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PETITION FOR CLEMENCY ON BEHALF OF

JOSEPH M. GIARRATANO

Submitted by:

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Arlington County
December 19, 1993

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Joseph M. Giarratano, a prisoner committed to the custody of the Director of the Virginia Department of Corrections, hereby petitions His Excellency, Lawrence Douglas Wilder, Governor of the Commonwealth of Virginia, to exercise his constitutional powers of clemency, to amend the conditions of pardon previously granted to him, by providing that he be pardoned for the murder of Barbara and Michelle Kline and the rape of Michelle Kline upon the following conditions: (1) Mr. Giarratano waive his constitutional right to not be prosecuted twice for the same offense (i.e. his double jeopardy rights) as to each of these crimes, and (2) he agree to his being maintained in the custody of the Director for a period of one year, unless criminal charges as to these offenses be sooner instituted by the Commonwealth, or the Commonwealth specifically waives its right to retry him for these offenses.

PROCEDURAL HISTORY

Joseph Giarratano was convicted and sentenced to death, in the Circuit Court for the City of Norfolk, for the murder of Michelle Kline in February, 1979, and to terms of life imprisonment for the rape of Michelle and the murder of her mother, Barbara Kline. Although not pleading guilty, he did not contest the evidence against him, presenting instead a defense of insanity that had no support in the evidence. Joe's conviction was based largely on a series of confessions which, in his previous clemency petition, he demonstrated conclusively were the product of suggestion by law enforcement authorities, to which he was particularly susceptible

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given his years of physical, mental and substance abuse. His trial counsel made no effort to investigate the question of his client's guilt.

Although Mr. Giarratano attempted to litigate the questions of competency in his post-conviction proceedings, he was unsuccessful in even obtaining an evidentiary hearing as to such matters. After exhausting his judicial remedies, Mr. Giarratano petitioned for clemency. In that document, he proposed that the Governor grant him a full pardon, conditioned upon his waiver of his double jeopardy rights. In this manner, Giarratano proposed the Commonwealth could retry him or, if it so chose, free him. Giarratano demonstrated that this proposal was practical and legal, a position endorsed by Professor Lawrence Tribe of the Harvard University School of Law.

In response to this clemency request, the Governor commuted Giarratano's death sentence to life imprisonment. However, he also delegated his authority to the Attorney General to, upon petition by Giarratano and in her sole discretion, join with Giarratano in a petition to the courts seeking a new trial. Before the day was out, however, the Attorney General rejected the possibility of such a petition. She did so despite the fact that she had yet to be petitioned by Giarratano and did not even know what evidence had been presented to the Governor to justify his decision. The result having been predetermined, Giarratano did not submit such a petition to the Attorney General.

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THE PRESENT REQUEST

Since the commutation of his sentence, the Giarratano defense team has continued its extensive investigation into his case. As the enclosed report indicates, that investigation has ultimately been frustrated by the disappearance of witnesses and the absolute refusal of law enforcement and prosecutorial authorities to provide him with information. As a result, although he has been able to develop additional information, he has not been able to ultimately solve the puzzle of the Klines' death.

Having been summarily denied the opportunity to demonstrate to the Attorney General or the courts his entitlement to a new trial, Mr. Giarratano now returns to the Governor seeking a remedy for his dilemma. As previously, Mr. Giarratano has no interest in thwarting the Commonwealth's ability to reprosecute him if it so chooses. He is prepared to stipulate to chains of custody and to the existence of evidence which may now have disappeared. Indeed, following the commutation of his sentence, Mr. Giarratano unsuccessfully sought a court order to preserve the evidence in the Commonwealth's possession, which effort was opposed by the Commonwealth. Nevertheless, he remains willing to stipulate to documented evidence which may not have been preserved.

Mr. Giarratano's original proposal for a conditional pardon remains viable. As he demonstrated in his original petition, the Governor of Oregon has employed a similar device in a non-capital case. Despite the attempts by the Attorney General to miscast this request as one for an order for a new trial, which plainly is

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beyond the Governor's power, Mr. Giarratano's request in fact involves nothing more than a classic exercise of the Governor's unfettered power to issue pardons and to condition such pardons as he sees fit.

Giarratano demonstrated at the time that his waiver of his double jeopardy rights would be enforceable. Notwithstanding the contrary suggestion of the Attorney General, it is plain from the material previously submitted to the Governor that Mr. Giarratano is free to waive that right. Furthermore, if Mr. Giarratano did protest the enforceability of his waiver, the condition of the pardon would fail and the amendment he now seeks would be a nullity. Thus, there is simply no possibility that the parties' intent to permit a new trial to go forward could be thwarted by Mr. Giarratano.

Absent intervention by the Governor, there is no prospect that Mr. Giarratano will ever be able to have the retrial he seeks, nor will the public have the opportunity to have the case determined, for the first time, on the merits in a court of law. Furthermore, it is likely that Mr. Giarratano will spend most if not all of his life in prison, since, given the nature of the offenses of which he has been convicted, parole is unlikely, despite his record of accomplishment since his pardon, as detailed in the materials attached to this petition. If, indeed, the conditional pardon sought by Mr. Giarratano is forthcoming, the citizens of the Commonwealth will, for the first time, be able to see the evidence which the Commonwealth has been unwilling to reveal.

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The Governor's original intent was to facilitate a new trial. That intent was thwarted unceremoniously by an Attorney General who was absolutely committed to the proposition that Mr. Giarratano was guilty and unwilling to even consider the possibility that a mistake had been made. There remains this final opportunity to correct the wrong and to provide for a just result, regardless of the ultimate outcome.

On behalf of Joseph Giarratano, therefore, we ask that the original pardon granted to him be amended as described above.

Respectfully submitted,

Kevin R. Appel, Esq.

Mike Farrell

Marie Deans

Marie Deans for Kevin Appel

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In re

JOSEPH M. GIARRATANO

Petition for Conditional Pardon
By the Governor of the Commonwealth of Virginia

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On behalf of JOSEPH M. GIARRATANO

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Joseph Giarratano asks that the Governor exercise his clemency power to facilitate the relief which the judicial system should have afforded him: a new trial. The Governor has the power to pardon Mr. Giarratano fully for the crime for which he was convicted. Mr. Giarratano does not seek a full pardon. Rather, he seeks a limited or conditional pardon: relief from his judgment of conviction which explicitly preserves the right of the Commonwealth to retry him on the same charges within a reasonable period of time.

Mr. Giarratano asks for a limited pardon, because it is the appropriate remedy for the wrongs in his case.

The judicial system has failed to achieve its most fundamental goal in the case of Mr. Giarratano. It has allowed him to be convicted and sentenced to death, and has cleared the way for his execution, despite the emergence of substantial doubt about his guilt. Some of the evidence giving rise to this doubt was available at the time of trial but could not be appreciated. Some of it was not available at the time of trial. Over the course of post-trial judicial proceedings, however, all of the available evidence has emerged and all of the previous barriers to its consideration have disappeared. Nevertheless, the judicial system has failed to provide the new trial that justice demands when we can no longer be confident that a condemned person is guilty.

The purpose of this petition is to review the evidence against Mr. Giarratano, to show how it raises rather than resolves

questions about [illegible]

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system and how they have allowed Mr. Giarratano to reach the brink of execution despite the emergence of substantial doubt about his guilt, and to assure the Governor that his clemency powers are broad enough and flexible enough to provide the relief which Mr. Giarratano seeks.

This process must begin, however, with an understanding of the life of Joe Giarratano -- what he faced as he grew up, how it shaped him, the kind of person he was at the time the crime occurred, the person he has become since then. We must begin here, because the doubt about Mr. Giarratano's guilt rests in some important measure upon who he is.

At trial, Mr. Giarratano was the Commonwealth's chief witness against himself; even more, he was the real prosecutor. Within thirty-six hours of the murders of Barbara and Michelle Kline, before Mr. Giarratano was a suspect, he sought out a police officer and confessed to killing the Klines. Prior to this moment, no one had pointed a finger at him, no one had sought his arrest for the murders of the Klines, no one had confronted him in a police interrogation room. His own profound sense of guilt propelled him to find a police officer and to confess. He did confess, over and over again, but he also did more. He refused to defend himself. In his mind, he was guilty and deserved to die. He tried to take his own life several times before trial. Failing that, he orchestrated his defense to assure his death. He refused to plead guilty in exchange for a life sentence. Afraid that even an

unconditional

assured his conviction by opting for a bench trial and asserting a defense that had no factual support. Upon conviction, he asked that the judge sentence him to death.

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So compelling was Mr. Giarratano's prosecution of himself that no one involved in his case at trial -- police officers, defense counsel, prosecutor, Central State Hospital staff, defense psychiatrist, or judge -- entertained the possibility that he might not be guilty. No one stepped back and asked, "Could his confessions be unreliable? Could they be the product of his imagination rather than his recollection? Could his profound sense of guilt be driven by a deluded process that made him think he had committed two murders when he had not, rather than a realization that what he knew he did was horrible?"

The questions were finally asked but not until several years after Mr. Giarratano's trial. The reason they were finally asked was Mr. Giarratano himself. He did not ask them. He caused others to ask them because of who he was and who he had become over the course of a number of years on Virginia's death row. Accordingly, we begin with Mr. Giarratano.

PART ONE:

The Life of Joseph Giarratano -- A Story of Torment, Frailty, Survival, and Dignity

Joe Giarratano's childhood was a nightmare come true. The very hands that should have held him in a safe, nurturing embrace instead kept him at a distance, battered him, ridiculed him, and

Joe's was a childhood of extreme [illegible]
by his mother and her friends, and sexual abuse by his stepfather.
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His "home" was infested with drugs and alcohol and served as a haven and party house for drug-dealers involved in the Ward/Von Eberstein/Lehder drug ring. At best he was ignored, at worst he was tortured there.

As United States District Judge Robert Doumar summarized in his order of June 25, 1986: "When he [Joe] was three or four years old, she [Carol Parise] would leave him alone for days at a time in their New York apartment. Drug dealers and other felons were frequent visitors in their home and a frequent source of 'amusement' for his mother and her 'friends' was to beat Giarratano with broom handles, baseball bats and other weapons. His life was threatened by both his mother and her visitors. He was burned. He was shocked with a cattle prod. He was handcuffed to a fence at night...." Appendix, hereafter "App., at 14-15.[1]

Carol Parise blamed Joe for everything that was wrong, from there not being enough money to his not taking on the full responsibility of being the "man" of the house when he was 15 and his stepfather died. App. 46-47.

Joe was a chubby little boy and has remained overweight all his life. As far back as Joe can remember, his mother's "pet" name

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[1] In the three-volume Appendix to the petition, Mr. Giarratano has included all the documents from the record in his case which bear upon his request for a conditional pardon.

for him was "Pig". She [illegible] and constantly told him he couldn't do anything right.

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The sexual abuse Joe suffered began as "fondling" when he was eight or nine years old, and graduated to full-blown rape which was repeated again and again until his stepfather died. App. 688-89.

At an early age, Joe began trying to escape the horror and shame of the abuse to which he was subjected by running away from home. App. 619. Social Service authorities recognized, at least as early as 1973, that his home environment was unhealthy and some attempts were made to find an alternative home; but Joe always was returned to his mother's guardianship. See App. 49, 51.

When running away failed to provide the escape he so desperately needed, and when authorities consistently returned him to a life of physical, psychological and sexual abuse, Joe, at eleven years old, turned to drugs, the escape that was most readily available in his home. If he, as a child, could not escape the abuse, drugs, at least, could dull the pain. By his early teen years Joe Giarratano had become severely addicted to drugs and alcohol. App. 57-69 (Affidavits of D. Hogan, F. Mitchell, L.T. Hogan, William Odom, Glenn Rogero); App. 72, 75-77 (Florida Prison Record).

Even this cursory look at the horror of Joe's childhood, of his attempts to escape and of his retreat to drugs at such an early age stands as a poignant counterpoint to Judge McNamara's legalistic observation in sentencing Joe to death, that "[b]y becoming a habituate of drugs and alcohol one does not cloak

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600.

Judge McNamara discounted the mitigating significance of Joe's addictions and drug and alcohol use. The courts have referred to Joe's substance abuse as "voluntary".

Yet, under the circumstances of this child's life, especially given his thwarted attempts to escape by running away, no one can fairly say that he turned to drugs and alcohol voluntarily, chose to become addicted, or chose to expand and prolong his substance abuse. Rather, he was driven to drugs and alcohol in the same way a terminally ill person in acute, persistent, physical and emotional pain would be.

At the age of 14, Joe was charged with possession of marijuana. Just two months later, he was caught again with marijuana. Less than a month later he was caught sniffing paint thinner. Two months later, his probation was revoked for school truancy and he was committed for a few months to Dozier School, Division of Youth Services. See App. 799-800. Unfortunately, he was returned to his mother's home.

In 1973, when Joe was 15, his stepfather died, removing one abuser from his life. However, experts have found that carrying the secret of the acts can be more damaging in some respects than the acts themselves. See M. Hunter, Abused Boys: The Neglected Victims of Sexual Abuse, Chapter 4.

Shortly after Joe's stepfather died, Joe made a very serious suicide attempt by overdosing on drugs and severely slashing his

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University Hospital under the care of Dr. Donald S. Beacock (now deceased). See App. 31-55. Because Carol Parise reported that Joe's only drug problem was that he "OD[s] when he wants attention," however, App. 45, Dr. Beacock was not aware (as were Joe's neighbors and friends) of the extent of Joe's addictions. See App. 57-69 (affidavits of neighbors and friends).

Dr. Beacock was aware and duly noted that Joe's mother projected guilt onto Joe and was so hostile to her son that Dr. Beacock ordered that her visits be severely restricted and closely supervised. App. 46. The hospital staff attempted to find foster placement for Joe outside of Carol Parise's guardianship, but those attempts failed, and once again Joe was returned to the environment from which he was trying so desperately to escape. App. 47, 49, 51.

Records from this hospitalization show Joe to be a seriously depressed child. App. 40-42. While hospitalized he was involved in individual and group therapy and maintained on Librium and Thorazine. App. 40. Under the discharge plan, Joe was to meet monthly with the "Alpha Team" and to remain on Librium. Id.

A child of 15 needs a parent or guardian to fill prescriptions for Librium and see that he gets to his monthly counseling meetings. Carol Parise did neither.

Had there been any real intervention or even the minimal intervention of monthly counseling and maintenance on Librium from age 15, Joe might have learned to cope with the brutality of his

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addiction. Instead, Joe was forced to deal with the effects of long-term physical and sexual abuse alone, while still being victimized by his mother and her friends and while his addictions to drugs and alcohol intensified.

Four months after his discharge from University Hospital, Joe was charged with carrying a concealed weapon and returned to Dozier. App. 800. He escaped a little over a year later with three other boys. Id. They were caught in Georgia with a stolen car and a weapon and Joe and one other boy were sent to adult prison. Id. By accident, in prison, Joe met his biological father. Joe's record in prison was good, App. 73, 76-7, and in November of 1976 he was paroled once again to the supervision of his mother.

