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Mental Illness, Severe Emotional Distress, and the Death Penalty: Reflections on the Tragic Case of Joe Giarratano

Richard J. Bonnie*

* Editor's Note: Professor Bonnie became involved in Joe Giarratano's case in 1979. After a bench trial in which the trial judge rejected an insanity plea, the court ordered Giarratano to undergo a psychiatric examination at the Forensic Psychiatry Clinic at the University of Virginia for possible use at the capital sentencing proceeding. Professor Bonnie observed the clinical evaluation and consulted with the Clinic staff as they developed their opinions and wrote the Clinic's report. Because Giarratano had confessed to the killings, had been convicted of committing them, and did not deny his guilt, the evaluators assumed he was guilty and focused entirely on possible mitigating factors, including whether Giarratano had experienced emotional disturbance and impaired volitional capacity at the time of the offenses.

After Giarratano was sentenced to death and the Virginia Supreme Court had affirmed the conviction and sentence, Giarratano declined to seek any further judicial review. As the execution date neared, Professor Bonnie went to see Giarratano at the request of anti-death penalty advocacy groups. Concluding that Giarratano was acutely distressed and possibly psychotic, Professor Bonnie attempted to persuade him to authorize the initiation of post-conviction proceedings while efforts were also undertaken to obtain psychiatric treatment for him. Giarratano equivocated, but eventually authorized Professor Bonnie and co-counsel to seek a stay and file a state habeas petition.

For several years, Giarratano vacillated about whether he wanted to terminate the proceedings as they moved unsuccessfully through state courts and thereafter in the federal district court. A central claim of the federal petition was that Giarratano had not been competent to assist counsel in connection with the sentencing proceedings. The district court denied relief on this claim in 1986. Over the years of 1986 and 1987, however, the entire narrative of the case changed as newly discovered evidence raised serious doubts about whether Giarratano had actually committed the murders. At that point, with Giarratano's unequivocal support, the federal habeas petition was amended to extend the competency claim to the guilt phase of the trial.

After the Fourth Circuit denied relief, Professor Bonnie participated in drafting and advocating the successful petition for a conditional pardon and has also written in support of Giarratano's requests for parole which has thus far proven fruitless.

Abstract

Joe Giarratano was on death row for twelve years, and remains incarcerated today, because mental illness and severe emotional distress wholly undermined reliable adjudication in his case. Using Giarratano's remarkable story as a case study, I illustrate some of the ways in which mental illness and acute emotional distress can lead to unreliable findings and judgments and—even worse—can actually propel the criminal justice system toward a death sentence. I cover the unreliability of his confession, his impaired ability to assist counsel, his impaired capacity to make a rational decision regarding whether to initiate or continue post-conviction proceedings, his diminished mental responsibility at the time of the alleged offenses if he actually committed them, and an issue that fortunately never arose—his competence to be executed.

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I. Introduction

Mental disability can undermine the reliability and fairness of capital adjudication at every stage of the process, from the defendant's very first interaction with law enforcement to the waning minutes before a scheduled execution.¹ Giarratano's case

1. See generally Rodney J. Uphoff, *The Role of the Criminal Defense*

illustrates many of these problems, ranging from his unreliable confessions during police interrogation to his impaired decisional capacity while on death row.²

A cardinal principle of Eighth Amendment death penalty jurisprudence is the heightened need for reliability in the determination that a defendant is guilty of a capital offense and that imposition of the penalty of death is legally authorized and morally warranted in the defendant's particular case.³ In *Atkins v. Virginia*,⁴ the Supreme Court precluded capital punishment for defendants with intellectual disability, noting the many ways in which intellectual disability can undermine the reliability of capital adjudication:

The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," *Lockett v. Ohio*, 438 U. S. 586, 605 (1978), is enhanced [in cases involving defendants with intellectual disability], not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. . . . [M]oreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the [judge or] jury. Mentally

Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate, or Officer of the Court?, 1988 WIS. L. REV. 65 (1988) (discussing the challenges of representing mentally ill defendants); Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785 (2009) (discussing the legal issues surrounding mentally ill defendants and capital punishment, including blameworthiness, jury determinations, and competence for trial).

2. See *infra* Parts II & IV (exploring the reliability of a defendant's confessions and a defendant's competence to make decisions about post-conviction relief).

3. See, e.g., *California v. Ramos*, 463 U.S. 992, 998–99 (1983) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.").

4. 536 U.S. 304 (2002).

retarded defendants in the aggregate face a special risk of wrongful execution.⁵

Notwithstanding the Supreme Court's firm declaration in *Atkins*, Professor David Bruck has shown that our system has failed, in practice, to prevent the execution of defendants who have been diagnosed as having an intellectual disability.⁶ Our system also had virtually no impact on the much larger number of cases in which intellectual impairments can impede reliable adjudications, including those impairments that fall short of a diagnosis of intellectual disability.⁷

Fortunately, Joe Giarratano has a first-class intellect and a sterling character. He was on death row for twelve years and remains incarcerated today, however, because mental illness and severe emotional distress wholly undermined reliable adjudication in his case.⁸ Using Giarratano's remarkable story as a case study, I illustrate some of the ways in which mental illness and acute emotional distress can lead to unreliable findings and judgments and, even worse, can actually propel the criminal justice system toward a death sentence.⁹ I address the unreliability of Giarratano's confession,¹⁰ his impaired ability to assist counsel,¹¹ his impaired capacity to make a rational decision regarding whether to initiate or continue post-conviction proceedings,¹² his diminished mental responsibility at the time of

5. *Id.* at 320–21.

