experience and logic" test set forth in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986) (*Press-Enterprise II*). The right extends to judicial proceedings when (1) a tradition of public access exists and (2) this access plays a significant positive role in the functioning of the judicial process. *Id.* In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–77 (1980), the Supreme Court recognized that the First Amendment provides the public with a presumptive right of access to criminal trials as this constitutional provision was enacted against the backdrop of a long tradition of public trials. *Richmond Newspapers* was followed by a line of cases expanding the doctrine. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605–07 (1982) (trial on charges of the rape of a minor is public); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984) (*Press-Enterprise I*) (voir dire is public); *Press Enterprise II*, 478 U.S. at 10 (preliminary hearings are public).

The Supreme Court addressed First Amendment rights of access to civil judicial proceedings in *Richmond Newspapers*, 448 U.S. at 580 n.17, when it observed that the question "is not raised by this case, but we note that historically both civil and criminal trials have been presumptively open." The Court's decision in *Richmond Newspapers* rested on the fact that criminal trials had been open "for centuries." *Id.* at 580. Thus, there is a compelling reason to apply the authority of *Richmond Newspapers* to civil as well as criminal trials in view of the fact that civil trials have historically been just as open as criminal trials. *See Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066 (3d Cir. 1984) (noting that "[t]he public's right of access to civil trials and records is as well established as that of criminal proceedings and records.").

Every circuit that has ruled on the issue has concluded that civil judicial proceedings, like criminal proceedings, are subject to a First Amendment right of access under *Richmond Newspapers*. *See Lugosch v. Pyramid Co.*, 435 F.3d 110, 124 (2d Cir. 2006) ("[T]he First Amendment does secure to the public and to the press a right of access to civil proceedings.") (quoting *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984)); *Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988) ("We believe that the more rigorous First Amendment standard should also apply to documents filed in connection with a summary judgment motion in a civil case."); *Publicker*, 733 F.2d at 1071 ("[T]he public and press possess a First Amendment right of access to civil proceedings."); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) ("[T]he policy reasons for granting public access to criminal proceedings apply to civil cases as well."); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178-79 (6th Cir. 1983) ("The historical support for access to criminal trials applies in equal measure to civil trials."). *But see Ctr. for Nat. Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 935 (D.C. Cir. 2003) (doubting, but not deciding, whether First Amendment right of access extends to civil proceedings).

For these reasons, Flynt has a presumptive First Amendment right of access to the identified sealed records.

B. There is a presumptive right of access to the records under the common law.

The Supreme Court ruled in *Nixon v. Warner Communications,* 435 U.S. 589, 597 (1978), that "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." In addition to First Amendment rights of access, there is also a common law right of access to public records generally from all three branches of government, which includes but is not limited to judicial

records. *See Washington Legal Foundation v. United States Sentencing Commission*, 89 F.3d 897, 903-04 (D.C. Cir. 1996) (*WLF II*). As the Eighth Circuit recently explained, the common-law right of access to judicial records "bolsters public confidence in the judicial system by allowing citizens to evaluate the reasonableness and fairness of judicial proceedings and to keep a watchful eye on the workings of public agencies.'" *IDT Corp. v. eBay*, 709 F.3d 1220, 1222 (8th Cir. 2013) (quotation and citations omitted). In that case, the court affirmed "that the common-law right of access applies to judicial records in civil proceedings." *Id.*

The sealed records, which were filed with this Court by the parties and relied upon by this Court in its decision, are judicial records for the purposes of the common law right of public access. For these reasons, Flynt has a common law right of access to the records.

C. There is no apparent compelling need to keep all of the records in their entirety from public view.

Public access to this Court's records is presumptive under both the First Amendment and the common law. But this Court might find that some parts of the documents do require secrecy.

Under the First Amendment, access can only be denied when "(1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest." *Washington Post v. Robinson*, 935 F.2d 282, 290 (D.C. Cir. 1991) (quoting *Oregonian Pub. Co. v. U.S. Dist. Court for Dist. of Oregon*, 920 F.3d 1462, 1466 (9th Cir. 1990)).