The Odom, Wilder and Rogero affidavits attest to Joe's heavy use of drugs and alcohol and how that usage escalated after 1976. They also attest to the blackouts Joe suffered from as early as age 14 or 15 and how these blackouts increased.

Odom recalls that Joe's use of drugs "was on the verge of killing him. He was living on that ragged edge in danger at any time of taking too much of an overdose." App. 64. Odom also recalls Joe's blackouts and his being "laid out in the front yard unconscious." Id.

Wilder, who was Joe's roommate for the year and a half before Joe left Florida for Virginia, App. 66, recalls that Joe used excessive amounts of drugs and consumed large quantities of whiskey

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and beer [illegible]

Wilder also recalls that Joe lapsed into "comas" and went through periods of time when he had absolutely no awareness of anything that might have happened. Id.

One of the most remarkable aspects of Joe's life was that, despite the brutality directed toward him, he did not become brutal himself. Friends and neighbors attest that throughout Joe's life, even under the most intense addiction, he was a good and non-violent person.

L. T. Hogan, a neighbor, says: "Joe wasn't a bad kid and he wasn't a fighter.... It is really tragic to see a young boy like Joe try so hard to make it, but because of circumstances, be subjected to bad influences at a time when he needed support and stability." App. 62.

William Odom, who lived with Joe and his family off and on from 1973 to 1978, says Joe tried to protect himself by acting like a tough guy, but it was a front. App. 64. In talking with the investigator, Odom brought up on his own an incident we did not know he knew something about -- the single incident of so-called violent behavior in Joe's record. On November 3, 1977, Joe was charged with battery of a law enforcement officer, aggravated assault, resisting arrest with violence and disorderly intoxication. The fact that all charges were dropped except for one count of battery and Joe received 18 months probation, see App. 800, made it clear that this incident was not nearly as violent as the cold charges implied, but we knew nothing more about the

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incident [illegible]

Odom told us, "As I was fighting with the bouncer [of "The Still", the bar where Joe's mother worked], out of the corner of my eye I saw someone coming at me from behind. Before he reached me Joe stopped him. He didn't have to, but I was his friend and I was in trouble. Things got real quick after that. In just a few minutes the law was there. Then he [Joe] did something I'll never forget. He knew I was in a whole lot of trouble because I was AWOL from the military, so he took the heat off me by taking on the police...even though it was me who got into the fight with the bouncer in the first place. Joe was not the kind of person who would go out and get into fights...." App. 63-64. We asked Joe why he had never told anyone the true story of this incident. It was because he was continuing to protect Mr. Odum, regardless of his own situation.

Scott Wilder says, "It shocked me when I heard about the crime Joe is supposed to have committed. I still can't bring myself to believe that Joe did it. I was close to Joe for that year and a half just before the crime was committed and I came to know him really well. I don't believe Joe is capable of killing anybody. He is not a violent person. In all the time I knew him, I never saw him in a fight. In fact, I never even saw him lose his temper once.... I am happy to hear that people are working hard on Joe's behalf. I hope they discover what I came to know and still believe about Joe -- that he is not the kind of person who would ever do violence to another human being." App. 67.

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was and, in another unsolicited comment, Rogero, a lifetime friend of Joe's, saw straight through to the core of Joe's case.

Rogero says, "I believe Joe is the kind of guy who is capable of confessing to something he didn't do because deep down inside he is a really good person. I can understand that if he was confused about something and he suspected he had done something how he might confess to it. He would probably assume he did it and confess to it because he would not be able to live with himself if he had any idea that he had done it." App. 69.

Without an understanding of the effects of childhood abuse and drug and alcohol blackouts, most people who have led relatively normal lives would not understand why a person would assume they did something as horrible as killing two people and go on to confess to such a crime. Rogero understands why Joe would confess to something he didn't do because Rogero knows Joe.

Whether Joe woke up in the apartment and found "Toni" and Michelle's bodies, as he believes, or he learned of their deaths in some other way (such as coming into the apartment after they had been killed or being told of their murders, as Doctors MacKeith and Gudjonsson suspect), he knew his friends had been murdered and he felt responsible for their deaths.

Why? The effects of physical and sexual abuse on a child depend on a multitude of factors and on the individual child. Factors which determine the extent of the trauma include how prolonged and frequent the abuse was; how intrusive (penetration

versus "fondling"); how closely related the relationship of the abuser, and whether other adults around the child ignore, deny or tolerate the abuse. In Joe's case he was on the far end of the continuum on each of these scales. See generally, M. Hunter, Abused Boys: The Neglected Victims of Sexual Abuse, Chapter 4; D. Schetky and A. Green, Child Sexual Abuse, Chapter 3.

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The abused child needs to make sense out of what is happening to him. In order to do so he frequently reasons that there must be something wrong with him: he must be bad or worthless. Taking the blame helps the child believe he has some control. If he can just stop being bad, the abuse will stop. In fact, the child has no control. In the case of a parent or guardian being the abuser, the child is an object under the power of the person or persons on whom he is most dependent. See M. Hunter, op. cit.; D. Schetky and A. Green, op. cit.

Abused children are taught that they have no right to feel angry or afraid about what has been done to them, and so they come to believe their emotions are bad and they need to be in control of them at all times or they will "go crazy" or become violent. Id.

The child learns to cope with the abuse by dissociating - compartmentalizing parts of the personality or body. "You can hurt my body, but not the real me." Over time dissociating creates memory problems, causing victims to "lose" large blocks of time from their childhood. These experiences of distrust of one's

emotions and memory -

mind is faulty and not to be trusted. Id.

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The emotional results of child abuse include:

Fear - demonstrated in nightmares, mistrust of others, vague feelings that something bad is going to happen, fear of authority and panic attacks.

Shame - which is related to a person's self rather than to an experience. Shame causes the victim to view himself as horrible rather than as someone to whom something horrible was done.

Guilt - which causes the victim to always believe he has done something wrong.

The behavioral aspects of child abuse are self-punishment, suicide attempts and suicidal ideation, and substance abuse to medicate emotions and repress memories. Id.

The abhorrent abuse perpetrated on Joe Giarratano and his attempts to cope with that abuse instilled in him an awesome burden of guilt and the confirmed belief that he was a bad person who could not trust his own mind, memory and emotions.

Drug and alcohol blackouts, of which Joe had long been aware, further compounded his distrust of his mind and memory.

According to Dr. James Hill, a specialist on alcoholism, such a blackout entails a complete lack of memory for events of a certain time span. Emerging from the blackout, the individual tries to ascertain what happened during the blackout by searching for clues and by imagining some plausible sequence of events. When he emerges from the blackout or amnesia, "if all is not well, he will

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relieve the dread and guilt." App. 80.

Joe Giarratano had been conditioned for 21 years to assume guilt for anything bad that happened to him or around him. For Joe, it was a perfectly normal reaction to assume guilt for the murders of "Toni" and Michelle Kline and go on to "confess" to those murders.

By 1979 the cumulative effects of long-term physical, psychological and sexual abuse and the years of extraordinary substance abuse had culminated in mental illness for Joe. However he learned of "Toni" and Michelle's deaths, he felt responsible, and convinced himself that he was worse than horrible; he was evil and had to be killed. Being so convinced, he did everything he could to convince others or carry out the job himself. He attempted suicide twice in the Norfolk City Jail. App. 612.

Sent to Central State Hospital for a pretrial competency evaluation because of the first suicide attempt, on February 17, 1979 he told Dr. Ryans he had been violent in prison, tearing a bed out of a wall, beating down the wall and beating "the hell out of a security officer." App. 82. His prison and other records show no such incident ever happened. See App. 71-77. He also told Dr. Ryans that if he tried to kill himself and the aides tried to stop him, he'd kill the aides. App. 82.

On February 22, Joe did attempt suicide at Central State and the aides did stop him. He did not harm them in any way. See App.

85, 89-90.

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From the day of his arrest, throughout his trial and for his first four years on death row, Joe was administered Thorazine, at times up to 900 mg. per day, and other psychotropic drugs. See, e.g., App. 85.

Following his direct appeal in 1980, Joe again attempted suicide and fought efforts to continue his appeals. After surgery, hospitalization at Central State and many hours of visits and telephone calls from Dr. Showalter, Professor Richard Bonnie and Lloyd Snook, Joe allowed a petition for habeas corpus to be filed in state court.

Lloyd Snook described his first encounter with Joe during this period: "When I first met Joe, he shuffled into the room and sat down at the table across from me. Although the temperature was over 90 degrees, he was shivering. From the very beginning Joe was a basket case. He was nervous, paranoid, sometimes actively delusional, and often angry at me for talking him into continuing his appeals. It was obvious to me that the psychiatric diagnoses were largely accurate - that Joe was under great stress, that he was on the verge of psychosis, that he was suicidal - but that he was genuinely remorseful for the crimes that he thought he had committed, and that he believed he did not deserve to live because of those crimes." App. 97.

Joe continued his appeals, not for himself but because he believed his testimony would be helpful to others, in the Mecklenburg conditions suit. App. 98. As soon as he believed he

was no longer needed [illegible]

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Id. In an effort to appear competent, he also began to refuse all psychotropic drugs prescribed for him by the prison psychiatrist.

In August, 1983, Joe was transferred to the death house in Richmond to assess his competency to waive his appeals. During his three months there, Lloyd Snook and Marie Deans spent hundreds of hours counseling him. App. 110-111. Joe was often delusional, experiencing auditory and visual hallucinations. App. 106-107. When he was rational he would argue that he had to be evil to do what he had done.

Joe also was going through a spiritual crisis. He was so deeply remorseful that he could not believe that even God could forgive him. Not wanting to offend God further, he tried desperately to rationalize that by dropping his appeals he was not committing suicide. He read the Bible and every book he could get on Catholic doctrine. He questioned Bishop Sullivan, the Catholic Chaplain and anyone who would talk with him about his religious concerns, seeking reassurance that he was not committing suicide (the ultimate sin in Catholicism). When the Catholic Chaplain told him he was committing suicide, Joe burst into tears.

He spent hours talking to and questioning Marie Deans about Michelle and "Toni" Kline.[2] He told Ms. Deans that he had said bad things about "Toni" and Michelle, hurting them even after he had killed them, and assured Ms. Deans that that was further proof

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[2] Ms. Deans' Mother-in-Law was murdered by an escaped convict in 1972, and she is the founder of a national organization of murder victims' families.

of how evil he was [illegible]

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company. He was confounded when Ms. Deans, who had worked with hundreds of men on death row in the South, told him that, on the contrary, she had not met anyone on any death row who grieved for their victims as he did or who demonstrated such genuine remorse.

Over the course of Ms. Deans' and Mr. Snook's counseling, Joe began to reveal details about the abuse he had suffered. App. 98-99; 111-114. They began to realize the extent of Joe's memory problems and learned that part of Joe's determination to be killed came from his amnesia. Although he was convinced that he had killed "Toni" and Michelle, he had no idea how, why or what actually happened. Understandably, this was incredibly frightening for Joe. App. 98.

Although Joe resisted their efforts to make him accept himself as the good person they believed him to be, he did begin to listen to their assurances that even on death row there were ways that he could help others.

Joe was returned to death row at Mecklenburg the last day of October. In early November, Joe developed a very bad toothache. After several days of his requests to see the dentist being denied, Joe refused to go back into his cell after breakfast, saying he wouldn't go in until the guards took him to see the dentist. The riot squad came to the pod threatening to put him back in his cell by force. Joe picked up a mop handle to defend himself. The riot squad gassed Joe, shot mace into his eyes and subdued him by force. On November 30, after viewing a videotape of this incident, Mr.

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See App. 99, [illegible]

over this incident and donated his settlement reward to the Virginia Coalition on Jails and Prisons.) Later that same day, Joe picked up his appeals, not because his struggle was over, but because he had become determined to win that struggle and make a contribution.

In spite of the struggle Joe went through to overcome his addictions and mental illness; in spite of having to teach himself to compensate for his neurological problems; in spite of having to deal with the long-term effects of his childhood abuse; and in spite of facing his own death sentence, Joe's primary concern became, not himself and his problems, but the men on death row and their problems.

Many in the country know of Joe's class action suit, Murray v Giarratano, in which he formulated, filed and led a First Amendment claim to secure counsel for death row inmates.

Few of those familiar with Murray v Giarratano know the personal history of the case. Joe had written a memo on the theory of the claim and sent it out to several death penalty lawyers. The impetus for Joe bringing the suit was his determination to save the life of Earl Washington, a retarded, functionally illiterate, black man on Virginia's death row. When over a hundred lawyers and law firms in Virginia and across the country refused to represent Earl, Joe did not curse the lawyers or the system. Instead, Joe took personal responsibility for Earl Washington and went to work to

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save his [illegible]

The man who years before decided to take the heat to protect his friend, William Odom, took on the Commonwealth of Virginia to save Earl Washington. The concern for others always had been part of Joe's character. Now he knew how to show that concern in a way that would help many.

Most people are not aware of how often Joe has intervened when the system has failed his fellow inmates on death row.

Most are not aware of Giarratano v. Bass, an earlier access case in which the settlement Joe agreed upon was the right to confidential legal visits, mail and phone calls for all death row inmates.

Nor are they aware of the petitions for certiorari, motions to stay the mandate, motions for extension of time and other actions Joe has taken over the years to challenge the legitimacy of the convictions and death sentences of his fellow death row inmates.

They are not aware of the many lawyers and law students Joe advises, encourages, counsels and supports.

They are not aware of the hundreds of hours Joe has spent counseling men on death row who are suicidal or angry enough to attack a guard or inmate.

They are not aware of the three troubled teenagers Joe has quietly counseled to keep them off drugs and out of trouble.

They are not aware of his enormous contributions to the Virginia Coalition on Jails and Prisons and other organizations.

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In his dissent in Giarratano v. Murray, Judge Hall noted Joe's contributions: "Surely, the majority cannot suggest that Giarratano is typical of Virginia death row inmates. Giarratano has risen to the level of a 'jailhouse lawyer' and has been instrumental in helping other inmates with their post-conviction proceedings.... It is clear from the record that Virginia has abrogated its duty to provide meaningful access by depending upon Giarratano and Marie Deans (Executive Director of the Virginia Coalition on Jails and Prisons) to provide the legal assistance required by Bounds to death row inmates." App. 147.

They are not aware because Joe doesn't talk about his good deeds. He doesn't even view these expressions of his concern for others as good deeds. He sees them simply as jobs that need to be done, and so he does them.

When Joe is not doing legal work, he is either reading or writing. He is a student of Tocqueville, Locke, Jefferson, Hume and the American Constitution, which he knows, understands and loves as few Americans do. He is also a student of theology, especially Kierkegaard, Bonhoeffer and Barth. His favorite "leisure" reading is Dostoievsky, Faulkner, Camus and Pirsig. Part of the punishment Joe endures is not having anyone around him with whom he can discuss the books he reads and the ideas they engender.