6. See Professor David Bruck, Virginia Capital Case Clearinghouse Clinic Director at Wash. & Lee U. Sch. of L., Panel Discussion at the Washington and Lee University School of Law Lara D. Gass Annual Symposium: From Conviction to Clemency: *Commonwealth v. Giarratano*, A Case Study in the Modern Death Penalty (Feb. 6, 2016) (discussing the use of capital punishment for individuals with mental illness and intellectual disability).

7. See generally *id.*

8. See *infra* notes 32–34 and accompanying text (discussing Giarratano's mental health issues at the time of his trial).

9. See *infra* Parts II–VI (examining various issues related to the mental capacity of death penalty defendants).

10. See *infra* Part II (discussing the reliability of confessions).

11. See *infra* Part III (considering the consequences in a death penalty case when a defendant is unable to assist counsel).

12. See *infra* Part IV (exploring whether a defendant has competence to seek or terminate post-conviction relief).

the alleged offenses if he actually committed them,¹³ and an issue that fortunately never arose—his competence to be executed.¹⁴

II. Reliability of Confessions

The first problem with the reliability of confessions is the risk of a false confession. Although Giarratano appears to have no memory of having committed these crimes, he reached the conclusion that he was responsible upon waking up in the apartment and seeing the victims' bodies.¹⁵ By convincing himself of his culpability, Giarratano undermined all the rules and safeguards that our system provides to prevent conviction of the innocent. Perhaps the most important of these safeguards is the requirement that the prosecution bear the heavy burden of proving the defendant guilty beyond a reasonable doubt.¹⁶ Giarratano relieved the police of the burden of investigating the case and relieved the prosecution of the burden of proving his guilt.¹⁷ This problem infected everything that followed—the police made no effort to corroborate the confession(s) or even to resolve inconsistencies among them.¹⁸ Giarratano was

13. See *infra* Part V (examining the challenges associated with diminished responsibility).

14. See *infra* Part VI (describing the impact such a consideration might have had in Giarratano's case).

15. See *Giarratano v. Procunier*, 891 F.3d 483, 486 (4th Cir. 1989) (quoting Giarratano's affidavit in which he stated "I do not know whether I murdered Toni and Michelle or not. Since the night I woke up in their apartment, I have always assumed, convinced myself I was guilty; but, I never had any actual memory of committing the murders").

16. See *Patterson v. New York*, 432 U.S. 197, 210 (1977) ("[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged.").

17. See *Procunier*, 891 F.3d at 485 (explaining that Giarratano confessed to the crime on multiple occasions).

18. See *Giarratano v. Commonwealth*, 220 Va. 1064, 1067–69 (1980) (detailing the content of Giarratano's multiple confessions); see also *In re Joseph M. Giarratano: Petition for Conditional Pardon by the Governor of the Commonwealth of Virginia*, at 30–31 (1991) [hereinafter *Giarratano Petition for Conditional Pardon*] (describing inconsistencies in Giarratano's various confessions).

unmotivated to defend himself and therefore made no effort to assist counsel.¹⁹ Indeed, his indifference to defending himself and his desire for the death penalty undermined his lawyer's motivation to defend him and, pretty clearly, his lawyer's efforts to do so.²⁰ No one, including Giarratano or his lawyer, made the police and prosecution do their jobs. Moreover, in the effort to identify possible mitigating claims focused on his mental state at the time of the offenses, the Forensic Psychiatry Clinic staff invited Giarratano to speculate about why he might have committed crimes that he had such a questionable recollection for having committed, and the resulting speculation made its way into the judge's sentencing memorandum.²¹

The impact of the unreliable confession did not end with the conviction and sentence. It also infected the post-conviction proceedings. Habeas representation was entirely a pro bono effort at that time and it did not occur to habeas counsel, including me, to question Giarratano's guilt or to review the evidence bearing on the conviction. As for the sentence, the Forensic Clinic staff had developed a fairly detailed social history and psychological formulation that was itself rare in the early days of post-1976 capital representation.²² The findings of that report supported a compelling case in mitigation based on diminished mental and emotional capacity. Given the trial record, the state habeas petition did not question the legality of the conviction.²³ Instead it challenged the constitutionality of the "future dangerousness" predicate in the capital sentencing statutes on its face and as applied in Giarratano's case, objected to constitutional errors

19. See Giarratano Petition for Conditional Pardon, *supra* note 18, at 2 ("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.").

20. See *id.* at 64 (explaining that because Giarratano was so convinced of his own guilt, "his attorney simply assumed that Mr. Giarratano was guilty").

21. See *Giarratano*, 220 Va. at 1077 (discussing the Forensic Psychiatry Clinic's testimony about Giarratano's "symbolic" reasons for committing the crime).

22. See *id.* at 1075–78 (describing the social history the Forensic Psychiatry Clinic compiled).

23. See *Giarratano v. Procunier*, 891 F.2d 483, 485 (4th Cir. 1989) (describing the claims raised in Giarratano's state habeas petition).

relating to the use of psychiatric testimony to prove dangerousness, and alleged ineffective assistance of counsel.²⁴ A key contribution of the state habeas proceedings, however, was the testimony of Giarratano's trial counsel, who depicted the struggles he confronted in coping with Giarratano's uncooperative and self-defeating behavior, including Giarratano's letter to the trial judge requesting a death sentence and his opposition to filing a direct appeal.²⁵ Giarratano's emotional insistence on execution for his evil deeds was obviously more intense than we had realized.²⁶ As discussed below, these realizations led us to develop a then-novel theory that Giarratano was not emotionally able to assist his attorney or to make rational decisions about the defense of the case.²⁷

In 1986, the reliability of Giarratano's confession, and his guilt, were called into doubt for the first time by newly discovered evidence—evidence that could have been discovered from the outset if any of us had been motivated to look for it and had had the resources to do so.²⁸ The fact that the prosecution had not revealed the existence of confessions that contradicted key statements in the confession used in court, as well as the discovery of evidence implicating other suspects, raised genuine doubts about the conviction, thus leading to the filing of an

24. See, e.g., VA. CODE ANN. § 19.2-264.2; see also *Procurier*, 891 F.2d at 485 (“The [state habeas] court conducted an evidentiary hearing on the allegation of ineffective assistance of counsel . . . [T]he state habeas court ruled that Giarratano's trial counsel afforded him competent representation.”).