"Where the common-law right of access is implicated, the court must consider the degree to which sealing a judicial record would interfere with the interests served by the common-law right of access and balance that interference against the salutary interests served by maintaining confidentiality of the information sought to be sealed." *IDT Corp.*, 709 F.3d at 1223. "Modern

cases on the common-law right of access say that the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and resultant value of such information to those monitoring the federal courts." *Id.*, at 1224 (internal quotation and citations omitted). Here, the documents were relied upon by this Court in adjudicating the case.

There is a presumption in favor of access. Except for two categories of documents—grand jury transcripts and warrant materials in a pre-indictment investigation—a "strong presumption in favor of access is the starting point." *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quotation and citations omitted). The party that wishes to seal a judicial record bears the burden overcoming the presumption. *Id.* "[T]he strong presumption of access to judicial records applies fully to dispositive pleadings, including motions for summary judgment and related attachments [because] the resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in ensuring the public's understanding of the judicial process and of significant public events." *Id.*, at 1179 (quotation and citations omitted). "[D]iscovery material filed in connection with pretrial motions that require judicial resolution of the merits is subject to the common-law right [of access]." *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1312 (11th Cir. 2001).

The public record does not demonstrate the justification for sealing the records Flynt identifies in his motion. Without access to the judicial records, however, "the public [is] unable to evaluate the reasonableness and fairness of the judicial proceedings in this case." *Aviva Sports, Inc. v. Fingerhut Direct Mktg., Inc.*, CIV. 09-1091 JNE/JSM, 2013 WL 4400395, *2 (D. Minn. Aug. 16, 2013). It does not appear that any interest the parties might have in keeping the records sealed has been balanced against the public's right of access to the records. Any party who

advocates for maintaining the seal should be required to articulate a justification for doing so and explain how that justification might outweigh the presumptive First Amendment and common-law rights of access.

Finally, even assuming that sealing portions of the records can be justified despite First Amendment and common-law right-of-access claims, this Court must consider whether other portions of the record "may be amenable to public access without jeopardizing the confidentiality of sensitive information[.]" *See Id.* (citing *United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995)). As the Second Circuit concluded, "it is proper for a district court, after weighing competing interests, to edit and redact a judicial document in order to allow access to appropriate portions of the document[.]" *Amodeo*, 44 F.3d at 147.

Flynt recognizes that the judicial records might have been filed under seal under the terms of a protective order. But "a protective order is entirely different than an order to seal or redact Court documents and implicates entirely different interests. [T]he public has a right to access documents that are submitted to the Court and that form the basis for judicial decisions." *Aviva Sports*, 2013 WL 4400395 at *1. Protective orders assist in discovery, which serves "a vastly different role" that judicial records and does not raise the same right-of-access concerns. *Id.* (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33-5, 104 S. Ct. 2199 (1984)).

III. Conclusion.

For the foregoing reasons, movant Flynt requests this Court grant his motion to unseal.

Respectfully submitted,

/s/ Anthony E. Rothert
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Attorneys for Movant

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and a copy was made available electronically to all counsel of record.

/s/ Anthony E. Rothert

Declaration of Larry C. Flynt

I, Larry C. Flynt, declare as follows:

1. I am over the age of 18 and legally competent to make a declaration.

2. I make this declaration on the basis of personal knowledge and upon information and belief.

3. I have been in the publishing business since the early 1970s.

4. On March 6, 1978, while standing trial on obscenity charges in Gwinnett County, Georgia, one of my attorneys and I were shot by a sniper near the courthouse.

5. As a result of the shooting, I was left partially paralyzed with permanent spinal-cord damage.

6. Joseph Franklin confessed to the shooting, although he has not yet been charged. As a result, I have a particular interest in Missouri's plans to execute Franklin as early as November 20, 2013.

7. I have advocated that Franklin should spend the remainder of his life in prison rather than be killed. As I explained in a published commentary (Encl. 1):

> Franklin has been sentenced by the Missouri Supreme Court to death by legal injection on Nov. 20. I have every reason to be overjoyed with this decision, but I am not. I have had many years in this wheelchair to think about this very topic. As I see it, the sole motivating factor behind the death penalty is vengeance, not justice, and I firmly believe that a government that forbids killing among its citizens should not be in the business of killing people itself.

8. To further express my belief that Missouri should not execute Franklin, I plan on petitioning the Governor of Missouri to commute Franklin's sentence and to share with the people of Missouri my concerns about the death penalty, both in general and as implemented by Missouri.