Joe's writings have touched the lives of many people. He has published articles on the law, the death penalty, prison reform and is currently writing a law review article on the 9th Amendment. Another law review article will be published in the Spring volume

of the Yale Law Journal. Equally important are the [illegible]

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honest articles Joe has written about death row. These have been widely published in books and magazines. Joe wrote these articles privately and sent them only to Marie Deans. It was only after Ms. Deans persuaded him that they could help people on death row that he allowed them to be published. A sampling of Joe's writings is included in the appendix, at 150-209.

The facts of Joe's case have gained wide support for a new trial. Eighteen editorials and numerous columns have been published in Virginia newspapers calling for a new trial or, at the very least, commutation to allow Joe to prove his innocence. The Washington Post published an editorial calling for clemency for Joe. Over a hundred articles have appeared in newspapers in Virginia, the United States, Europe and Canada. See, e.g., App. 211-240.

In June of 1989, Amnesty International published "The Risk of Executing the Innocent," which focused on Joe and Ronald Monroe. App. 242-264. On October 23, 1990, John G. Healey, Executive Director of Amnesty International USA, wrote the Washington Post that "[i]nternational law holds that someone may be sentenced to death only when there is 'clear and convincing evidence.' The new evidence, if considered, casts serious doubts on the correctness of his conviction. Amnesty International USA believes U.S. courts should do justice by considering evidence that may prove Mr. Giarratano innocent." App. 265.

In August, an ad hoc committee of supporters formed GRACE

(Giarratano Review Action Committee). See App. [illegible]

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to draw the public's attention to the case in order to cause the disclosure of all evidence and to ensure that a fair trial be held. Id. Early members included James J. Kilpatrick, Joseph Rauh, Jr., Ed Garvey, Richard Viguerie, Oliver Stone, Jack Lemmon, George McGovern, former Commonwealth Attorney Douglas K. Baumgardner, Delegate Samuel Glasscock and Senator Thomas J. Michie, Jr. Today the list has grown to include members such as Benjamin R. Civiletti, Bishops Sullivan and Vache, Virginia Senators Colgan, Stallings and Kevin Miller. See App. 268-274. Also included in GRACE are a number of national and regional organizations, including American Baptist Churches, U.S.A., National Black Police Association, and Reedville Fisherman's Association. See App. 272, 294-296. European support includes the European Parliament, Dutch Association of Criminal Lawyers, the former Prime Minister of Ireland and thirteen European parliamentarians. See App. 273-274, 298.

Perhaps even more impressive is the support Joe, the man, has gained.

Former Attorney General of Maryland, Steven H. Sachs, a proponent of the death penalty, said in a March 15, 1990 letter to Attorney General Mary Sue Terry: "He [Joe] is sensitive. He is kind and considerate. He has enormous compassion for those less fortunate, if you will, than himself. He acts on those beliefs and freely gives his time, energy and talents to other inmates. He has trained himself to be a lawyer, and a very good one. I am in awe

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undertaken and mastered. In my contacts with him, I sensed [illegible] of the self pitying resentment so often characteristic of inmates embittered at 'the system.' On the contrary, I was amazed to find no trace of bitterness in Joe at all, a quality that I know has been observed in him by others.

"In short, Joe Giarratano is a good man. By some unknowable process and for some imponderable reason, in the course of a decade on death row a different human being has emerged from the hell that was his life before. His words, his deeds and the growing number of those of us whose lives he has touched attest to it...." App. 302.

Martha A. Geer, one of the attorneys on Murray v Giarratano, has known Joe since 1985. She writes: "Ironically, given his own case, Joe seems to believe in 'the system.' He continues to believe that if you are morally correct and present your case logically and with legal support, 'the system' will work and courts will do what's right. He has begun to learn that it does not always work that way.

"Joe is not, however, just another jailhouse lawyer. He does not receive some black-market compensation. He has no delusions of grandeur. The sole reason for his very substantial efforts? He wanted the men on Virginia's Death Row to have a fair chance.

"Joe has earned my respect and admiration.

"He cares about people unconditionally whether they are death row inmates, guards, children, or institutional attorneys. One

assistant attorney general [illegible]

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absolutely stricken, protesting, 'But he's just a big teddy bear.' Joe understands the pain of the guards and the wardens, who have to confront the men on Death Row. Remarkably, he expresses no bitterness about his mother's efforts against him. He has always taken responsibility for his own life. He signs his letters 'Peace' and 'Shalom' and means it. Joe exhibits compassion, depth, intelligence, insight, and forgiveness...." App. 119-120.

Joshua M. Horwitz, Attorney, writes: "I returned to my office the next day (after meeting with Joe) with a new understanding of many of the issues I was dealing with in my practice. Now I correspond regularly with Mr. Giarratano seeking his advice on legal issues.

"Mr. Giarratano is, and with your help will continue to be, a constructive and vital part of society and the legal community...." App. 303-304.

Actor/Activist Mike Farrell writes: "I say Joe least of all because he has become my friend. Through all of our communication over the past year, the single thing that has come through most clearly is his decency. He is a thoughtful, articulate, humane and compassionate man. A decent man...." App. 306.

Jonathan E. Gradess, Executive Director of New York State Defenders Association, writes: "In the course of reviewing Joe Giarratano's case, I have come to know him personally. He is a remarkable human being whose struggle with life and events has forged in him great sensitivity, a wholeness of spirit, and love

for humankind. He is a self-trained lawyer [illegible] colleague, inspiring defense lawyers from California to New York in capital cases, securing support for men on the row, healing those in pain who struggle with issues of life and death." App. 310.

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Retired U.S. Diplomat Richard H. Morefield and Dorothea Morefield, parents of a son who was murdered in Virginia in 1976 write: "It is sometimes a temptation to ignore the fate of those unfortunate enough to have fallen between the cracks in our society. But the Giarratano we have come to know and care so much about over the last two years is not the suicidal alcoholic who was sentenced to death over ten years ago. We have found him to be a man of sensitivity, intelligence and compassion." App. 311.

Alvin J. Bronstein, Executive Director of the ACLU's National Prison Project and counsel in Brown v Murray, the Mecklenburg conditions suit, writes: "During the course of the Brown case during the last ten years I have had frequent occasion to meet personally with Giarratano and to have telephone and letter communication with him. Two things must be said as a result. First, I have personally seen Mr. Giarratano change and grow in those years from a confused, unfocused, inarticulate and nervous youngster to a serious, thoughtful, intelligent, well-spoken and mature man. He is the most cooperative, truthful and helpful client we have in this office. He has a positive relationship with most of the prison staff and has attempted to correct perceived wrongs through constructive action within our legal system.

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"Second, Giarratano has taught himself to become a [illegible] legal analyst, an excellent writer and an extraordinarily productive person, even from the confines of Virginia's death row. He is an author, a poet and a first-rate legal thinker. He will undoubtedly continue to grow and can live an important and productive life in our troubled world...." App. 313.

Professor Eric M. Freedman, of Hofstra University, writes: "His interest was not in himself but in another; he was not seeking to defy the legal system but to work within it; and his goal was to prod our system of justice under law into meeting its own highest aspirations.

"[H]e is living proof that rehabilitation is possible.... [G]uards as well as inmates deeply value the role he has played time and again in forestalling crises, large and small. And, as writer, scholar, and activist, he contributes far more to the broader society than do many in the outside world. He is a colleague who would be welcome on our faculty and a friend who would be welcome in my home." App. 315-316.

Professor Anthony G. Amsterdam, New York University Law School, writes: "Joseph Giarratano has not only a rare goodness of mind but a rare goodness of spirit. He possesses the gift of empathy with other people. He is sincerely dedicated to helping others and has worked untiringly at it despite the pressures of his own situation. With uncommon strength of character, he has resisted the natural inclination of anyone on Death Row to become absorbed entirely in himself. There is nothing self-seeking,

petty, or mean [illegible]
understanding; he has charity." App. 318.

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Associate Professor Michael Millemann, University of Maryland School of Law, writes: "I know Joe because, as a lawyer and law professor, I worked with him on Murray v Giarratano. When I first met him I was overwhelmed by his humanity. I had to press him to talk about matters of self-interest affecting his own life because his concern was for the lives of other death row inmates in Virginia. They have been his primary concern for a number of years. In another lifetime, with the most modest family support that we all take for granted, Joe Giarratano would have been a brilliant lawyer. He is a dedicated advocate for the more forgotten poor today." App. 319.

Professor John Charles Boger, the University of North Carolina School of Law writes: "Joe stood out as absolutely unique. He was as smart and knowledgeable as any lawyer with whom I worked. Even more remarkable, however, were his personal characteristics: unfailingly thoughtful, courteous, honorable, deeply concerned about others. He has worried more about, and has done more for, his fellow inmates on Virginia's Death Row -- many of them illiterate and confused about their plight -- than have their prison counsellors and attorneys. Joe has served his fellow inmates as both father and friend. His character and his accomplishments while in prison have shone like a beacon...." App. 321.

One of the more poignant letters included in this packet is

a draft letter [illegible]

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Allison was with Paul, Weiss, Rifkind, Wharton & Garrison and worked with Joe on Murray v Giarratano. The letter, with changes in Mr. Allison's handwriting, speaks of Joe as "the most decent person I have ever met," of his "admiration for Joe as a person". App. 323-324. Mr. Allison died while working on this letter. His family, knowing of his close friendship with and commitment to Joe, requested that, in memory of Mr. Allison, donations be sent to the Virginia Coalition on Jails and Prisons to help that organization continue its work on Joe's behalf.

Those who have known Joe for many years speak of his remarkable transformation. Indeed, there has been a transformation. Joe's story is a story of the triumph of the human spirit against all odds.

PART TWO:

There Is Reasonable Doubt About Joe Giarratano's Guilt

It is crucial to understand that what we now know about Joe Giarratano is relatively recently acquired knowledge. Before and during trial and for nearly five years on death row, Joe and his life history were profoundly misunderstood.

He was known to have been abused as a child. He was perceived as having been antisocial and on the fringes of criminal behavior from the time he was an adolescent. He was thought to be violent, abusive in inter-personal relationships, and self-absorbed. He was

known to have been [illegible]

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drugs and alcohol. And finally, he was thought to have the potential for further, explosive acts of violence due to the anger that seemed to be bottled up within him. See App. 88-102, 168-200.

In short, during this period of time, Mr. Giarratano was perceived as having the history, personality, potential for violence, and low regard for himself and others that were entirely consistent with being the murderer portrayed in his confessions.

It was only after Mr. Giarratano's mental health began to improve in the mid-1980's that we began to realize that this portrait was grossly distorted. Qualities of character emerged during this time -- empathy, compassion, charity, generosity, gentleness of spirit, and a searching intellect -- which were wholly inconsistent with the person Mr. Giarratano had seemed to be up until that time. Insight into his life began to be shown. For the first time he talked about how he had been made to feel in his mother's home -- and in the process revealed the previously unknown and much more egregious acts of victimization he suffered, at the hand of his stepfather, his mother, and her friends.[3] He talked about the numbing pain he felt and his attempts to run from it through drugs and alcohol. And he identified for the first time

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[3] Before this time, no one knew that Mr. Giarratano had been sexually abused by his stepfather. And while it was known that his mother had been abusive, "Nothing was presented to indicate the extent of depravity Giarratano now claims he suffered at the hands of his mother." App. 15 (Opinion of United States District Judge, Robert Doumar, Giarratano v. Procunier, No. 83-185-N (E.D.Va.), June 25, 1986).

the people who really knew his circumstances, [illegible]
and his true character.

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With these revelations, Mr. Giarratano's counsel began investigating his life as no one ever had before. Our investigation confirmed every detail of the new revelations from Mr. Giarratano. From it, the life history in Part One, supra, was drawn, and the truth emerged about the quality of person Joe Giarratano was.

As we learned the truth about Mr. Giarratano's life history, about his frailties and vulnerabilities, and about his strengths, we began as well to wonder about the reliability of his confessions. The crime to which he confessed seemed fundamentally inconsistent with the kind of person Joe Giarratano actually was. No one who cared about him and knew him well prior to the crime could believe that he was capable of committing it. Further, we learned more and more about gaps in Mr. Giarratano's memory. As we followed out these instincts, we realized that no one had ever done this before in Mr. Giarratano's case. No one had ever started at sum zero, cast aside the reflexive presumption that the confessions were true, and taken a critical look at them, at the congruence between the confessions and the physical and crime scene evidence, and at the evidence of his guilt independent of the confessions.

As the preliminary review of Mr. Giarratano's case may have already made clear to the Governor and his staff, Mr. Giarratano's confessions can be divided into two categories. One, given in

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several statements to [illegible] turned himself in, had Mr. Giarratano killing Barbara Kline first in an argument over money, then killing Michelle Kline to remove her as a witness. In this category, there was no harm done to Michelle -- i.e., she was not sexually assaulted -- before she was killed. The second category, given to Norfolk officers two days later, did an about face on these facts. In this confession, Mr. Giarratano said he first raped, then killed Michelle Kline, and upon being discovered in the apartment thereafter by Barbara Kline, killed her. Just a week after giving this version of events to the Norfolk officers, Mr. Giarratano was sent to Central State Hospital for evaluation of his competence to stand.[4] While at Central State, he lapsed into his original version of the crime, asserting that Barbara Kline was killed first, Michelle Kline thereafter, and that he had not raped Michelle.

During trial and for several years thereafter, no one seemed to be troubled by Mr. Giarratano's series of reversals about the events of the crime. The version given to the Norfolk officers at least fit two of the material facts documented by the medical examiner -- the likelihood that Michelle was raped and the sequence of the Klines' deaths -- so the Norfolk confession was accepted as the operative confession. The contradictions concerning the most basic facts of the crime within Mr. Giarratano's confessions seemed to trouble no one. All the participants in the trial assumed that

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[4] The precipitating event for this evaluation was his attempted suicide in the Norfolk Jail, referred to in Part One, supra.

Mr. Giarratano was guilty even if he was unable to [illegible] straight.

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Thus, the ability to step back, take a critical look at the confessions and their relation to the other evidence, and make a fresh judgment about guilt free from any automatic presumption that the confessions are reliable is a novel undertaking in Mr. Giarratano's case. That, however, is what we have done, spurred on by the revelation of Mr. Giarratano's true character.

The results of our analysis are striking, as the following discussion demonstrates. In sum, when all of the relevant evidence is taken into account and subjected to critical scrutiny, gaping canyons of doubt about Mr. Giarratano's guilt are opened up. There is nothing about the confessions, the processes by which they were obtained, or the evidence independent of the confessions that bridges these gaps. The confessions are simply not trustworthy, reliable accounts of events recollected by Mr. Giarratano. Whatever they are -- a product of his faulty memory, sense of guilt, and vulnerability to confabulation (the unconscious filling-in of gaps in memory by persons with memory deficits), or of suggestion by the Norfolk police, or of both -- they cannot be confidently relied upon for assurance of Mr. Giarratano's guilt.