25. See *Giarratano v. Procurier*, No. 83-185, at 12 (E.D. Va. June 25, 1986) (“Giarratano's self-destructive tendencies led to his August 16 letter to Judge McNamara requesting the death penalty and to two subsequent letters to the same judge asking that his execution date be advanced.”).

26. See *Giarratano Petition for Conditional Pardon*, *supra* note 10, at 38–39 (explaining that after discovering the bodies of Barbara and Michelle Kline, Giarratano's “belief in his guilt became entrenched, and as it did he came to see himself as evil and as deserving to die”).

27. See *Giarratano*, No. 83-185, at 11–12 (describing Giarratano's claims that his mental state limited his ability “to provide his counsel with the information he needed to effectively present a case in mitigation at the sentencing hearing”).

28. See *Giarratano Petition for Conditional Pardon*, *supra* note 10, at 53–62 (describing inconsistencies between Giarratano's confessions and physical evidence and discussing evidence suggesting that someone else committed the murders).

amended federal habeas petition²⁹ and eventually to a successful request for gubernatorial clemency.³⁰ Naturally I have wondered whether we should have been more skeptical about the confession from the outset. As already indicated, it was clear even then that Giarratano's ability to recall the events during the time period before, during, and after the killings was severely impaired.³¹ Indeed, Giarratano's impaired memory was apparent to the psychiatrist at Central State Hospital,³² who had evaluated Giarratano's competence to stand trial when he attempted to commit suicide in jail after his arrest.³³ The Central State psychiatrist diagnosed Giarratano as having Korsakoff's Syndrome, a severe impairment of memory attributable to organic brain damage associated with chronic alcohol and drug intoxication.³⁴

In any event, the fact is that no one questioned the reliability of Giarratano's confession until eight years later.³⁵ Could this happen today? As Richard Leo³⁶ and Brandon

29. See *Giarratano v. Procunier*, 891 F.2d 483, 485 (4th Cir. 1989) (describing the procedural history of Giarratano's federal habeas appeal and noting that Giarratano amended his petition to include a claim that he was incompetent to participate in the sentencing proceeding).

30. See B. Drummond Ayres, Jr., *Virginia Governor Blocks Execution*, N.Y. TIMES (Feb. 20, 1991), <http://www.nytimes.com/1991/02/20/us/virginia-governor-blocks-an-execution.html> (last visited Sept. 9, 2016) (describing the circumstances that led to Governor Wilder's decision to commute Giarratano's sentence) (on file with the Washington and Lee Law Review).

31. See *Procunier*, 891 F.3d at 486 (discussing Giarratano's lack of memory surrounding the murders).

32. See *Giarratano v. Commonwealth*, 220 Va. 1064, 1071 (1980) (noting Dr. Ryans's explanation for Giarratano's memory loss surrounding the crimes).

33. See *id.* at 1069 (explaining that Giarratano's "mental difficulties" [warranted] emergency hospitalization at Central State Hospital).

34. See *id.* at 1071 (discussing Dr. Ryans's testimony that inconsistency in Giarratano's confessions was due to memory loss from drug abuse and that individuals with that type of memory loss "can't get it straight in their mind so they confabulate . . . consistent with what we call a Korsakoff's syndrome").

35. See *Giarratano v. Procunier*, 891 F.2d 483, 487 (1989) ("[Giarratano] alleged newly discovered evidence discrediting the facts proved by the Commonwealth that corroborated his confession.").

36. See Professor Richard Leo, Hamill Family Chair Professor of L. & Soc. Psychol., U. of San Francisco Sch. of L., Panel Discussion at the Washington and Lee University School of Law Lara D. Gass Annual Symposium: From Conviction to Clemency: *Commonwealth v. Giarratano*, A Case Study in the

Garrett³⁷ observed at this Symposium, the problem of unreliable confessions is much more widely understood today and the standard of practice for capital defense is much more demanding than it was in 1979.³⁸ We expect more of trial counsel—and of habeas counsel as well. Especially in a capital case, the properly trained trial lawyer will scrutinize every item of prosecution evidence and will put the State on notice that corroboration for a confession is essential.³⁹ The existence of contradictory confessions would likely have been revealed by adequate discovery, and it would have made a huge difference if Giarratano’s confession(s) had been recorded. To sum up my point, Giarratano’s mental and emotional condition led him to confess to crimes that he did not remember and may not have committed.⁴⁰ Yet, despite the indicia of unreliability, the problem was not noticed at trial or in an entire round of state and federal habeas proceedings.⁴¹

Modern Death Penalty (Feb. 5, 2016) (discussing capital punishment and actual innocence claims).

37. See generally Brandon Garrett, *Confession Contamination Revisited*, 101 VA. L. REV. 395 (2015) (discussing false confessions that were contaminated during interrogation and arguing that courts should investigate reliability consistent with scientific research into the false confession phenomenon). See also Professor Brandon Garrett, Justice Thurgood Marshall Professor of L., U. of Va. Sch. of L., Panel Discussion at the Washington and Lee University School of Law Lara D. Gass Annual Symposium: From Conviction to Clemency: *Commonwealth v. Giarratano*, A Case Study in the Modern Death Penalty (Feb. 5, 2016) (discussing remedies for ineffective assistance of counsel claims).