9. I recently learned about the secrecy shrouding Missouri's execution process. This includes recent revelations that Missouri appears to have used unsavory methods to secure and maintain execution drugs and hiding this and other information from the public.

10. As recently as October 2013, Missouri produced records about its drug-supply in response to Sunshine Law litigation. Days after those records were made public, Missouri abandoned its execution protocol and cancelled the planned execution of Allen Nicklasson, another intervening plaintiff in this action.

11. I am skeptical that the individual designated "M3" is truly a board-certified anesthesiologist because anesthesiologists are certified by the American Board of Anesthesiology, Inc. ("ABA"). According to ABA:

> [I]t is the ABA's position that an anesthesiologist should not participate in an execution by lethal injection and that violation of this policy is inconsistent with the Professional Standing criteria required for ABA Certification and Maintenance of Certification in Anesthesiology or any of its subspecialties. As a consequence, ABA certificates may be revoked if the ABA determines that a diplomate participates in an execution by lethal injection."

ABA's 2013 Booklet of Information, § 5.06. (Encl. 2)

12. Furthermore, on April 2, 2010, the ABA issued a Commentary announcing that "[e]ffective February 15, 2010, the American Board of Anesthesiology (ABA) has incorporated the AMA's position on capital punishment into its professional standing requirements[.]" (Encl. 3). The Commentary made clear that "anesthesiologists may not participate in capital punishment if they wish to be certified by the ABA." The purpose of the policy is "to uphold the highest standards of medical practice and encourage anesthesiologists and other physicians to honor their professional obligations to patients and society."

13. I believe that I and other members of the public have a right to review the evidence upon which this Court relied in making its factual findings about M3, but cannot do so because it is filed under seal.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on 11/8/13

Larry C. Flynt

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Larry Flynt: Don't Execute the Man Who Paralyzed Me (Guest Column)

6:00 AM PDT 10/17/2013 by Larry Flynt

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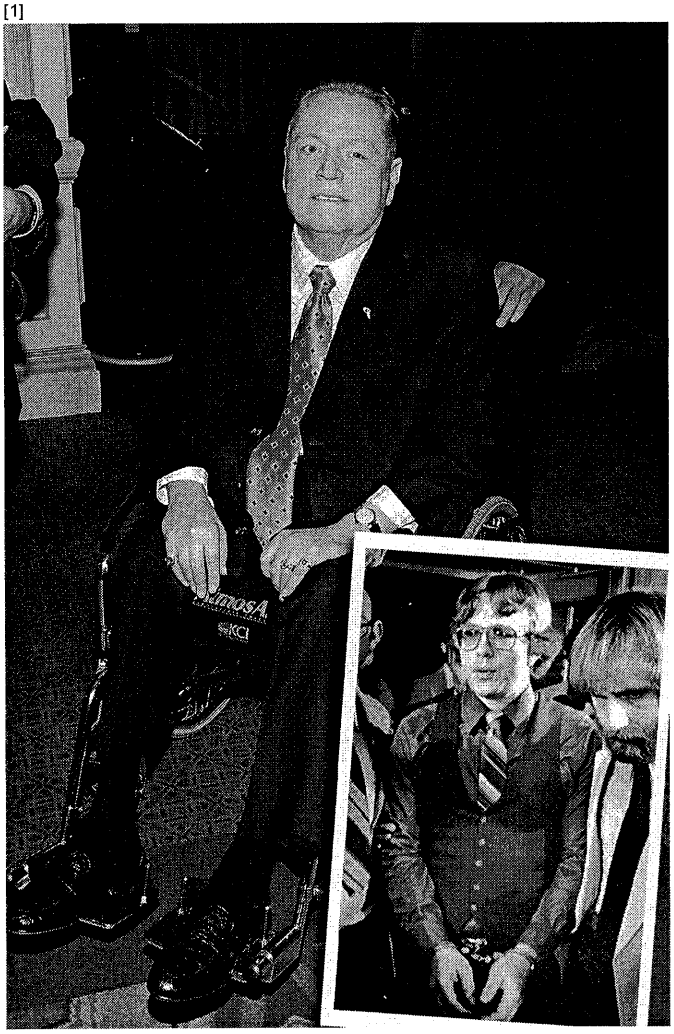

Getty Images; AP
Larry Flynt (Inset: Joseph Paul Franklin)

Joseph Paul Franklin, who has confessed to shooting Flynt in 1978 and been convicted in a series of racially motivated murders, is set for execution in Missouri in November. Flynt writes for THR, "I have every reason to be overjoyed with that decision, but I am anything but."