A. The evidence against Mr. Giarratano

On February 5, 1979, the bodies of Barbara and Michelle Kline were found in their apartment in Norfolk, Virginia. App. 374-75. Barbara Kline's body was found in the bathroom of the apartment in a large pool of blood. See App. 647-649 (crime scene photographs).

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She had been stabbed twice in the neck and once in the abdomen. App. 656. She was fully clothed. App. 647-649. Bloody footprints were found in the doorway of the bathroom and in the hall adjacent to the bathroom. App. 647. Michelle Kline was the 15-year-old daughter of Barbara Kline. App. 374-75. Her body was found on a bed in the southeast bedroom of the apartment. App. 651. She was naked from the waist down and was covered by an Afghan and a towel. App. 763. There was some blood in her nose and on her face, but there was no other blood on or around her body. App. 652 (crime scene photograph); App. 766. Her face was swollen and discolored, and there were striations on her neck. App. 652. The cause of her death was strangulation. App. 660. The Klines' bodies had been found by the landlord of the apartment during a routine check of his property on February 5, 1979.

At 3:20 a.m. on February 6, 1979, Joe Giarratano walked up to Deputy Sheriff Charles Wells in the Greyhound bus station in Jacksonville, Florida, and said, "'I killed two people in Norfolk, Virginia, and I want to turn myself in.'" App. 632. In his written report concerning this incident, Deputy Wells noted that "[n]o other details were available at the time of this report." Id. During the next hour, Mr. Giarratano gave three additional statements to Jacksonville Deputy Sheriffs Mooneyham and Baxter. In the first of his statements, he said that he killed Barbara Kline and her daughter Michelle in their apartment in Norfolk. App. 634-635. He explained that he killed Barbara first by stabbing her with a knife following an argument over money. App.

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strangled her. He mentioned nothing about sexually assaulting Michelle. See App. 634-635. In the two statements taken thereafter, covering each killing separately, he gave the same reasons for the homicides as in the first statement. App. 637, 639. After his interrogation by the Jacksonville police, Mr. Giarratano was examined by a physician and was placed on Mellaril, a major tranquilizing drug.

Mr. Giarratano gave a fifth confession two days later, on February 8, to two detectives from Norfolk, R.J. Mears, and R.D. Whitt, who came to Jacksonville to interrogate him on the basis of their knowledge of the crime.[5] This confession was quite different from the previous confessions in several significant respects: it reversed the sequence of events, asserting that Michelle was killed first; it revealed that Michelle was first raped and then killed when she began screaming; and it revealed that Barbara was killed after she arrived home in order for Mr. Giarratano to evade detection for the rape and murder of Michelle.

Before obtaining the confessions, detectives Mears and Whitt first discussed with Mr. Giarratano the facts they then knew about the crime. App. 396. Thereafter, Mr. Giarratano gave a formal statement in which he related that he had lived with Barbara Kline in her apartment in Norfolk for three or four weeks, but that he

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[5] By the time that detectives Mears and Whitt came to Florida, the crime scene had been fully investigated and the results of the autopsies were available. See App. 362-364; 377-380; 654-658; 660-661.

had moved out [illegible]

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admitted him into the apartment at about 8:00 p.m. Sunday night, February 4, 1979. He was under the influence of four grams of Dilaudid. He and Michelle talked for a while and then went into the bedroom. He tried to persuade her to have sex with him, but she refused. Thereafter, he physically assaulted her and raped her, and to stop her from screaming, strangled her. While he was still in the house, Barbara returned, discovered him there, and began screaming; and he stabbed her. He then made his way to the bus station, where he boarded a Greyhound bus to Jacksonville. See generally App. 641-646 (statement of Mr. Giarratano).

After the interrogations in Jacksonville, Mr. Giarratano was transported back to Virginia and confined in the Norfolk jail. Soon after his arrival at the Norfolk jail, he noticed two spots of blood on his boots, told the detectives about his discovery, and turned his boots over to them. App. 390; 674-675.

At trial, the chief evidence introduced against Mr. Giarratano was his confession to the Norfolk detectives on February 8, 1979. App. 383-389. However, the Commonwealth also introduced physical evidence and crime scene evidence in an effort to confirm Mr. Giarratano's confession. This evidence consisted of the following:

1) Several items of evidence relating to the victims' blood were introduced in an effort to connect Mr. Giarratano to the crime: photographs of the bloody footprints leading away from Barbara Kline's body, Mr. Giarratano's boot with two spots of blood on it, and the towel covering Michelle Kline's face (which had some

blood on it), along with evidence that Michelle Kline's [illegible]

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O+, matched the type of the blood found on Mr. Giarratano's boot and on the towel. See App. 410-411; 667-669. Barbara Kline's blood was not typed, so there was no direct evidence linking the blood on Mr. Giarratano's boot to the bloody footprints leading from Barbara's body, but the impression was created that Mr. Giarratano made the footprints.

2) A number of human hairs were collected from or near the body of Michelle Kline, and evidence concerning laboratory analysis of these hairs was introduced. App. 410-411; 667-669. A total of twenty-four (24) human hairs, including head hairs and pubic hairs, were recovered from Michelle Kline's clothing, from the Afghan which covered her body, and from her body or immediately next to her body. App. 668. Fourteen (14) of these hairs were identified as Michelle's head hairs. Id. Six (6) of these hairs were identified as human pubic hairs, but none of them was consistent with the pubic hair sample obtained from Mr. Giarratano. Id. One (1) pubic hair was identified as consistent with the pubic hair sample submitted by Mr. Giarratano.[6] Id. The one pubic hair that was found to be consistent with Mr. Giarratano's hair was among three pubic hairs found "'on Michelle Kline's left hand, stomach, and pubic area.'" Id. No one identified in which of

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[6] As explained by the Commonwealth's expert who examined the hair found at the crime scene, unlike fingerprint evidence, the finding that a hair is "consistent with" a particular person's hair simply establishes that the hair could have come from that person. App. 415. The characteristics of hair are not like fingerprints, for many people can have the same hair characteristics, while only one person can have the same fingerprint characteristics. Id.

these three places this hair was found.

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3) Physical evidence tending to show that Michelle Kline was raped was also introduced at trial. The medical examiner testified that there were two lacerations in her vaginal area from which there had been bleeding. App. 351. There was no description of the quantity of bleeding from these lacerations, however. In addition, the medical examiner found that sperm cells were present in Michelle's cervix. App. 354. See also App. 412-414. There was no testimony, nor any evidence from any source other than the confession, that the sperm found in Michelle Kline's cervix had any connection to Joe Giarratano.

4) Finally, the police lifted twenty-one (21) fingerprints, which were sufficiently distinct to allow identification, from various areas of the Klines' apartment. App. 365. One (1) of these fingerprints was identified as the fingerprint of Mr. Giarratano. App. 366-368. This print was found on the closet door in the northeast bedroom of the apartment, a bedroom that was otherwise unconnected to the crime. App. 367. Michelle's body was found in the southeast bedroom, not the northeast bedroom. App. 363.

During the course of Mr. Giarratano's trial, no one questioned the reliability of his confession to the Norfolk police on February 8, 1979. The operative, but unstated, presumption was that the confession was reliable. With this presumption, the evidence against Mr. Giarratano was overwhelming. The confession fully established his guilt, and the physical and crime scene evidence

appeared to provide some independent corroboration of the guilt established by confession. If one sets aside the presumption that the confession was reliable, however, and tries to measure its reliability by all the available evidence, substantial doubt emerges concerning the reliability of the confession.

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B. Mr. Giarratano's Confessions

As we have noted, the process of examining the reliability of the confessions began with counsel's realization that the portrait of Mr. Giarratano which had been painted during trial proceedings, perceived as accurate then and for several years thereafter, was fundamentally inaccurate. Counsel then embarked on the process of questioning the reliability of the confessions. The last person on the defense team to question the reliability of the confessions was Mr. Giarratano. Confronted by his counsel, his investigators, and his advocates with the contradictions within his confessions, the incongruence between the confessions and the physical and crime scene evidence, and the absence of any other evidence of guilt, he acknowledged that he had no actual memory of killing Barbara and Michelle Kline. His only actual memory was of going to the Klines' apartment to pick up some personal belongings, and at some point thereafter, finding Barbara on the floor of the bathroom in a pool of blood and Michelle on a bed with her face swollen and discolored. App. 671-672. Over the next few hours, he came to believe that he had killed the Klines. App. 672-673. It was this belief that led him to turn himself in at the Jacksonville bus

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station. Over the next several days, his belief in his guilt became entrenched, and as it did he came to see himself as evil and as deserving to die. App. 673-675. As he put it in an affidavit he submitted in 1988, "[T]he only thing that seemed real to me was that I had murdered Toni [Barbara] and Michelle. I was evil and had to be punished for what I did." App. 675.

If Mr. Giarratano is accurate, his confessions were the product of his imagination rather than his recollection. If that is so, his confessions cannot be taken as reliable evidence of his guilt. His confessions would be nothing more than what mental health professionals call "confabulation," or a "[f]abrication of facts or events in response to questions about situations or events that are not recalled because of memory impairment." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 393 (3d Ed. Rev. 1987). Significantly, confabulation "differs from lying in that the person is not consciously attempting to deceive." Id.[7]

Whether Mr. Giarratano is accurate when he says that his confessions were a product of his imagination rather than his recollection is, accordingly, a crucial matter to be determined. However, it cannot be determined on the basis of Mr. Giarratano's realization in 1988 that his confessions were based on inference rather than recollection. Skeptics would not rely on Mr. Giarratano because his realization would be seen as self-serving.

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[7] For this reason, Mr. Giarratano's confessions could have been unreliable but still convincing. He thought they were true and thus could speak with the confidence of a truth-teller.

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Even if one were convinced of Mr. Giarratano's honesty, however, one could not rely on his insights in 1988. As two mental health professionals, Dr. James MacKeith and Dr. Gisli Gudjonsson, renowned for their evaluation of the reliability of confessions, have made clear in their recent evaluation of Mr. Giarratano, the reliability of the confessions must be determined apart from what Mr. Giarratano says he remembers, for his ability to remember is impaired. App. 694-696; 739-740. Even his realization that he passed out in the Klines' apartment only to wake up to find the bodies may itself be a confabulation. App. 739. He may not even have that memory. It may an be unconscious effort to fill in what is otherwise a black hole in Mr. Giarratano's life. Accordingly, the reliability of Mr. Giarratano's confessions must be measured by looking to the facts that do not depend on his recollections.

The starting point in analyzing the reliability of Mr. Giarratano's confessions is to examine what he reported about the murders to the Jacksonville police officers, before he had any contact with the Norfolk officers who had independent knowledge of the circumstances of the murders. Based upon the information reported by Mr. Giarratano at this point, one can at least determine whether he had information which could have been known only by the killer or by someone connected to the murders.

Mr. Giarratano revealed four facts to the officers in Jacksonville: (1) that he had killed Barbara and Michelle Kline in Norfolk, Virginia; (2) that he killed Barbara Kline by stabbing her "three or four times" with a kitchen knife; (3) that he killed

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Michelle Kline by strangling her; and (4) that he killed Barbara Kline first due to an argument over money that she owed him and Michelle, thereafter, because she was screaming about what he had done. App. 634-635.

Two questions must be answered about each of these facts: Are the facts accurate? If so, are they facts that could have been known only by the killer?

With respect to the first three facts -- knowledge of the murders of Barbara and Michelle Kline and how each was murdered -- the facts reported by Mr. Giarratano were accurate. Whether these are facts that could have been known only by the killer, however, is not as clear. Certainly the killer would have known them. However, it is equally plausible that Mr. Giarratano could have learned these facts innocently. He could, for example, have learned this much detail about the murders from someone else. Alternatively, he could have learned about them in the way that he now says he did: by passing out in the Klines' apartment when nothing had happened, coming to later to find the bodies of the Klines.

The photographs of Barbara and Michelle Kline, as they were found in their apartment, demonstrate the plausibility of this alternative, for the cause of their deaths could have been readily ascertained by someone who found their bodies and tried to figure out what happened. One of the stab wounds in Barbara Kline's neck is plainly visible in the crime scene photographs of her. Compare App. 649 (crime scene photograph) with App. 650 (autopsy

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photograph). The pool of blood surrounding her body obviously came from one or more stab wounds. See App. 647, 648. Had Mr. Giarratano examined her body beyond simple observation, he would readily have seen other stab wounds. Similarly, Mr. Giarratano could have ascertained by simple observation that Michelle Kline was killed by strangulation. As the photograph of Michelle demonstrates, her face was swollen and discolored, with some evidence of bleeding from her nose. App. 652. In addition, there were marks on her neck consistent with someone squeezing her necklace against her neck. Id. Together, these signs could have been easily deciphered as signs of strangulation by a person trying to figure out what had happened to her.

Unlike the first three facts disclosed by Mr. Giarratano to the Jacksonville deputies, the fourth fact -- that Barbara Kline was killed first in an argument over money -- is plainly inaccurate. On the basis of the autopsies, the medical examiner determined that Michelle Kline was killed first, and her mother second. App. 754. Obviously, the killer would have known the order in which the Klines were killed, so the question is, what does Mr. Giarratano's inaccurate reporting reflect about his involvement in the crime? There are three possible answers: he was not involved in the murders, he was involved but could not remember the details accurately, or he was involved and did not want to report the details accurately. Without additional information, it is impossible to decide which of these is the most accurate answer. Thus, Mr. Giarratano's erroneous recounting of

the sequence of the murders raises, rather than resolves, doubt about his involvement in the murders.[8]

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Accordingly, the information about which Mr. Giarratano was accurate prior to his contact with the Norfolk officers certainly would have been known by the killer. However, it is not information that could have been known only by the killer. The information about which he was inaccurate -- the sequence of the murders -- would have been known by the killer. The information that he disclosed prior to contact with the Norfolk officers, therefore, does not establish that he committed the murders. To the contrary, it leaves reasonable doubt about whether he was involved in the killing of Barbara and Michelle Kline.

The next step in analyzing the reliability of Mr. Giarratano's confessions is the examination of the confession provided to the Norfolk police. See App. 641-646. The two most striking facts about the confession to the Norfolk police are that Mr. Giarratano said that the murder of Michelle Kline preceded the murder of Barbara Kline and that Michelle was sexually assaulted and raped prior to her murder. Both of these facts were consistent with the crime scene evidence. However, since Mr. Giarratano inaccurately reported the sequence of the murders to the Jacksonville officers and mentioned nothing about Michelle having been raped, the question is whether Mr. Giarratano produced these facts on his own

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[8] In light of the established sequence of the murders, it is not likely that Barbara Kline was murdered over a dispute about money. Mr. Giarratano's statement that this was the motive for the murder of Barbara Kline, therefore, does not stand as a hallmark of information that only the killer could have known.