38. See, e.g., *Rompilla v. Beard*, 545 U.S. 374, 388 (2005) (discussing a defense attorney’s duty to investigate aggravating evidence); *Wiggins v. Smith*, 539 U.S. 510, 523–24 (2003) (explaining that defense attorneys must attempt to discover all reasonably available mitigating evidence as well as evidence to rebut aggravating circumstances). See generally AM. BAR ASS’N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. Feb. 2003) [hereinafter GUIDELINES FOR THE APPOINTMENT] (providing recommendation for capital defense counsel from appointment through post-conviction and clemency proceedings).

39. See *Rompilla*, 545 U.S. at 387 (“The duty to investigate exists regardless of the accused’s admissions or statements to the lawyer of facts constituting guilt or the accused’s desire to plead guilty.” (quoting STANDARDS FOR CRIMINAL JUSTICE 4-4.1 (AM. BAR ASS’N 2d ed. 1982 Supp.))).

40. See *supra* notes 31–34 and accompanying text (discussing Giarratano’s memory and mental state at the time of the murders and the trial).

41. See *supra* notes 28 & 33 and accompanying text (discussing the

III. Competence to Assist Counsel

Giarratano's case presents a fairly common scenario in capital homicide cases. He twice attempted to commit suicide in jail after his arrest, thereby triggering an evaluation of his competence to stand trial—as it virtually always does—even before counsel had been notified.⁴² He was also put on anti-psychotics during the pretrial period.⁴³ In many of these cases, the defendant is actively seeking a death sentence and, in others, the defendant may feel that a death sentence is inevitable.⁴⁴ Either way, the defendant's lack of motivation to assist counsel is often accompanied by overt efforts to subvert counsel.⁴⁵ What typically happens in these cases is that the defendant pleads guilty (sometimes over counsel's objection) and invites the judge to impose the death penalty.⁴⁶ The tensions in the attorney-client relationship are often invisible to everyone else except counsel. That is effectively what happened in Giarratano's case as we now know that he essentially undermined counsel every step of the way. He turned down a possible plea agreement and insisted on a

discovery of evidence calling the accuracy of Giarratano's confessions into question).

42. See *Giarratano v. Commonwealth*, 220 Va. 1064, 1069–70 (1980) (describing the circumstances of Giarratano's initial competency evaluation).

43. See *Giarratano Petition for Conditional Pardon*, *supra* note 10, at 15 (“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.”).

44. See Richard J. Bonnie, Symposium, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169, 1189 (2005) [hereinafter Bonnie, *Mentally Ill Prisoners*] (explaining that prisoners who are competent may opt for execution out of feelings of “guilt and remorse,” a situation that is particularly problematic if those feelings “take[] root immediately after the crime”).

45. See *Godinez v. Moran*, 509 U.S. 389, 392 (1993) (explaining that Moran fired his attorneys and changed his pleas to guilty to avoid presenting mitigating evidence).

46. See Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 588 (1993) [hereinafter Bonnie, *The Competence of Criminal Defendants*] (“Such defendants typically insist on pleading guilty against counsel's advice and instruct counsel to refrain from introducing any evidence in mitigation, or like Richard Moran, they discharge their attorneys and plead guilty while represented. These defendants also frequently request sentences of death.”).

bench trial.⁴⁷ He wrote to the judge asking for a death sentence.⁴⁸ He directed counsel not to appeal the conviction and sentence (although counsel filed a pro forma appeal because he concluded that he was required to do so).⁴⁹

Of what legal significance is this fairly common scenario? Is a capital defendant who seeks a death sentence, and undermines counsel's efforts to defend him, incompetent to stand trial? The books are replete with cases where these defendants are ruled to be competent to stand trial.⁵⁰ The psychiatrist who examined Giarratano at Central State after his suicide attempt found him competent to stand trial because Giarratano understood the charges and the proceedings against him, understood the role of counsel, and was able to communicate coherently with his attorney.⁵¹ Furthermore, the Forensic Psychiatry Clinic staff raised no doubts about his competence to stand trial.⁵² Indeed, it is clear that Giarratano appreciated his jeopardy and was not experiencing delusions, disorganized thinking, or other cognitive deficits that are usually the focus of assessments of competence to stand trial.⁵³ Clearly he did not lack the ability to assist counsel in the usual sense.⁵⁴

47. See Giarratano Petition for Conditional Pardon, *supra* note 18, at 2–3 (“He refused to plead guilty in exchange for a life sentence. Afraid that even an unconditional guilty plea would result in a life sentence, he assured his conviction by opting for a bench trial and asserting a defense that had no factual support.”).

48. See *id.* at 3 (“Upon conviction, he asked that the judge sentence him to death.”).

49. See *id.* at 15 (noting that Giarratano's direct appeal took place in 1980).

50. See, e.g., *Godinez*, 509 U.S. at 392 (explaining that the trial court found Moran competent to stand trial, to waive his right to an attorney, and to plead guilty). See generally Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363 (1988) [hereinafter Bonnie, *The Dignity of the Condemned*] (discussing obligations of attorneys and courts when capital defendants elect to be executed).

51. *Giarratano v. Commonwealth*, 220 Va. 1064, 1070 (1980).

52. See *id.* at 1076–77 (discussing evidence presented by the Forensic Clinic).

53. See *id.* at 1070 (explaining that the Central State psychiatrist concluded that Giarratano was “suffering from a ‘transitional disturbance of adult life with anxiety manifestations’” and there was no evidence of “mental illness or feeble-mindedness”).