ENCL. 1

On March 6, 1978, as I stood on the steps of the Georgia courthouse where I was fighting obscenity charges, a series of gunshots rang out. I remember nothing that happened after that until I woke up in the intensive care unit. The damage to my central nervous system was severe, and it took several weeks before doctors could stabilize me. From then on, I was paralyzed from the waist down, and have been confined to a wheelchair ever since.

Years later, a white supremacist named **Joseph Paul Franklin** was arrested for shooting and killing an interracial couple. He soon began confessing to other crimes, and that's when he admitted to having shot me. He said he'd targeted me because of a photo spread I ran in *Hustler* magazine featuring a black man and a white woman. He had bombed several synagogues. He had shot **Vernon Jordan Jr.**, the civil rights activist. He hated blacks, he hated Jews, he hated all minorities. He went around the country committing all these crimes. I think somebody had to have been financing him, but nothing ever turned up on who that somebody may have been.

PHOTOS: Larry Flynt and The Inner Life of a Dirty Old Man [5]

In all the years since the shooting, I have never come face-to-face with Franklin. I would love an hour in a room with him and a pair of wire-cutters and pliers, so I could inflict the same damage on him that he inflicted on me. But, I do not want to kill him, nor do I want to see him die.

Supporters of capital punishment argue that it is a deterrent which prevents potential murderers from committing future crimes, but research has failed to provide a shred of valid scientific proof to that effect whatsoever. In 18th century England, pickpocketing was a capital offense. Once a week, crowds would gather in a public square to observe public hangings of convicted pickpockets, unaware that their own pockets were being emptied by thieves moving among them. That's a true story, and, if you're ever trying to convince somebody of why the death penalty is not a deterrent, that's a good example.

PHOTOS: 20 Biggest Political Players in Hollywood [6]

As far as the severity of punishment is concerned, to me, a life spent in a 3-by-6-foot cell is far harsher than the quick release of a lethal injection. And costs to the taxpayer? Execution has been proven to be far more expensive for the state than a conviction of life without parole, due to the long and complex judicial process required for capital cases.

Franklin has been sentenced by the Missouri Supreme Court to death by legal injection on Nov. 20. I have every reason to be overjoyed with this decision, but I am not. I have had many years in this wheelchair to think about this very topic. As I see it, the sole motivating factor behind the death penalty is vengeance, not justice, and I firmly believe that a government that forbids killing among its citizens should not be in the business of killing people itself.

Links:
[1] http://pinterest.com/pin/create/button/?url=www.hollywoodreporter.com/news/larry-flynt-dont-execute-man-649158&media=http://www.hollywoodreporter.com/sites/default/files/2013/10/larry_flynt_no_killer_instinct_a_p.jpg&description=Larry Flynt: Don't Execute the Man Who Paralyzed Me (Guest Column)
[2] http://www.hollywoodreporter.com/news/larry-flynt-sells-hustler-hq-523408
[3] http://www.hollywoodreporter.com/news/kevin-smith-why-quentin-tarantino-645204
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THE AMERICAN BOARD OF ANESTHESIOLOGY, INC.

Member Board of the American Board of Medical Specialties

The above certification mark is a registered certification mark of The American Board of Anesthesiology, Inc.

BOOKLET OF INFORMATION

Certification and Maintenance of Certification

February 2013

4208 Six Forks Road, Suite 1500 Raleigh, North Carolina 27609-5765
Phone: (866) 999-7501 | Fax: (866) 999-7503
www.theABA.org

ENCL. 2

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the ABA office and shall set forth the grounds upon which the request for formal review is based. If the individual does not give the ABA written notification of the intent to seek formal review within the time and in the manner prescribed, the individual shall be considered to have accepted the decision of the Board and the decision shall become final.

Upon receipt of notice of a request for formal review within the time and in the manner prescribed, the request will be screened to determine whether or not it meets the standards for a formal review to occur. Minimum criteria for a formal review are grounds that the Board's action was inconsistent with ABA policies or not supported by the evidence available to the Board when the action was taken. If it is determined that there are grounds for a formal review, the ABA shall form a Review Panel and schedule a hearing. Otherwise, the decision of the Board shall become final.