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or was prompted to produce them by information provided by the Norfolk police officers. There is no conclusive answer to this question, but the great weight of the evidence is that Mr. Giarratano did not produce these facts on his own.[9]

As we have already noted, the written, contemporaneous records of the four statements given by Mr. Giarratano to the Jacksonville deputies do not in any way suggest that Mr. Giarratano raped Michelle. However, the trial testimony of Deputy Wells, the Jacksonville officer with whom Mr. Giarratano first made contact in the bus station, was that Mr. Giarratano did admit to him that he raped Michelle. App. 442-443. If Deputy Wells' trial testimony is accurate, it would be the first indication that Mr. Giarratano had knowledge of a crime fact he likely would have obtained only by having participated in the crime.[10] But, it is unlikely that Deputy Wells' trial testimony was accurate. Wells' contemporaneous written account of Mr. Giarratano's statement to him, in contrast to his later trial testimony, makes no mention of a rape. App.

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[9] The interview between Mr. Giarratano and the Norfolk officers apparently was not tape recorded. The only contemporaneous record made during the interview was the formal questioning of Mr. Giarratano, which occurred sometime during a nearly two-hour interview. App. 394-395. Accordingly what information was provided by the officers and what information was generated independently by Mr. Giarratano can be determined only by circumstantial evidence.

[10] Even if Mr. Giarratano did have knowledge of the rape prior to his contact with the police, however, there would still be some doubt about how he obtained this knowledge. If he discovered the bodies after having been unconscious or asleep, he would have found Michelle's body in a bed naked from the waist down. One might very well surmise from such circumstances that Michelle had been a victim of a sexual assault, as well as a murder.

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632. If Mr. Giarratano had made such an admission, it is extremely difficult to believe that Deputy Wells would have neglected to mention it when he made his written record of Mr. Giarratano's statement, in which he reported "[n]o other details ... available" about the crime. Id. Unfortunately, Mr. Giarratano's trial lawyer failed to confront Deputy Wells with this inconsistency when Wells testified at trial.[11] Nevertheless, it is likely that Wells' contemporaneous written record, rather than his testimony, is more accurate.

Mr. Giarratano's omission of any reference to raping Michelle over the course of several interrogations by the Jacksonville deputies raises doubt about whether he knew about the rape. It is possible that he might have been holding this fact back, but there is no indication that he was holding anything back -- after all, he initiated the entire process by walking up to Deputy Wells in the bus station and confessing to the murders. It is thus significant that Mr. Giarratano's first admission of a rape came after his interrogation by the Norfolk officers, who very likely knew -- unlike the Jacksonville officers -- that Michelle was raped before they talked with him. At trial, the Norfolk officers did not admit that they suggested the rape to Mr. Giarratano in

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[11] Indeed, it is likely that Wells' testimony took defense counsel by surprise. Wells was called by the defense, and on direct, in response to counsel's open-ended question, "What was [Giarratano's] version of the [crime]," Wells made no mention of the rape. App. 442. Then on cross-examination, the prosecutor asked, "Did he make any statements about sexually molesting a 16-year-old Junior High student?" App. 442. Wells responded, "Yes, he did." Id.

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questioning of him. However, in light of the events leading up to their interrogation of Mr. Giarratano, and in the way they admitted questioning him, there is a distinct possibility that they did.

The preliminary autopsy findings concerning Michelle Kline, which included the finding of a sexual assault, were made the day before the Norfolk officers interrogated Mr. Giarratano. App. 660. One of the Norfolk officers testified that they "kn[e]w as much about the crime as possible" by the time they questioned Giarratano. App. 391. And the same officer admitted that they "confronted [Giarratano] [with the] facts and circumstances" known to them, on at least some occasions using that information to suggest to Mr. Giarratano that he was not revealing what really happened. App. 396-397.

Taken together, these circumstances indicate that Mr. Giarratano did not generate on his own the admission that Michelle Kline was raped. Rather, he adopted it as a part of his confession when it was suggested to him by the Norfolk police officers. To be sure, we cannot be certain about this. On the other hand, we cannot be confident that Mr. Giarratano generated the facts revealing the rape on his own. There is, accordingly, genuine doubt about this crucial matter.

Mr. Giarratano's confusion about the order in which Barbara and Michelle Kline were killed also weighs in favor of his having no memory of the murders. Until the Norfolk officers interrogated him and confronted him with what they knew, he reported the sequence of the murders erroneously. It is possible, of course,

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that at the time they interrogated him, the Norfolk officers did not know the sequence of the murders. The written autopsy reports do not establish the sequence; to our knowledge, the only written record of this fact is a letter written several months later from the medical examiner to defense counsel. See App. 754. However, the absence of information establishing the sequence of the murders from the autopsy reports is not at all conclusive. The Norfolk officers candidly admitted that they attempted to learn all they could about the murders prior to their trip to Jacksonville to interrogate Mr. Giarratano. App. 391. Something caused Mr. Giarratano to adopt a different version of this important fact when he was questioned by the Norfolk police. Before then, he had consistently told the Jacksonville deputies that Barbara Kline was murdered first.

In these circumstances, when confronted by officers with knowledge about the crime, it is conceivable that Mr. Giarratano changed the order of the murders to conform more accurately to what he knew had happened. Under this theory, Mr. Giarratano would have deliberately mis-reported the sequence of the murders to the Jacksonville officers to achieve some sort of benefit for himself. He might have realized that if he reported the crime accurately -- that he raped and killed Michelle, then killed Barbara because of her ill-timed return to the apartment -- the crime would have been treated as more serious than if he reported it the way he did to the Jacksonville officers -- that he killed Barbara in an argument, then killed Michelle, because she was screaming. This

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theory is not plausible in the circumstances of Mr. Giarratano's case, however, for there is no evidence that Mr. Giarratano at any time was motivated to achieve any benefit for himself. To the contrary, he initiated his prosecution. At a time when he was under no pressure from the police, he walked up to a police officer and gave himself up. From that point on, he did nothing to try to benefit himself, in the sense of trying to put a less culpable gloss on the crime. Everything that he did thereafter was aimed at making himself look as bad as possible, to assure his conviction and execution.

It is not likely, therefore, that this is the explanation for the reversal of sequence. The much more likely explanation is that Mr. Giarratano did not know, or remember, who was killed first, so he filled in this fact by saying that Barbara was killed first when he talked to the Jacksonville deputies. When confronted by the Norfolk officers, who knew that Michelle was killed first, he changed the sequence to conform to the facts they provided him. Evidence developed by the Commonwealth during the course of trial proceedings, along with evidence after trial, provides overwhelming support for this explanation of Mr. Giarratano's contradictory accounts.

The Commonwealth's own psychiatric evaluation, which was conducted at Central State within two weeks after the crime, assessed Mr. Giarratano's contradictory statements about the sequence of the murders as evidence that he had no memory for this fact. As the Commonwealth's lead psychiatrist, Dr. Miller Ryans,

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testified at trial,

> I would attribute it [Mr. Giarratano's inability to get the sequence right] to the combination of the drugs. Now, as I said, he admitted to being high on cocaine and Dilaudid and inferred that he was also a heavy user of alcohol. Now, there is an entity called Korsakoff's syndrome in which a person has peripheral neuropathy, loss of recent memory and they confabulate.
>
> [Those who confabulate] are not doing it on purpose but they simply can't remember, so they will say this is what likely happened so this is what I'll say.

App. 426-427.

Dr. Ryans' finding has been confirmed and amplified in a recent evaluation of Mr. Giarratano by two mental health experts from England, Dr. James MacKeith and Dr. Gisli Gudjonsson. Dr. MacKeith and Dr. Gudjonsson have won international acclaim for their pioneering work in evaluating the reliability of confessions. They were invited to evaluate this question in Mr. Giarratano's case because of its obvious significance.

Over the course of several months, Dr. MacKeith and Dr. Gudjonsson conducted a far-reaching and lengthy evaluation of the reliability of Mr. Giarratano's confessions. They determined that Mr. Giarratano's long history of drug abuse, along with the psychiatric disturbances such as depression which he suffered for many years, resulted in a serious vulnerability to "suggestibility" and "confabulation." As they explained,

> Suggestibility refers to the extent to which individuals can be misled by leading questions and how they respond to interrogative pressure. Confabulation refers to problems in memory processing where individuals replace gaps in

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> their memory with imaginary experiences which they believe to be true. It is a process that operates outside awareness and should not be confused with deliberate deception or malingering.

App. 731.

In concluding that Mr. Giarratano was vulnerable to suggestibility and confabulation, Dr. MacKeith and Dr. Gudjonsson took into account the dramatic improvement in Mr. Giarratano's mental and emotional functioning since 1979. That Mr. Giarratano still showed significant deficits in these areas provided strong confirmation that his deficits at the time of the confessions were worse than they are now. The methodology for their evaluation, the data taken into account, and the reasoning they used to reached their conclusions are all set forth at length in the separate reports of Dr. MacKeith and Dr. Gudjonsson. See App. 679-752. Their conclusions are worth setting forth at length here, for they explain Mr. Giarratano's vulnerabilities to suggestibility and confabulation and demonstrate how those vulnerabilities could have led to his inconsistent reports about the crime.

> In spite of Mr. Giarratano's improvement since 1979, which seems to be related to regular meetings with Marie Deans since 1983 and abstinence from drugs and alcohol, he is still left with a marked residual deficit in his memory processing. This deficit is subtle and possibly not immediately apparent without specific testing. I doubt very much that Mr. Giarratano is himself fully aware of it. My impression is that Mr. Giarratano has very little insight into how vulnerable he is to confabulation and incorporation of suggestions into his memory recollection.
>
> One of Mr. Giarratano's vulnerabilities relates to an abnormal tendency to fill gaps in his

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> memory with confabulated material, that is, imaginary experiences that he believes to be true. Even for material that he has reasonable memory about he confabulates. This is undoubtedly a problem which relates to how Mr. Giarratano has in the past learned how to cope with gaps in his memory. It is not possible to say whether or not his tendency to confabulate resulted from his extensive substance abuse, but if it existed before then the substance abuse is likely to have exacerbated the condition very markedly. Abstinence from substance abuse over a period of several years is likely to have made him less prone to confabulation, even though he is still left with very substantial vulnerability.
>
> A related problem to the confabulation is Mr. Giarratano's tendency to incorporate post-event information into his memory recollection. In particular, being asked specific question, which he believes helps him to focus his mind and improve his memory, markedly distorts his subsequent recollection without his being aware of it. On the surface, Mr. Giarratano appears to be quite resistant to suggestions. However, his resistance to suggestions is quite superficial and he is far more suggestible then is immediately apparent. His susceptibility to suggestions is probably mediated by his marked inability to detect discrepancies between what he observes and what is suggested to him.

App. 738-739.

Together, the evaluations by Dr. Ryans and by Drs. MacKeith and Gudjonsson establish that Mr. Giarratano's contradictory versions of the crime reflected his lack of knowledge, or memory, of those events, rather than an effort to portray himself more favorably. Dr. Ryans' finding that Mr. Giarratano's contradictory versions reflected a lack of memory is crucial. It was made contemporaneously, at the time Mr. Giarratano was reporting these matters. Further, it reflected a judgment about the reason for the

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contradictions. Dr. Ryans could have concluded that they reflected a manipulative attempt to put himself in a better light, but he didn't. He thought they reflected an absence of memory. With this fact established, the more recent findings by Drs. MacKeith and Gudjonsson provide additional insight into why Mr. Giarratano behaved as he did in talking with the police.

Vulnerable to confabulation, to "replac[ing] gaps in [his] memory ... with imaginary experiences which [he] believe[d] to be true," App. 731 (report of Dr. Gudjonsson), Mr. Giarratano had a confabulated memory for the crime when he walked up to Deputy Wells in the bus station. When he gave his confessions to the Jacksonville deputies, who knew nothing about the crime independent of what he told them, he thus could give a consistent account over several interviews. However, when the Norfolk officers interrogated Mr. Giarratano -- utilizing their independent knowledge that Michelle was sexually assaulted and killed first -- Mr. Giarratano's additional vulnerability, suggestibility, came into play as well. He abandoned the original version of events and assented to the Norfolk officers' version of the crime. Thereafter, when Mr. Giarratano was committed to Central State Hospital and left once again to provide his own account of the offense, he reverted to his original version. See App. 82, 84. The discrepancies over the course of his confessions, therefore, reflected his lack of memory for the events of the crime. His confabulation of those events, lacking any stable base in actual recall, bent to accommodate the Norfolk officers' suggestion of

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details when he was in their presence.

The next step in analyzing the reliability of the confessions is to examine the congruence, or fit, between the details recounted in the confessions and the physical and crime scene evidence. If there is significant incongruence, the theory that Mr. Giarratano's confessions were based on imagined, rather than remembered events, is further confirmed. If, however, there is congruence, this theory may be called into question. Our analysis has revealed significant incongruence. Mr. Giarratano was inaccurate with respect to a number of details in the Norfolk confession:

1) He confessed that he strangled Michelle Kline with his hands. App. 643. However, an independent review by Dr. John Smialek, the Chief Medical Examiner for the State of Maryland, of Dr. Faruk Presswalla's autopsy findings establishes that it is unlikely that Michelle was strangled manually. See App. 756. The complete absence of the hallmarks of manual strangulation -- "discreet bruising produced by the assailant's fingers and fingernails marks, among others" -- in combination with "the pattern of injuries on the face and neck, both externally and internally" which was reported by Dr. Presswalla, led Dr. Smialek to conclude that the strangulation was most likely accomplished "by a broad object such as a forearm (a type of 'chokehold')," not by the use of hands.[12] Id.

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[12] In the field of forensic pathology, only two types of homicidal strangulation are recognized, manual or "ligature." Strangulation by ligature is strangulation by anything other than the hands, such as a rope, cord, or a chokehold of the type described by Dr. Smialek. See, e.g., W. Spitz, R. Fisher, eds.

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2) Mr. Giarratano confessed that, as he heard Barbara Kline starting to enter the apartment, he "waited by the wall in the living room." App. 644. As she unlocked the door and came into the apartment, he tried to run past her, but "she started screaming and I stabbed her." Id. Although the precise location of the assault on Barbara Kline is not crystal clear from this account, it seems that it took place in the hallway between the living room and the door into the apartment. The account in no way suggests that the stabbing of Barbara Kline took place in the bathroom. Even if the stabbing started out in the hallway and ended up in the bathroom, there would have been some blood in the hallway. However, there was none. All of the crime scene evidence pointed to the entire assault upon Barbara Kline occurring in the bathroom, for all of the blood was there, except for what was

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Medical Legal Investigation of Death 328 (1980).