54. See *Dusky v. United States*, 362 U.S. 402, 402 (1960) (explaining that the test for competency to stand trial is “whether he has sufficient present

This issue is fundamentally about motivation. How should the courts respond to lack of motivation to defend oneself? Does it matter *why* the defendant isn't motivated? We have all seen obstreperous clients who create autonomy fights with counsel, but capital cases raise the stakes qualitatively higher.⁵⁵ Is a suicidal defendant competent to stand trial? A depressed defendant? A defendant who believes he deserves to die? A defendant who is traumatized by the homicidal encounter? There was plenty of evidence in Giarratano's case of acute emotional distress but was he *unable* to assist counsel or did he *choose* not to assist counsel? This is a complicated clinical question that ultimately requires a value judgment. We concluded, based on expert consultation, that his depressed mental state and near-psychotic level of distress were attributable to psychopathological factors beyond his control and that his emotional distress and agitation became more intense as the proceedings neared a climax—initially the trial itself and pronouncement of a death sentence and then the prospect of execution.⁵⁶ It is likely that active treatment with anti-depressants as well as psychotherapy could have been effective in restoring Giarratano's capacity to exercise reasoned judgment, but no such treatment was attempted.⁵⁷

We can easily see why courts might be reluctant to hold, categorically, that depressed or distressed defendants are not competent to proceed. Malingering could be a serious problem for one thing, and, even if the depression is genuine, bringing the criminal process to a halt while depressed defendants are being treated on the basis of the diagnosis alone is probably not sensible. The key issue is functional impairment of decisional

ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational and factual understanding of the proceedings against him”).

55. See *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (“[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice.”).

56. See Giarratano Petition for Conditional Pardon, *supra* note 18, at 71 (discussing Giarratano's mental state during his trial and its impact on his ability to participate in his defense).

57. See *id.* at 70–71 (noting that during federal habeas proceedings, Giarratano's mental health improved “as a result of intensive, sustained therapy”).

capacity. The question should be whether the defendant's emotional condition is symptomatic of a clinically diagnosable disorder and is interfering materially with his ability to make a rational, self-interested decision about the defense or disposition of the case.⁵⁸ The typical contexts in which this problem arises are cases in which the defendant insists on pleading guilty over counsel's objection, refuses to accept a plea agreement that would preclude a death sentence, refuses to put on a case in mitigation or otherwise contest a death sentence, or resolves the "autonomy fight" with counsel by waiving his right to counsel and invoking his right to represent himself under *Faretta v. California*.⁵⁹ Giarratano's case highlights the importance of distinguishing between a defendant's abilities to understand the proceedings, appreciate his jeopardy, and communicate rationally with counsel, on the one hand, and his decisional capacity, on the other. What Giarratano lacked was the capacity to make rational, self-interested decisions.⁶⁰ I hasten to add that I am not saying that every defendant who would prefer to be executed lacks decisional capacity. I have taken the opposite position.⁶¹ Attorneys must, however, undertake a capacity assessment.⁶²

I have seen enough of these cases to convince me that a suicide attempt or other clinically significant symptoms of depression should raise a red flag and invite ongoing assessments

58. See Bonnie, *Mentally Ill Prisoners*, *supra* note 44, at 1186-87 (discussing a defendant's mental illness and ability to make decisions and work with attorneys).

59. See 422 U.S. 806, 807 (1975) (concluding that a defendant in a criminal trial has a constitutional right to proceed without an attorney if he makes a voluntary and intelligent choice to do so).

60. Representing Giarratano in his post-conviction proceedings informed my scholarly writings on the subject of competence for criminal adjudication. See the theory developed in Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L. 291 (1992) and further elaborated in *The Competence of Criminal Defendants*, *supra* note 46.

61. See Bonnie, *The Dignity of the Condemned*, *supra* note 50, at 1367 ("I have refused, however to become involved in other cases in which a prisoner whose competence was not in doubt similarly expressed a preference for execution.").

62. See GUIDELINES FOR THE APPOINTMENT, *supra* note 38, at 4.1 & cmt. (discussing the importance of evaluating a defendant's mental state and competence in capital trials).

of a defendant's competence for adjudication in capital cases.⁶³ Moreover, even if the defendant is regarded as competent for adjudication, it does not follow that justice is well-served by bringing the defendant to trial in this condition. The State should not be in a hurry to bring defendants with suicidal wishes and treatable depression to trial. Practice guidelines for capital representation should also advise counsel how to recognize symptoms of depression, how to respond to those symptoms—especially to suicidal ideation and behavior—and how to ameliorate possible adverse impact on the attorney-client relationship and on client decision-making.⁶⁴

None of this was done in Giarratano's case. As mentioned above, we argued in post-conviction proceedings that Giarratano had been incompetent to assist counsel during the pre-trial period and that proceeding to adjudication under these circumstances violated his Sixth and Fourteenth Amendment rights to effective assistance of counsel and to a fair trial.⁶⁵ Unfortunately, the claim never got any traction in the courts.⁶⁶ The degree of Giarratano's emotional distress and its impact on the performance of trial counsel only became apparent in the state habeas. The federal habeas petition, as amended in 1983, raised the claim that Giarratano had been unable to assist counsel due to his emotional condition.⁶⁷ Like the state petition, the federal petition only challenged the death sentence and did not seek to set aside the conviction.⁶⁸ Although, in retrospect, this was a

63. See Bonnie, *The Competence of Criminal Defendants*, *supra* note 46, at 575 (noting that various symptoms of mental illness and disorders, including depression, "may impair a defendant's capacity to weigh information in order to make rational choices").

64. See, e.g., GUIDELINES FOR THE APPOINTMENT *supra* note 38, at 4.1.A.2 ("The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.").

65. *Supra* notes 23–25 and accompanying text (discussing the claims of Giarratano's habeas petition).

66. See *Giarratano v. Procunier*, 891 F.2d 483, 485 (4th Cir. 1989) (listing the procedural postures of Giarratano's various appeals).