5.06 PROFESSIONAL STANDING

Professional standing satisfactory to the ABA is a requirement for acceptance as a candidate for ABA certification and for certification, subspecialty certification, and maintenance of certification by the ABA.

Applicants with a medical license that is revoked, suspended or surrendered in lieu of revocation or suspension will not be accepted as a candidate for initial certification in anesthesiology. Applicants with less severe restrictions on a medical license may be accepted into the ABA system, and certification may be deferred until the medical license is unrestricted or the Credentials Committee recommends and the Board approves awarding certification to the physician.

Candidates with a medical license that is revoked, suspended or surrendered in lieu of revocation or suspension may be permitted to take ABA examinations and certification will be deferred until the license is unrestricted. Candidates with less severe restrictions on a medical license may be permitted to take ABA examinations and certification may be deferred until the medical license is unrestricted or the Credentials Committee recommends and the Board approves awarding certification to the physician.

The ABA will initiate proceedings to revoke the certification(s) of diplomates with a medical license that is revoked, suspended or surrendered in lieu of revocation, suspension, inquiry or investigation, upon notice of such action. The ABA has the authority and may decide to undertake proceedings to take action against diplomates with other, less severe medical licensure restrictions (e.g., probation or "conditions"), which may include revocation of the certification.

The ABA incorporates the AMA Code of Medical Ethics, Opinion E-2.06 (June 2000), regarding physician participation in capital punishment into its own professional standing policy. Specifically, it is the ABA's position that an anesthesiologist should not participate in an execution by lethal injection and that violation of this policy is inconsistent with the Professional Standing criteria required for ABA Certification and Maintenance of Certification in Anesthesiology or any of its subspecialties. As a consequence, ABA certificates may be revoked if the ABA determines that a diplomate participates in an execution by lethal injection.

5.07 RE-ATTAINING CERTIFICATION STATUS

The ABA established an application procedure for diplomates with the designation Certified – Not Clinically Active, Certified – Retired, or Retired to re-attain the designation Certified. There also is a procedure for physicians whose ABA certification is revoked to apply to the ABA to re-attain certification. Interested physicians should contact the ABA office for details about these application procedures.

The ABA considers applications for re-attaining ABA certification on an individualized, case-by-case basis. The ABA may require the applicant to do one or more of the following in order to re-attain certification:

- Pass the ABA Part 1 Examination.

THE AMERICAN BOARD OF ANESTHESIOLOGY, INC.

A Member Board of the American Board of Medical Specialties

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Commentary (4/2/10)

Anesthesiologists and Capital Punishment

The majority of states in the United States authorize capital punishment, and nearly all states utilize lethal injection as the means of execution. However, this method of execution is not always straightforward (1), and, therefore, some states have sought the assistance of anesthesiologists (2).

This puts anesthesiologists in an untenable position. They can assuredly provide effective anesthesia, but doing so in order to cause a patient's death is a violation of their fundamental duty as physicians to do no harm.

For decades the American Medical Association (AMA) has been opposed to physician involvement in capital punishment on the grounds that physicians are members of a profession dedicated to preserving life when there is hope of doing so (3). Effective February 15, 2010, the American Board of Anesthesiology (ABA) has incorporated the AMA's position on capital punishment into its professional standing requirements for all anesthesiologists who are candidates for or diplomates of the ABA (4). Thus, anesthesiologists may not participate in capital punishment if they wish to be certified by the ABA. What constitutes participation is clearly defined by the AMA's policy.

The ABA has not taken this action because of any position regarding the appropriateness of the death penalty. Anesthesiologists, like all physicians and all citizens, have different personal opinions about capital punishment. Nonetheless, the ABA, like the AMA, believes strongly that physicians should not be involved in capital punishment. The American Society of Anesthesiologists has also supported the AMA's position in this regard (5), as have others (6). Patients should never confuse the practice of anesthesiology with the injection of drugs to cause death. Physicians should not be expected to act in ways that violate the ethics of medical practice, even if these acts are legal.

In conclusion, the ABA's policy on capital punishment is intended to uphold the highest standards of medical practice and encourage anesthesiologists and other physicians to honor their professional obligations to patients and society.

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ENCL. 3

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