Examination of the autopsy report concerning the death of Michelle Kline reveals that the initial findings of Dr Presswalla were the same as the findings on review by Dr. Smialek. Initially, Dr. Presswalla diagnosed the strangulation of Michelle as having been accomplished by "partial ligature." App. 660. Thereafter, following the interrogation of Mr. Giarratano by the Norfolk officers, in which Mr. Giarratano said the strangulation was accomplished manually, Dr. Presswalla changed his diagnosis to read "strangulation, either by partial ligature with metal choker necklace or manually." App. 662. There is nothing in the autopsy report, such as additional laboratory results or physical findings, that would explain why the initial diagnosis of strangulation by partial ligature was changed to include a diagnosis of strangulation by partial ligature or manually. The only known intervening event that might have influenced this change was the confession of Mr. Giarratano. Accordingly, the initial autopsy findings in Virginia -- which have no cloud over their integrity -- are consistent with the independent findings of Dr. Smialek, further confirming the likelihood that Michelle Kline was not strangled manually.

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tracked out of there. See App. 647.

3) Mr. Giarratano confessed to using a kitchen knife, approximately seven inches long, to kill Barbara Kline. App. 645. However, none of the three stab wounds inflicted upon Barbara Kline was deeper than three inches. App. 656. Given the force utilized to inflict these wounds, it is likely that the wounds would have been deeper if inflicted by a knife of the size described by Mr. Giarratano.

4) Mr. Giarratano confessed that he threw the knife with which he killed Barbara Kline into the yard adjacent to the apartment house. App. 644. However, no knife was ever found in that location or any other location.

5) In his confession, Mr. Giarratano indicated that Michelle went into the bedroom with him voluntarily, and that his assault upon her began after they were in the bedroom. App. 643. In contrast, the officers who investigated the crime scene noted the presence of "drag marks," which indicated to them that Michelle Kline had been forcibly dragged into the bedroom. App. 400.

6) Mr. Giarratano confessed that once he began the sexual assault upon Michelle, he pulled her clothes off and raped her. App. 643. However, the physical evidence suggests that Michelle had her clothing on at the time that she died. The forensic scientist who testified for the state noted that there was a smell of urine in Michelle Kline's underwear and pants. App. 668. The usual cause for this is the emptying of the bladder which

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occurs at the time of death. App. 759-760. Moreover, while there was evidence of sexual abuse, the evidence left doubt about whether the form of that abuse constituted rape. Dr. Presswalla's report and testimony do not mention penile penetration, which is necessary to a finding of rape in Virginia. The report of forensic evidence expert Pat Wojtkiewicz indicates that what Dr. Presswalla found -- the presence of spermatozoa, but the absence of semen, in Michelle's vagina -- demonstrates only that intercourse, consensual or otherwise, had taken place within 72 hours preceding death. App. 759. Doubt about whether there was a rape was particularly significant, for the finding of a rape made the murder of Michelle Kline a capital felony instead of a life felony.

7) Mr. Giarratano confessed that when he left the apartment after the murders, he "locked the bottom door with Michelle's keys and threw the keys in the dumpster across the street." App. 645. The crime scene facts, however, contradicted the accuracy of this statement. When the landlord discovered the bodies on February 5, 1979, he reported that the bottom door of the apartment was unlocked, rather than locked.

In isolation, the inconsistencies between these elements of Mr. Giarratano's confession and the physical and crime scene evidence may seem inconsequential. However, in context, as part of a systematic analysis of the reliability of the confessions, these inconsistencies add considerable weight to the view that Mr. Giarratano's confessions were based upon what he imagined rather than what he remembered.

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As we have shown, when one searches for facts known by Mr. Giarratano independent of any prompting by the police, which only the killer could have known, one finds that there are no such facts. Further, when one examines the two major factual inconsistencies between the confessions to the Jacksonville deputies and the confession to the Norfolk officers, all of the available evidence establishes that Mr. Giarratano had no knowledge on his own that Michelle Kline was raped, that he had no knowledge on his own that Michelle Kline was killed first, and that he obtained knowledge of these facts and adopted them as his own during the course of the interrogation by the Norfolk officers. In this context, the additional inconsistencies between Mr. Giarratano's Norfolk confession and the crime scene evidence confirm that he was providing details about the crime, not from recollection, but from what he imagined had taken place.

Without a presumption of reliability, therefore, Mr. Giarratano's confessions cannot withstand critical scrutiny. From any analytical perspective, unbiased analysis yields the same conclusion: no aspect of the confessions provides any assurance that they are statements of what Mr. Giarratano did, as distinct from what he imagined he did. There is nothing to pull his confessions out of the quicksand of doubt.

C. The Evidence Apart from the Confessions

In some cases in which a conviction rests upon a confession, and evidence later shows the confession to have been unreliable,

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the unreliability of the confession may be inconsequential. There may be evidence of guilt apart from the confession which is so substantial that there is still no reasonable doubt about guilt. Mr. Giarratano's case is not such a case.

Apart from his confession, the evidence of Mr. Giarratano's guilt leaves far too much doubt to sustain his conviction. The presence of one fingerprint from Mr. Giarratano in a bedroom of the apartment where no event related to the crime took place means nothing. Since he lived with Barbara and Michelle Kline for several weeks, one would expect to find his fingerprints anywhere in the apartment. The presence of a single pubic hair similar to his own is equally insignificant. That hair could not be identified with any certainty as his, and there were many other pubic hairs on or near Michelle's body which were not identified as either his or Michelle's. Further, as Pat Wojtkiewcz, an experienced forensic examiner for the State of Louisiana has explained in reviewing this evidence, one would expect, as with the fingerprint, to find such evidence anywhere in an apartment where Mr. Giarratano had lived. App. 758. No other physical or testimonial evidence connected Mr. Giarratano to the sexual assault of Michelle Kline.

Finally, the two spots of O+ blood on one of Mr. Giarratano's boots plainly did not originate from his walking in the blood of Barbara Kline, as the Commonwealth may have tried to imply by introducing photographs showing bloody footprints leading away from Barbara Kline's body. See App. 768-770 (affidavit of June Browne

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Tillman, the prosecution's serologist); 771-772. And while Michelle Kline did have O+ blood, the most common type, there was no evidence that she bled externally from her vaginal lacerations or from any other injury in sufficient quantity to have accounted for the blood on Mr. Giarratano's boot. Thus, for example, no evidence of bloody clothes, sheets, blankets -- in short any of the materials that she naturally would have deposited blood on if she had bleed externally in any quantity -- was introduced. In fact, there was no such evidence. As Peter Mohrmann, the person whom the police brought to the apartment to identify the bodies, recently responded when asked by an investigator whether there was any blood around Michelle Kline's body,

> No, not at all, she was sprawled over the bed, her legs from the knee on was hanging down, so uh, there was no blood. You would have spotted it, I mean, white bed sheet and blood, no, you would have spotted it.

App. 766.

Thus, the physical and crime scene evidence was at least as consistent with Mr. Giarratano's innocence as it was with his guilt. The doubt about his guilt that arises from a critical examination of his confessions is in no way allayed by that evidence.

D. Evidence that Someone Else Committed the Murder

In the course of reinvestigating Mr. Giarratano's case, we have found a number of facts which point to the possibility that someone else other than Joe Giarratano murdered Barbara and Michelle Kline. These facts are not sufficient to establish beyond

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a reasonable doubt that someone else committed the murder, but they do provide still more reinforcement for the doubt about Mr. Giarratano's guilt.

We have learned that one of the items found in the Klines' apartment was a driver's license belonging to a male other than Mr. Giarratano. App. 675. We do not know to whom that license belongs, but we have confirmed that such a license was found by the officers investigating the crime scene. See Interview of Reporter from Der Spiegel (German) Television with Bert Rohrer, spokesperson for the Attorney General. During the pendency of Mr. Giarratano's habeas corpus proceeding in the United States District Court for the Eastern District of Virginia in 1987, we requested that the court order the Commonwealth to produce this driver's license. The court denied our request, however. Our subsequent requests to the Attorney General that this evidence, along with other evidence not previously disclosed, be turned over to us, have been ignored.

The presence of another man's driver's license in the Klines' apartment is significant on its own and also when considered in light of the unidentified fingerprints and pubic hairs that were collected at the crime scene. As we have noted, twenty-one fingerprints sufficient for identification were collected in the apartment, but only one was identified as Mr. Giarratano's fingerprint. We do not know whether the other twenty fingerprints were identified as belonging to Barbara or Michelle Kline, for there was no testimony about the other twenty fingerprints, and we have not been provided laboratory reports concerning the attempts

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to identify the other twenty fingerprints. However, if those fingerprints did not match the fingerprints of the Klines, they might have been the fingerprints of another person, perhaps the person whose driver's license was found in the apartment. Similarly, six pubic hairs were collected from the crime which were inconsistent with Mr. Giarratano's pubic hair. No pubic hairs were collected from Barbara or Michelle Kline so we do not know whether the unidentified pubic hairs were consistent with theirs. However, as with the fingerprints, if they were not consistent with the Klines' pubic hair, these unidentified hairs may have been consistent with the pubic hair of the person whose driver's license was found in the apartment.

Finally, our investigation has identified a man who may have been the killer. His history of previous sexual assaults and his relationship with Barbara Kline suggest that he is the kind of person who could well have killed Barbara Kline and raped and killed her daughter. Because our investigation into this person is continuing at the present, we cannot disclose in this petition all of the details which have singled this person out as a likely suspect. However, for the confidential use of the Governor's office, we have submitted under seal copies of the affidavits which were provided to the federal courts, setting forth the information known about this person. See App. 774-783 (in separate envelope). Given the sensitive and ongoing nature of the investigation of this person, we ask that the Governor's office retain this information under seal and not allow it to be publicly disclosed.

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E. Conclusion

For these reasons, we believe that there is substantial doubt -- at least reasonable doubt -- about Mr. Giarratano's guilt. Further, we believe that any independent, even-handed examination of the record in this matter will lead anyone to the same conclusion. Our discussion of the doubt about Mr. Giarratano's guilt has carefully taken into account the questions previously raised by the Attorney General in relation to this matter. We are open to, indeed we invite, further questioning and inquiry into this matter by the Governor and his staff. We have nothing to hide, we have distorted nothing, and we have tried to take into account all the known facts. To our knowledge, there are no facts which allay the gnawing concern that Joe Giarratano did not commit the crimes for which he has been convicted and sentenced to death.

PART THREE:

Why The Courts Have Failed to Intervene Despite the Emergence of Reasonable Doubt About Joe Giarratano's Guilt

In the face of the doubt that now exists about Mr. Giarratano's guilt, one must wonder why the courts have not intervened and ordered a new trial. The answer lies in the insidious effects of Mr. Giarratano's mental and emotional disabilities on the entire course of judicial proceedings in his case, and in the rigidity with which the courts have viewed the relatively recent, and by their measure, inexcusably late, discovery of this matter. Because of rigidity of their rules, the

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courts have not had to face up to the truth about Mr. Giarratano's case: how compromised and incompetent he was at the time of trial, how difficult his incompetence was to appreciate until many years later, and how this has created the risk that an innocent person will be executed. Fortunately for the interests of justice, the Governor is not ensnared by the same rules.

As we have noted throughout this petition, at the time he was tried and for some time thereafter, Mr. Giarratano suffered from multiple, serious mental disabilities, many of which had their genesis in the unrelenting abuse he suffered as a child. He suffered from a mental illness called schizoaffective disorder, which clouded his ability to perceive and think accurately about reality and which caused periods of profound depression, characterized by feelings of worthlessness, self-hatred, and suicidal thoughts and behavior. App. 785-788. He suffered from many years of drug abuse, which also compromised his ability to perceive and think accurately about reality. Id.; App. 792. He suffered from brain damage, which exacerbated the effects of schizoaffective disorder and drug abuse. App. 791-792. And finally, as a result of one or more of these disorders or the unrelenting years of abuse and humiliation, he suffered from memory impairment, causing him to be highly suggestible and prone to confabulation. App. 731-740.

These disabilities set up an insidious process after Mr. Giarratano learned that Barbara and Michelle Kline had been murdered. Prone to thinking the worst about himself, he came to

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believe that he had committed the murders. Not aware that he had no memory of committing the murders, he unconsciously filled the void with a confabulated version of events and, again unconsciously, embraced the suggestions of the police as to the details. Driven by contempt for himself for what he believe he had done, he did all he could to secure his demise. He tried to commit suicide several times, he threatened violence to those who tried to prevent his suicide, he told of a past riddled with violence, and he failed to contest his mother's false characterization of him as a problem child who was violent, self-pitying, and hateful toward those (like her) who tried to embrace him.

In retrospect, it is easy to see that Mr. Giarratano was incompetent to stand trial. He had no ability to assist in his defense. He was so immersed in the imagined horror of murdering the Klines that he precluded any real trial.

The contradictions in Mr. Giarratano's various confessions were apparent to everyone. Nonetheless, because Mr. Giarratano was so convinced of his own guilt, he was psychologically unable to defend himself and he foreclosed any possibility that the reliability of his confessions would be carefully scrutinized or that the prosecution would be required to prove his guilt by evidence apart from his confessions. As the record amply demonstrates, his attorney simply assumed that Mr. Giarratano was guilty, just as did everyone else, including Dr. Ryans and the police officers.

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Thus, when the Norfolk police officers were faced with the most fundamental contradictions between Mr. Giarratano's initial accounts to the Jacksonville deputies and what they knew about the crime, they did not hesitate to structure the interrogation so that the February 8 confession would conform to the major components of the crime. In other contexts, such contradictions would have raised suspicion about the reliability of the initial accounts and hence, about the reliability and guilt of the confessor, but not here, so strong and convincing was Mr. Giarratano's belief in his own guilt.

When these same fundamental contradictions surfaced again during the Central State evaluation, Dr. Ryans accurately attributed them to confabulation. Yet this acknowledgment of unreliability was ignored because all of the participants at the trial assumed that Mr. Giarratano was guilty of the killings despite his difficulty in providing a consistent account of what took place. And finally, because the confessions were assumed to be reliable, no effort was made to scrutinize the prosecution's physical evidence for its bearing on the identity of the Klines' killer. Although that evidence failed completely to link Mr. Giarratano to the commission of the crimes, this was never of concern to anyone.

Mr. Giarratano was so convinced of his guilt and his worthlessness that he portrayed himself -- and allowed his mother to portray him -- as the very kind of person whom one would expect to commit a crime like this.

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At Central State, Mr. Giarratano told Dr. Ryans that he was determined to kill himself, and that if an aide "tried to stop him, he would take [the aide] with him." App. 82. Further, he gave Dr. Ryans a vivid history of his past violent behavior. For example, he told Dr. Ryans that once when he was incarcerated in a state prison in Florida, he was transferred from the prison to the University of Florida mental ward "because I was violent, I tore a bed out of a wall and beat down the wall and also beat the hell out of a security officer." App. 82. He told Dr. Ryans that at the time he was transferred to the University of Florida mental ward he was serving a five-year sentence for three counts of aggravated assault of a police officer with intent to kill. Id.