67. See *id.* at 486 (discussing Giarratano's competency claims and noting that "the gravamen of his claims has always been that he lacked the capacity to provide information to counsel that was necessary to construct his defense" (quoting Giarratano's amended habeas petition)).

68. See *id.* at 484–85 (listing the claims in Giarratano's appeal from the

huge mistake, it seemed like a prudent move at the time. Why invite the court to rule that Giarratano had been incompetent to stand trial and to set aside a conviction that was not in doubt? His mental and emotional disorder had driven him to seek the death penalty and rendered him incapable of assisting counsel in connection with the sentencing proceeding.⁶⁹ Granting the relief we sought would not require a new trial, only a new sentencing proceeding. While the case was still under consideration in the district court, however, the newly discovered evidence discussed earlier raised genuine doubt about the conviction and we then sought to amend the petition to challenge the conviction as well.

In response to the State's argument that procedural default barred review of the validity of the conviction, we argued that the seriousness of Giarratano's disability had been completely obscured by his unshakeable belief in his own guilt and the failure of his counsel to seek assistance in dealing with his obviously self-destructive client after the initial request for a competence evaluation.⁷⁰ We contended that his lawyer was ineffective for failing to raise the issue as the case proceeded and that the judge also denied Giarratano due process by failing to raise the issue *sua sponte* at the time of sentencing. The district court denied relief on our competency claim as it pertained to the sentence and denied leave to amend the petition to extend the claim to the conviction due to procedural default.⁷¹ The Fourth Circuit affirmed the dismissal of both competency claims without discussing our motivationally grounded decisional capacity claim, deferring to the state trial court's original finding that Giarratano was competent to stand trial.⁷²

district court's denial of habeas corpus, which focused on sentencing and competency).

69. See *supra* notes 25–27 and accompanying text (discussing Giarratano's behavior during the trial).

70. See *Procunier*, 891 F.2d at 485–86 (discussing the claims Giarratano raised in his federal appeal).

71. See *id.* at 486 (describing the procedural posture of Giarratano's motion to amend his petition in the district court).

72. See *id.* at 486–87 (rejecting Giarratano's competency challenge and affirming the district court). The procedural history of the post-conviction litigation is summarized by Judge Butzner in the panel opinion. *Id.* at 485–86. The deferential stance taken by the Fourth Circuit is typical of its approach to death penalty cases in the post-*Furman* era.

IV. Competence to Decide Whether to Seek or Terminate Post-Conviction Relief

I want to turn now to another issue that Giarratano's case raised—the proper response to concerns about the capacity of a condemned prisoner to decide whether to seek or terminate post-conviction relief. This problem is typically an extension of the dynamic I just discussed in the pre-trial context. In many cases where capital defendants attempt suicide, subvert their own defense, and request a death sentence, the judge or jury obliges and the defendant finds himself on death row.⁷³ With the passage of time, however, many of these condemned prisoners change their minds.⁷⁴ That very fact should be a sufficient reason for trial courts to routinely assure treatment of depressed and suicidal defendants, monitor their competence, and readily grant continuances to enable counsel to establish and preserve a trusting productive relationship.

Giarratano, however, did not change his mind. After the Supreme Court of Virginia affirmed his conviction and death sentence, his appointed attorney's obligation expired. He had no duty to file a certiorari petition in the U.S. Supreme Court and none was filed. Nor did Giarratano seek representation to file a state habeas. An execution date was set and the clock was ticking. Several anti-death penalty advocacy groups took interest and requested me to go and see him. That visit began a deeply draining process. He initially said no to post-conviction proceedings. I prepared a contingency plan to file a petition as "next friend" on my own without his consent based on my own judgment that he was not competent to make a rational self-interested decision regarding whether or not to seek post-conviction relief. Eventually we worked out a plan in which he agreed to allow Lloyd Snook and me to file a petition for a stay and post-conviction relief while we attempted to get him the

73. See, e.g., *Godinez v. Moran*, 509 U.S. 389, 392–93 (1993) (explaining that after the defendant waived his right to counsel and pleaded guilty, "a three-judge court sentenced [him] to death").

74. See Bonnie, *Mentally Ill Prisoners*, *supra* note 44, at 1188–89 ("It should be emphasized, however, that many prisoners are likely to change their minds (authorizing post-conviction proceedings) as a result of successful [mental health] treatment.").

psychiatric attention he needed. What followed during the next several years was an off-and-on process in which Giarratano would direct us to pull the plug and Lloyd Snook and Marie Deans would convince him to relent. Eventually, after newly discovered evidence raised genuine doubt about Giarratano's guilt, Giarratano joined unequivocally in the effort to save his life.⁷⁵

Much has been written on the ethical dilemmas faced by counsel in cases where his or her clients seek to terminate post-conviction proceedings and on the proper response of the legal system when a condemned prisoner "volunteers" for execution, seeking "state-assisted suicide."⁷⁶ I will not attempt to summarize that debate here. In a word, my view is that we should respect the dignity of condemned prisoners to make their own decisions about whether to abandon legally available opportunities to overturn their death sentences as long as they are competent to make rational self-interested decisions based on their own values.⁷⁷ This view is reflected in the ABA's Resolution on Mental Disability and the Death Penalty and in the companion position statements of the American Psychiatric Association and the American Psychological Association.⁷⁸

75. See *supra* note 28 and accompanying text (discussing the discovery of new exculpatory evidence in Giarratano's case).

76. See generally Bonnie, *The Dignity of the Condemned*, *supra* note 50 (analyzing problems of client autonomy to waive appeals against social interest in capital punishment); John Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939 (2004) (analyzing similarities between "volunteers" for execution and suicidal persons and identifying a standard to ensure death row inmates do not use the death penalty as a form of suicide).

77. See Bonnie, *The Dignity of the Condemned*, *supra* note 50, at 1390-91 (discussing essential factors to examine when a prisoner "volunteers" for execution).

78. See *ABA Task Force on Mental Disability and the Death Penalty, Recommendations and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668, 673 (2006) [hereinafter *ABA Task Force*] ("Any meaningful competence inquiry in this context must focus not only on the prisoner's understanding of the consequences of the decision, but also on his or her *reasons* for wanting to surrender, and on the rationality of the prisoner's thinking and reasoning."); see also Bonnie, *Mentally Ill Prisoners*, *supra* note 44, at 1184 ("[R]espect for the dignity of the defendant or condemned prisoner requires counsel to adhere to the wishes of a competent client . . .").

V. Diminished Responsibility and Proportionality

Joe Giarratano was the third person to be sentenced to death in Virginia during the post-*Furman*⁷⁹ era. How Virginia's newly structured capital sentencing statute would be interpreted and administered remained unclear. One overarching question that has still not been satisfactorily resolved relates to the basic moral structure of capital sentencing and particularly to the relationship between aggravating and mitigating circumstances.⁸⁰

Having observed numerous capital sentencing evaluations at the Forensic Psychiatry Clinic over the past forty years, I have had an ongoing opportunity to reflect on the legal and moral implications of the clinical narratives that emerge in these cases. One recurrent question is whether the aggravating circumstances will do all the work, completely marginalizing the mitigation narratives that might be derived from childhood abuse and deprivation, mental disability, situational pressures, or the "diverse frailties of humankind."⁸¹ Specifically in connection with mental disability, will jurors, judges, and appellate courts ever allow compelling mitigating factors to override the momentum toward the death penalty created by a narrowed list of capital elements and a finding of "dangerousness" or "vileness"?⁸² In Virginia, as in most states, defendants have an opportunity to demonstrate specified statutory mitigating circumstances

79. See generally *Furman v. Georgia*, 408 U.S. 238 (1972) (finding that the death penalty violated the Eighth and Fourteenth Amendments in a case where an accidental gun discharge during a robbery resulted in a death penalty sentence).

80. See VA. CODE ANN. § 19.2-264.4 (2016) (detailing aggravating and mitigating circumstances for capital offenses in Virginia).

81. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

82. See VA. CODE ANN. § 19.2-264.4(C)

The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

regarding mental illness, such as “extreme mental or emotional disturbance” at the time of the offense or “the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired.”⁸³ Many defense attorneys worry, however, that evidence of mental illness will amount to a “double-edged sword” so that mitigation is essentially warped into aggravation.⁸⁴ That is exactly what happened in Giarratano’s case. The trial judge found that both key factors regarding diminished mental responsibility existed in Giarratano’s case, just as the clinic report had stated.⁸⁵ Yet he nevertheless sentenced Giarratano to death.⁸⁶ He also interpreted one of the factors in a way that nullified its moral significance: by concluding that “by becoming an habituate of drugs and alcohol one does not cloak himself with immunity from penalty for his criminal acts,”⁸⁷ he ignored the fact that Giarratano’s severe addiction—accompanied by its resulting psychopathology and neuropathology—had its roots in childhood when he was exposed to his mother’s habitual use of drugs and became addicted to them at a very early age.⁸⁸ Nor was Giarratano seeking “immunity from penalty for his criminal acts.”⁸⁹ Giarratano’s compelling moral and legal claim was simply that the death penalty would be disproportionate to his

83. *Id.* at § 19.2-264.4 (B).

84. For a more optimistic view of how supposedly “double-edged” evidence gets litigated today in Virginia—with far more defense victories than in the past—see Brandon Garrett, *The Decline of the Virginia (and American) Death Penalty*, 105 *GEO. L.J.* (forthcoming 2017).

85. See *Giarratano v. Commonwealth*, 220 Va. 1064, 1078 (1980) (“The court concludes that the evidence of emotional stress and reduced control, while admissible by statute and carefully considered by the court, is not of such nature as to mitigate the penalty in this case.” (quoting the trial judge at Giarratano’s sentencing)).

86. *Id.* at 1066.

87. *Id.* (quoting the trial judge at Giarratano’s sentencing).

88. *Id.* at 1075 (“Testimony showed that the defendant . . . started using drugs at age 11 and that for a number of years he has had a significant drug-alcohol problem.”).

89. *Id.* at 1078.

culpability.⁹⁰ Even if he committed the crime, as he claimed that he had, he should not have received a death sentence.⁹¹

The only way to prevent this pattern of disproportionate capital sentencing, and to assure that compelling claims of diminished mental responsibility are given adequate moral weight, is (1) to make findings of these mitigating factors preclusive and (2) to require aggressive judicial review of trial court findings (by judges, not juries) that the evidence does not meet the mitigating criteria. Unfortunately, that has not happened in Virginia or most other states. This common judicial failure to take seriously the moral importance of proportionality in capital sentencing is one of the reasons the Supreme Court has precluded the death penalty altogether for adolescents and persons with intellectual disability.⁹² Now, the argument is being made that a finding of serious mental illness should also preclude the death penalty.⁹³ In 2006, the American Bar Association, American Psychiatric Association, and American Psychological Association endorsed identical position

90. See *id.* (discussing Giarratano's arguments that the sentence was "arbitrary" and "disproportionate").

91. See *id.* ("Defendant concludes that the reasonable and just sentence, if the conviction is affirmed, is more properly life in the penitentiary than death.").

92. See *Roper v. Simmons*, 543 U.S. 551, 572–73 (2005) (explaining that the nature of a brutal crime might "overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death"); *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002) (explaining that intellectually disabled defendants "face a special risk of wrongful execution" because they may not be able to "make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors").