Mr. Giarratano's mother, Carol Parise, willingly picked up the brush to help paint the portrait of her son's worthlessness. Ms. Parise portrayed her son as a problem child who had always been violent -- within his family, App. 803 ("he beat up on the twins and his sister constantly"); outside the home, id. ("[h]e was often aggressive with peers and frequently got into fights"); and even during hospitalizations, App. 804 ("Mrs. Parise related that throughout all of Joseph's suicide attempts and short hospitalizations, he was always very violent[;] [s]he relates a story of him being strapped to hospital beds and ripping the straps off and jumping out of beds[;] [s]he relates another story of him being in straight jackets and ripping himself out of them"). Ms. Parise admitted that she occasionally lost her patience with Joe and abused him, App. 608, but portrayed herself as usually

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supportive and as always there for him: "through all of [Joe's] violent outbreaks she was the one that could always talk to him and calm him down and control him[;] [s]he relates that she was always there with cops, paramedics, and Joseph trying to help in which ever way she could." App. 804. To emphasize her role of support despite Joe's problematic character, she solicited letters of support for herself attesting to her long-suffering and patient outreach to her son, see 807-814 -- even though the request which elicited these letters had been a request for letters about Joe. App. 616.[1]

Further, Ms. Parise first suggested a motive that may have pushed her son to commit the murders, a motive which had its genesis in her belief that Joe was inveterately hateful and violent:

> She related to [the parole officer helping with the presentence investigation] that she really does believe that Joseph loves her dearly. However he also hates her. She firmly believes that when he killed this woman and child in Virginia, in his mind he was killing his mother and sister Nickie. She says it is a frightening thought to admit but she truly believes it.

App. 804. Ms. Parise's speculation thereafter gained prominence when, during the course of the evaluation of Mr. Giarratano for the sentencing phase of the trial by Dr. Robert Showalter and his

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[1] Ms. Parise's letters of support, ironically, were provided by many of the other persons who had joined in her abuse of Joe over the years. In recent years, a number of these people have been convicted for their involvement in the activities of a major drug cartel, as we documented in a Motion for Relief from Judgment, filed April 7, 1989 in Giarratano v. Procunier, No. 83-185-N (E.D. Va).

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colleagues. Mr. Giarratano was asked if he could have been symbolically killing his mother and sister when he killed the Klines. He said that he thought he could have been. See App. 625-626. Dr. MacKeith and Dr. Gudjonsson have recently demonstrated that Mr. Giarratano's ratification of this theory was probably nothing more than an example of his vulnerability to suggestion, but Ms. Parise's characterization of her son's "motive" for killing the Klines nevertheless found its way into the trial with the seeming agreement of Mr. Giarratano himself.

Finally, Ms. Parise capped off the portrait of her son as a prototypical murderer by assuring the court that the problem with her son was simply bad character, not something more mitigating, like mental illness or disability. Mr. Giarratano informed various evaluators that he had been committed for psychiatric treatment during his adolescence. When the presentence report investigator asked Ms. Parise for further details about this, Ms. Parise said "[s]he talked to [Joe's] psychiatrist who told her that 'Joseph is just an obese child who feels sorry for himself.'" App. 804.

As we demonstrated in Part One of the Petition, supra, we now know that every aspect of the portrait of Mr. Giarratano painted by Mr. Giarratano and his mother was patently false. However, Mr. Giarratano was so bent upon self-destruction that he embraced it rather than contradicting it.

In retrospect, therefore, it is easy to see that Mr. Giarratano's trial was a non-trial. The only real trial that occurred in his case was in his profoundly disturbed mind. Once

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he had become the "deluded instrument of his own conviction," Culombe v. Connecticut, 367 U.S. 568, 581-82 (1961) (quoting 2 Hawkins, Pleas of the Crown 595 (8th ed. 1824)), everyone else -- the police officers who interrogated him, the state hospital psychiatrist, his mother, the prosecution, the defense attorney and the court -- merely ratified his own conclusion. Because he was mentally unable to defend himself, all of the constitutional safeguards designed to prevent this from occurring were nullified.

As insidious as it was during his trial, Mr. Giarratano's incompetence to stand trial has now been exposed. Indeed, it was partially exposed in federal habeas corpus proceedings in 1985, and became fully exposed by 1987. However, the courts failed to take any steps to rectify Mr. Giarratano's situation. Despite the emergence of reasonable doubt about his guilt and the revelation of his incompetence and how it operated to obscure doubt about his guilt and to conceal his humanity and virtues of character, the courts have refused to intervene must and require a new trial. The courts' refusal to intervene must be understood, for it should serve as a stimulus for appropriate remedial action by the Governor.

The courts' refusal to intervene rests primarily on the view that Mr. Giarratano has waived any claim that he was tried when incompetent. They have faulted him for not exposing his incompetence earlier in the judicial process. The facts underlying the courts' assessment of fault are as follows.

There was an inquiry into Mr. Giarratano's competence to stand

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trial at the very beginning of the Commonwealth's prosecution of him. Shortly after he was brought back to Norfolk from Jacksonville, Mr. Giarratano noticed the blood on one of his boots and turned them over to the dectives. Immediately thereafter, he attempted suicide. As a result, he was committed to Central State Hospital for evaluation by Dr. Ryans and his colleagues. Noting that he felt a deep sense of guilt for the crime, that he was depressed, and that he might continue to be suicidal, Dr. Ryans nevertheless found Mr. Giarratano competent.

Mr. Giarratano continued for some time thereafter to be suicidal. He attempted suicide again at Central State and at the Norfolk jail after his return from Central State. He rejected an offer of a plea bargain for a life sentence, insisted on going to trial asserting an insanity defense for which there was no evidentiary support, and at the conclusion of the trial, asked the judge to sentence him to death. For four years thereafter -- during the course of his direct appeal and state habeas proceedings -- he attempted suicide several more times, was periodically transferred to Central State, and on one occasion refused to pursue legal proceedings in the face of an impending execution date. Throughout this period of time, he suffered the hallucinations, delusions, ambivalence, and withdrawal associated with psychotic illness.

Nearly a year after Mr. Giarratano's federal habeas corpus proceeding was commenced, as a result of intensive, sustained therapy Mr. Giarratano's mental health began to improve. As his

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sanity returned, it became increasingly apparent to his lawyers and to mental health professionals that Mr. Giarratano had been very, sick, far sicker than anyone had suspected during the trial and post-trial period when he was so suicidal. Moreover, it became increasingly apparent that Mr. Giarratano's illness had seriously interfered with his defense at trial. As his illness waned, matters which were crucial to his defense, which were previously sealed away by the profound lack of insight associated with his mental illness, gradually emerged. He was able to reveal the sordid details of his tortured childhood, which he had adverted to only in opaque generalities at trial. His humaneness and the virtues of character which had been concealed by his suicidal obsession during trial emerged and flourished. As a result of these revelations, the process of investigation began which ultimately revealed the quicksand of doubt about his guilt. Following these revelations, Mr. Giarratano asserted the claim that he was incompetent to be tried.

When Mr. Giarratano returned to the state courts to raise his claim of trial incompetence in a state habeas corpus proceeding, the Commonwealth argued that he had waived his claim by not pursuing it after it was first raised at trial. Mr. Giarratano responded by offering the reasons why he had not pursued the claim of incompetency at that time, proffering evidence to show that the full range and legal significance of his disabilities had not been appreciated by anyone at trial or for some time thereafter; that the product of his disabilities -- his profound sense of guilt and

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desire to be punished -- had obscured from everyone's view, including his own, that his behavior in relation to the charges against him was genuinely the product of disability rather than choice; and that his incompetence was only clear in retrospect, after he had regained an extraordinary degree of mental health and could reveal matters he could neither recognize nor reveal at trial. Notwithstanding his proffer, the state courts held that Mr. Giarratano had waived his incompetency claim by failing to pursue it earlier. They did not hold a hearing and find that his explanation for his failure to pursue the claim was somehow lacking. They simply held that the claim was waived for failure to raise it earlier.

The federal habeas courts responded similarly, though they did not explicitly frame the issue as one of waiver. Instead, they said that they owed deference to the original pretrial determination that Mr. Giarratano was competent. The underlying rationale was the same, however: notwithstanding the evidence that the pretrial competency determination had failed to appreciate the full range of Mr. Giarratano's disabilities, that his disabilities had the effect of obscuring his incompetence, and that the passage of time and restoration of mental health had revealed how compromised the truthfinding process had been at Mr. Giarratano's trial, the federal courts were bound by the original trial court determination of competency.

While policies that accord finality to state convictions can serve worthy societal goals, the courts' rigid adherence to those

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policies in Mr. Giarratano's case reveal the limits of such policies. The courts have failed in this instance to strike the proper balance between the need for finality and the need to assure that fairness is accorded an individual. The responsibility to strike such a balance in Mr. Giarratano's case has passed to, and now rests solely with, the Governor.

PART FOUR:

The Power of the Governor to Grant the Relief Requested and the Necessity of Doing So

Throughout his childhood, forced to endure the unendurable, Joe Giarratano was pushed to the rim of desolation and self-destruction. But he persisted. On death row, he traveled a tortured path of introspection and discovery, rejected a past filled with life's cruelest fates and most bitter circumscriptions and ultimately came to recognize his own humanity and inherent self worth. He liberated himself from the economic, physical and emotional ravagement of the world he inherited to become a scholar and mentor, inspiring those whose lives he touched. Must we now accept the perverse irony that Joe Giarratano struggled so valiantly to achieve personal redemption only to have his life even snuffed out when it has really just begun? This possibility is more repugnant in light of the facts before us today. For, while the execution of a guilty man is lamentable, the execution of an innocent man is obscene.

We know that Joe's confession of murder and rape is entirely unreliable, born of anguish, alienation and self-loathing. We know

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that his trial was unconscionably brief and its examination of the evidence wholly superficial. We know that not a single piece of independent evidence connects Joe to the crime. We know that both his past and present character, when properly perceived, and all the evidence available to us, in fact, point to his innocence. Yet, Joe Giarratano finds himself but days away from execution.

It will be said that numerous appellate courts have considered his situation, applied the law, and allowed to continue his seemingly inexorable march to the electric chair. Does not the collective judgment of these jurists establish his guilt beyond reasonable doubt?

It does not.

For, these courts, by their own rules, were precluded from a reexamination, or more precisely a proper examination (since none has yet occurred) of the facts surrounding the murder of Barbara Kline and the rape and murder of Michelle Kline. Instead, each court of appeal before which Joe's case has appeared merely has upheld the state's procedural right to deny a full and complete consideration of the evidence.

Is Joe Giarratano then inexorably ensnared by the viscid strands of a judicial spider web? Is our legal system so myopic in its focus, so malignant in its application that Joe Giarratano's life is demanded in sacrifice to our adherence to legalism over justice? Is his final epitaph to read "Here lies Joseph Giarratano, a good man, procedurally defaulted"?

The founders of our democracy, the framers of our federal and

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state constitutions, were sagacious enough to avoid such a result. They were prescient enough to predict circumstances, though unforeseeable in specific, in which our legal system would fail to produce a just outcome. To avoid the application of such unfair and unacceptable consequences, they created a court of last resort. And that court, Governor, is you.

In rejecting monarchy and authoritarianism for democracy and republicanism our founding fathers created a system comprised of an intricate design of checks and balances, of advice and consent, of rule by law not man. Governance by consesus. However, they carved out one significant exception. In regard to the dispensation of criminal sanctions, the denial of individual freedom or in the ultimate, the state's taking a human life, they recognized that no system, regardless of its complexity or ingenuity was sufficient to safeguard such essential liberties. Consequently they placed their trust in the final judgment of a single person, the Chief Executive of the State. They put their faith in him, in his ability to recognize systemic inadequacies, to identify inequitable verdicts, to perceive the failure of procedural protections and to look beyond them. They vested in the chief executive extraordinary power to right the wrongs, to provide equity, to render justice.

As the United States Supreme Court explained in Ex Parte Grossman, 267 U.S. 87, 120-121 (1925):

> Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law.

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> The administration of justice by the courts is not always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts the power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases.

The Code of Virginia provides:

> In accordance with the provision of Section 12 Article V of the Constitution of Virginia, the power to commute capital punishment and to grant pardons or reprieves is vested in the Governor.

Code of Virginia Chapter 12 Section 53.1-229 (1988).

This grant of authority, which gives the Governor of Virginia the power to grant executive clemency, including pardons and commutation of capital punishment, has remained essentially unchanged since its adoption in the 1870 Virginia Constitution.[2]

The authority is fully discretionary and exercisable without the approbation of the General Assembly[3] or the courts.[4] Executive clemency is inherently a matter of grace thereby bestowing upon a

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[2] A.E. Howard, Commentaries on the Constitution of Virginia 642 (1974).

[3] Id. at 672.

[4] Note, A matter of Life and Death: Due Process Protection in Capital Clemency Proceedings, 90 Yale L.J. 889, 892 (1981) (citing Spinkellink v. Wainwright, 578 F.2d 582, 618 [5th Cir. 1978], cert denied, 440 U.S. 976 ["clemency decision discretionary and 'not the business of judges'"]; Sullivan v. Askew, 348 So. 2d 312, 315 [Fla.], cert. denied 434 U.S. 878 [1977] ["Legislature and judiciary prohibited from encroaching on executive clemency powers"]).

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Governor broad discretion in devising the clemency, and the manner in which he will dispense it. Consequently, the Governor may utilize any information which he chooses in order to make his decision, cite any reason as the basis for his decision to grant clemency, and craft any relief which he finds to be appropriate under the circumstances of any individual case. See, e.g., Executive Papers of the Secretary of the Commonwealth, at the Virginia State Archives, House and Senate Documents for the years 1900-1990.

The Supreme Court has recognized the value of executive clemency to our system of capital punishment. The Court in Gregg v. Georgia[5] noted that a system without executive clemency "would be totally alien to our notion of criminal justice" and declined to hold the discretion inherent in clemency power to violate the standards set forth in Furman.[6]

Given the breath of your power, it is clear, Governor, that you have a wide variety of options which you may consider in devising an appropriate remedy in the case of Joseph Giarratano. Unfortunately, it is beyond your purview to unilaterally grant the one remedy Joe Giarratano truly desires, a new trial. If you could permissibly offer such relief, our application for it would have reached your desk long ago. However, the institution of a new trial can only come about by order of the court, which would arise

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[5] 428 U.S. 153, 199 and 200 n.50 (1976) ("Nothing in any of our cases suggests that the decision to grant an individual mercy violates the Constitution").

[6] Furman v. Georgia, 408 U.S. 238 (1972).

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either from an admission of fault by the Attorney General (which she has explicitly refused) or a motion on our part. Due to the compounding of procedural default rule in successive habeas corpus petition and the fact that coram nobis is unavailable in Virginia as a remedy in this circumstance we are virtually prohibited from obtaining such writ.