93. See Robert Batey, *Categorical Bars to Execution: Civilizing the Death Penalty*, 45 HOUS. L. REV. 1493, 1527 (2009) (arguing that the Supreme Court should extend *Atkins* to offenders who suffered from severe mental illness at the time they committed a capital offense); Lyn Entzeroth, *The Challenge and Dilemma of Charting a Course to Constitutionally Protect the Severely Mentally Ill Capital Defendant From the Death Penalty*, 44 AKRON L. REV. 529, 534 (2011) (arguing that severe mental illness diminishes the "extreme culpability" the Supreme Court requires for imposition of the death penalty); Winick, *supra* note 1, at 814 ("To the extent that mental illness produces effects that reduce volitional control and blameworthiness to the same degree as mental retardation and juvenile status, the imposition of the death penalty is insufficiently related to the purposes of capital punishment to allow its application consistent with the Eighth Amendment.").

statements favoring this view,⁹⁴ and legislation codifying this principle is under consideration in many states, including Virginia.⁹⁵

VI. Competence to Be Executed

The Eighth Amendment bars execution of a prisoner who does not appreciate the nature of the punishment and the reasons it is being imposed.⁹⁶ Fortunately this is an issue that did not arise in Giarratano's case. The only point to make about it here is that it is unfortunately tied to the other issues that I have addressed, not conceptually or doctrinally but empirically. If one looks at the records of most prisoners whose attorneys argue that they are not competent to be executed, they typically were incompetent at earlier stages of the case.⁹⁷ Unlike Giarratano, these defendants have typically had histories of severe mental illness, often including repeated episodes of psychiatric hospitalization.⁹⁸ The records frequently indicate that their

94. See ABA Task Force, *supra* note 78, at 668:

Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that impaired their capacity to (a) appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law.

See also generally Christopher Slobogin, Symposium, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1133 (2005) (analyzing the Task Force's recommendations for a prohibition on executing offenders whose mental disability reduced their culpability at the time of the offense).

95. See H.B. 794, 2016 Gen. Assemb., Reg. Sess. (Va. 2016) (providing that a defendant in a capital case who suffered from a severe mental illness at the time of the offense is not eligible for the death penalty and establishing procedures to determine the defendant's mental status at the time of the offense).

96. See *Panetti v. Quarterman*, 551 U.S. 930, 957 (2007) (discussing the lower court's conclusions and finding that they were too narrow in scope) (citing *Ford v. Wainwright*, 477 U.S. 399, 417 (1986) (plurality opinion)).

97. See *id.* at 936–37 (describing Panetti's severe mental illness prior to committing the offense, as well as his behavior following the offense and conduct at trial).

98. See *id.* at 936 (noting that Panetti had been hospitalized on multiple

mental and emotional functioning was significantly impaired at the time of the offense and that their capacity to assist in their own defense was at best “borderline.”⁹⁹ Declaring the prisoner to be incompetent for execution is sometimes the last opportunity to rectify a moral error that was uncorrected at every previous stage of the criminal process.¹⁰⁰

VII. Conclusion

Joe Giarratano deserves to be celebrated for his courage and many good deeds over the course of his imprisonment.¹⁰¹ It is time for the Commonwealth of Virginia to give him the opportunity to become a free man. I have chosen to pay tribute to Giarratano by using his case to illustrate the many ways in which a defendant’s serious mental illness and emotional distress can compromise the integrity of capital adjudication. In the absence of abolition, the preferred remedy for most of these deficiencies is to embrace prophylactic rules and safeguards to reduce the risk of unreliable outcomes,¹⁰² but I suspect that most of the participants in this Symposium are doubtful that such an approach can succeed. After all, we have had forty years to ascertain whether

occasions, and, at one time, was convinced the devil had possessed his home).

99. See *id.* (“During his trial, petitioner engaged in behavior later described by his standby counsel as ‘bizarre,’ ‘scary,’ and ‘trance-like.’ According to the attorney, petitioner’s behavior both in private and in front of the jury made it evident that he was suffering from ‘mental incompetence.’”); see also Richard J. Bonnie, Panetti v. Quarterman: *Mental Illness, the Death Penalty, and Human Dignity*, 5 OHIO ST. J. CRIM. L. 257, 261 (2007) [hereinafter Bonnie, Panetti v. Quarterman] (providing a summary of Panetti’s behavior during his trial).

100. See Bonnie, Panetti v. Quarterman, *supra* note 99, at 281–82 (arguing that prisoners who bring claims challenging their competence to be executed likely have a history of serious mental disorders and that fabricating competence claims under those circumstances is rare).

101. See David Margolick, *Legal Scholar on Death Row Fights to Halt Own Execution*, N.Y. TIMES, Mar. 5, 1990, at A1 (“Mr. Giarratano has fashioned novel legal arguments to broaden the constitutional rights of prisoners, notably their right to counsel.”).

102. See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 358 & n. 5–6 (1995) (discussing the argument that the complexity of the procedure surrounding capital punishment delays executions in lieu of abolition).

the modern generation of capital sentencing statutes can be fairly administered so as to reduce arbitrariness and assure a reliable determination that death is morally appropriate for each defendant sentenced to die.¹⁰³ In Giarratano's case, a death sentence was not the morally appropriate sentence and the case reveals multiple systemic failures. While some of these systemic problems have been ameliorated over the past four decades, the unvarnished truth is that human error is an ever-present risk in criminal adjudication and an unacceptable one in capital adjudication. In telling the story of Giarratano's case, it has been especially sobering for me to come face-to-face with errors of my own.

103. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (“[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” (citation omitted)); see also *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (“[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”).