Consequently, we propose a course of action (developed through rigorous research and consultation with legal scholars throughout the country) through which you might employ your clemency powers to bend an otherwise unbendable system to shape a just result. Based upon all you now know about the man, the circumstances of his background and his conviction, and his inability to obtain proper review otherwise, we urge you to issue a conditional pardon to Joseph Giarratano, conditioning that grant of relief upon:

(a) The State's right to commence reprosecution of Mr. Giarratano within ninety (90) days of the issuance of the pardon, and

(b) Mr. Giarratano's voluntary waiver of all federal and state protections he possesses against exposure to double jeopardy if such a reprosecution occurs.

While it is uncertain whether reprosecution would occur, what is certain is that either the institution of a new trial or the pardoning of a condemned man is unequivocally more just than the execution of an innocent man, or one whose guilt has not properly been established.

Thus far, in discussing the pardon power we have focused on what is known as an absolute pardon. An absolute pardon gives the grantee his freedom in an unconditional manner. There are

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pardons, however, that do not grant freedom absolutely, but rather offer more limited relief conditioned on the grantee accepting some restriction of freedom. This exercise of the executive clemency power is known as the conditional pardon.

Conditional pardon has traditionally been used as integral to the dispensation of clemency by the Chief Executive or Monarch. According to English common law scholar Blackstone:

> The King extends his mercy upon what terms he pleases; and may annex to his bounty a condition either precedent or subsequent, on performance whereof the validity of the pardon will depend . . .

Blackstone Commentaries, Book at 401 (Cooley, 4th ed. 1899).

The President of the United States derives his conditional pardon power from the broad mandate set forth in Article II of the Constitution. The Court made this clear in Hoffa v. Saxbe, 378 F. Supp. 1221, 1234 (D.D.C. 1974): "We think that the history and nature of the pardoning power has always contemplated the type of broad discretion which would permit the repository of the power to devise and attach lawful conditions to its clemency and to offer the same to the clemency applicant." See also Schick v. Reed, 418 U.S. 256 (1974).

The most common exercises of pardon power are those we have come to know as parole and commutation. They are actually forms of conditional pardon. For example, a governor or pardon board may offer immediate release to a convict in exchange for his willingness to remain within a specific area, report to a parole officer, limit his associations, etc., or a condemned man may have

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his life spared if he is willing to accept a life sentence in lieu of execution. Hoffa v. Saxbe, 378 F. Supp. at 1232.

Indeed the conditions governors have devised are remarkably varied. A short list includes: that the grantee will (1) not use intoxicating liquors[7], Arthur v. Craig, 48 Iowa 264, (---); (2) be under the supervision of the pardon and parole board,[8] Re McKinney, 32 Del. 434, 138 A. 649 (_____); (3) remain on good behavior and in observance of the penal code,[9] Harrel v. Mount, 193 Ga. 818, 20 S.E.2d 69 (----); (4) pay the expense of his trial, People v. Marsh, 125 Mich. 410, 84 N.W. 472 (_____); (5) pay a fine, Harrell v. Mount at ----; (6) pay restitution to the government,[10] Bradford v. U.S., 47 Ct. Cl. 141 (1911); (7) leave the state or county where the crime occurred, Com v. Haggerty, (1869) 4 Brewst. (Pa.) 326; Cacherdi v. Rhodes, 560 F. Supp. 1010 (S.D. Ohio 1982); or (8) spend the duration of a sentence in a city jail rather than the state penitentiary, Lee v. Murphy, 63 Va. 789 (_____) or be confined to a mental hospital. Ex Parte Davenport, ____ Tex. Crim. Rep. _____, 7 S.W.2d 589 (1927).

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[7] See Interview with Miss Martha Bell Conway, Secretary of the Commonwealth, in Richmond, Virginia, Feb. 20, 1969 cited in 26 Washington and Lee Law Review at 312.

[8] See also Conway interview, cited in 26 Washington and Lee Law Review at 312.

[9] See also Conway interview, cited in 26 Washington and Lee Law Review at 312.

[10] See also Conditional pardon to Curtis Adams in List of Pardons, Commutations, Reprieves And Other Forms of Clemency, Va. S. Doc. No.2 at 6 (1966). Cited in 26 Washington and Lee Law Review at 312.

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An examination of unusual and creative conditions precedent and subsequent for the granting of a pardon, demonstrates the genius of placing in a single person, the Chief Executive, the final opportunity to produce justice as he sees fit. For he can tailor a remedy which is totally specific to the situation. He can do so without the burdensome bureaucracy of the legislature or the parameters of precedent which inhibit the judiciary.

As the Hoffa court instructs us,

> Indeed the lack of precedent regarding similar condition tells us very little about the nature of the pardoning power itself inasmuch as the lack of precedent can just as easily be explained by the fact that the unique circumstances of plaintiff Hoffa's case are unlikely to have ever before presented themselves. In any event we can not decide the broad issue presented here on the basis of the lack of a similar condition in past practice, for to make lack of precedent a ground for attacking a condition would forever prevent the President from shaping the conditions of his pardon or commutation to meet the precise exigencies of the clemency applicant.

Hoffa v. Saxbe, 378 F. Supp. 1232, n.37.

In keeping with this tradition, the Virginia Constitution bestows upon the Governor almost unlimited authority in creating requirements for conditional pardons. (Parenthetically, we would like to point out that Virginia governors have demonstrated their overwhelming endorsement of conditional pardon versus absolute pardon. According to a 1969 Washington and Lee Law Review (26 Wash. and Lee, at 34) 76 percent of all pardons granted by Virginia Governors are conditional in nature.) Moreover, since 1872 when the Virginia Constitution was modified to reflect its current

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language, the only limitations ever placed on the type of conditions the Governor may require of the grantee of a conditional pardon are that the conditions not be "immoral, illegal or impossible of performance." Wilborn v. Saunders ___ Va. ___, 195 S.E. 723, 725 (1938).[11]

Joe Giarratano is petitioning you to grant him a conditional pardon, conditioning this relief upon:

(a) The Commonwealth's right to commence reprosecution of Mr. Giarratano within ninety (90) days of the issuance of the pardon, and

(b) His voluntary waiver of all federal and state protections he possesses against exposure to double jeopardy if such a reprosecution occurs.

We will now examine the propriety of this request in light of the test enunciated by the Virginia Supreme Court on Wilborn, supra. Specifically, does the condition set forth above require Mr. Giarratano to perform an act which is "(1) immoral, (2) illegal, or (3) impossible"?

Obviously we can dismiss the impossibility issue since Mr. Giarratano has already tendered his waiver.

Morality is a subject best dealt with by philosophers or clerics. However, it would seem that one would be hard pressed to

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[11] Other states have similar standards for adjudicating the validity of a conditional pardon. see Cacherdi v. Rhodes, 560 F. Supp. 1010, 1013 (S.D. Ohio 1982). In Cacherdi, the plaintiff argued that the condition, leaving the state, placed on his parole was beyond the scope of executive power in Ohio. In finding that this claim was without substance, the court applied a test analogous to the test applied by the Wilborn court: "A condition of commutation decreed by the governor will ordinarily not be invalidated by the state courts unless it is found to be illegal, impossible of performance or contrary to public policy." Cacherdi v. Rhodes 560 F. Supp at 1013.

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argue that Mr. Giarratano's request is immoral since it is designed to spare him from death, and afford him the opportunity to obtain a new trial and his freedom if he is found not guilty or if the state fails to reprosecute.

We turn then to our final prerequisite under the Wilborn test. Is the waiver of double jeopardy protections illegal? Clearly, such an act violates no Virginia statute. Consequently, any claim of illegality would turn on a constitutional prohibition.

Conditional pardons, by nature, infringe on constitutional rights. Cacherdi v. Rhodes, supra, (right to travel); Hoffa v. Saxbe, 378 F. Supp. 1221 (D.D.C. 1974) (right of association); People v. Mason, 488 P. 2d 630, --cal---, ---cal--- ( ) (freedom from unreasonable search and seizure).

Consider, for example, the common condition of requiring the grantee to leave the jurisdiction in exchange for a pardon. In Virginia, this practice has been accepted and frequently used by its governors. 26 Washington & Lee Law Review at 312, citing List of Pardons, Commutations and Other Forms of Clemency, Va. S. Doc. No. 2 at 6 (1968), Pardons of Clarence Williams (no return to county) and Curtis Adams (no return to state). Undoubtedly, a "no return" condition on a pardon infringes on a number of constitutional grantees, including the right of a citizen to travel from state to state and freedom of association.[12] The common

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[12] In Cacherdi v. Rhodes, supra, the court considered whether waiver of the rights of travel and association can be a valid condition in exchange for commutation releasing grantee from incarceration. In Cacherdi, plaintiff was convicted in 1971 of

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thread that constitutionally permits waiver of these, and other rights, is that the grantee has consented to be stripped of his protections. The grantee, therefore, has allowed the infringement of his rights in exchange for a benefit.

It is apparent from the many examples of the permissible waivers of constitutional rights cited above that any assertion that the waiver of double jeopardy rights is illegal would require one to establish that double jeopardy protections fall into a class

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numerous charges and sentenced to a term of 20-50 years imprisonment. In 1979, the Ohio Parole Board recommended that the governor of Ohio commute Plaintiff's sentence to a term of 12-50 years, thus making plaintiff eligible for immediate parole. Before action was taken on the recommendation, plaintiff wrote the governor indicating that he would leave the state if released. In 1980, the governor commuted plaintiff's sentence as recommended with the condition that plaintiff not return to Ohio until the maximum term of his sentence had run. Plaintiff accepted the condition in writing. He was released and took up residence in Indiana. Cacherdi v. Rhodes at _____.

Eight weeks later plaintiff applied to the Ohio Parole Board for permission to return to the state so that he could spend the Thanksgiving and Christmas holidays with his fiancee. The Parole Board denied this request. Plaintiff filed suit asking that the condition be nullified. Id. at 1011-1013. Plaintiff's objection to the conditional commutation included that the condition violated his individual rights of association, freedom from cruel and unusual punishment, travel and his right to due process.

The state argued that plaintiff could not claim these constitutional rights because he had validly waived their protections by signing the commutation and parole agreement. Id. at 1016. Clearly acknowledging that a "no return" clause implicates a number of important constitutional guarantees, the court nonetheless held against plaintiff finding that he had "no inherent constitutional right to be conditionally released before the expiration of a validly imposed sentence." Id. at 1015. Moreover, "once released on parole, a convict may not be entitled to the full range of rights accrued by other citizens and the government may impose upon the parolee certain conditions of liberty which would be unconstitutional if applied to ordinary individuals." Id.

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of rights so unusual and extraordinary that they cannot be waived.

Fortunately there is a significant body of case law, including a recently decided United States Supreme Court decision, which expressly holds that the constitutional guarantee against double jeopardy can be waived.

In U.S. Broce, 488 U.S. ____, 102 L.Ed.2d. 927 (1989) the Supreme Court noted that "our intervening decision in Ricketts v. Adamson, 483 U.S. 1, _____, 97 L.Ed.2d. 1, 107 S.Ct 2860 (1987), made clear that the protection against double jeopardy is subject to waiver." Similarly, in Hoffer v. Morrow, 797 F.2d 348, 350 (7th Cir. 1986), the court explained "You can waive the defense of double jeopardy like other constitutional defenses." See also, Hoffa v. Saxbe, 378 F. Supp. at 1240[13] (finding that while Mr. Hoffa's Fifth Amendment guarantees were infringed, it was a permissible exercise of executive power in that Mr. Hoffa also agreed and benefited from the conditional commutation).

Clearly then, there is ample authority for the proposition

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[13] In Hoffa v. Saxbe, former Teamster President, Jimmy Hoffa challenged the terms of a conditional commutation that was operational in his early release from federal prison. Hoffa was originally sentenced to a term of 13 years in prison. Mr. Hoffa's term was commuted to six and one half years allowing him to be released early. As a condition to the commutation, Mr. Hoffa was required "not to engage in direct or indirect management of any labor organizations prior to March 6, 1980. Hoffa v. Saxbe, 378 F. Supp at 1221.

After his release pursuant to the commutation Mr. Hoffa challenged the condition claiming that it "unlawfully infringes on his First Amendment rights of speech and association, amounts to additional punishment and a bill of attainder, as well as contravening the double jeopardy clause, all in violation of the Fifth Amendment. 378 F. Supp. at 1225.

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that a defendant possesses the right to waive double jeopardy protection.

However, even without such precedent, one may easily perceive the illogic of a system which would allow the waiver of rights of travel, and free association and disallow waiver of double jeopardy protection. Such rights as the right to travel and to associate affect the day to day existence of every individual in the nation while double jeopardy touches only previously tried criminal defendants.

It is apparent therefore that the three pronged test in Wilborn, supra is unmistakably satisfied. The condition in question is "not immoral, illegal or impossible."

The Public Interest

As the Governor of the Commonwealth of Virginia, you have the duty not only to protect the rights of the individual, but also to safeguard the best interests of society at large. Every gubernatorial act sends a signal to each constituent.

What message is put forth by granting the conditional pardon Mr. Giarratano seeks?

Let us examine the potential results of the pardon he requests.

(1) The Commonwealth retries Mr. Giarratano and he is found not guilty. Then Governor, you will have saved the life of an innocent man.

(2) The State retries Mr. Giarratano and he is found guilty.

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In this case, you will have protected the essential constitutional right to a fair trial. You will have done this with no risk of public safety. For Mr. Giarratano is willing to remain incarcerated during the time period subsequent to the grant of conditional pardon and the conclusion of the new trial.

Since Virginia history is replete with instances where governors have conditionally pardoned individuals who thereby have obtained their immediate release, it has expressed its willingness to risk their participation in society at large to serve the overall purpose of equal justice. We are consequently in an a fortiori situation relative to the typical situation. The conditional pardon requested by Mr. Giarratano requires no such risk.

(3) The prosecution, in its discretion, declines to retry Mr. Giarratano. This will establish the fact that the original prosecution was fatally flawed and never should have occurred. For, there was no evidence that was available for the Commonwealth at the original trial, which would not be available at a retrial, except, perhaps, for Mr. Giarratano's wholly unreliable and confabulated confession. No witnesses have died or otherwise fallen beyond the reach of the prosecution. No DNA evidence has exceeded its shelf life. Their case, but for the above cited exception, remains intact.

If the Commonwealth is unable to reprosecute, due to lack of evidence, Mr. Giarratano will not have the opportunity to establish his innocence. However, you will have prevented the execution and

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further incarceration of an individual whose guilt has not been properly established beyond reasonable doubt in a fault-free trial.

Any of the three potential outcomes will serve the cause of justice with no risk to the people of Virginia.

Consequently, we urge you to conditionally pardon Mr. Giarratano

Respectfully submitted,

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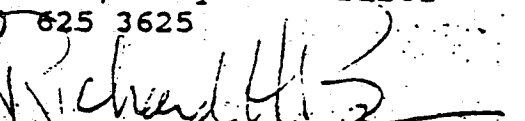
By 

On behalf of JOSEPH M. GIARRATANO