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## *The Commonwealth of Virginia v. Joseph Michael Giarratano: A Cautionary Tale*

Todd C. Peppers

*Washington and Lee University School of Law*, [pepperst@wlu.edu](mailto:pepperst@wlu.edu)

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# The Commonwealth of Virginia v. Joseph Michael Giarratano: A Cautionary Tale

Todd C. Peppers\*

The goal of this short Essay is to introduce the reader to a remarkable man named Joseph Michael Giarratano, whose death penalty case served as the focusing event for both the February 2016 *Washington and Lee Law Review* symposium as well as the articles contained in this special issue of the *Law Review*. So why should we care about an aging prisoner who was convicted of capital murder during the Carter Administration? At a minimum, Giarratano's case reminds us that Virginia's capital punishment regime was riddled with flaws in the decades immediately following the Supreme Court's lifting of its death penalty moratorium<sup>1</sup> and that inmates like Giarratano paid a steep price for these defects. Giarratano's story, however, is tragically relevant today, since many of the errors which plagued his case still foul the gears of the "machinery of death"<sup>2</sup> which, nevertheless, grinds unabated across the southern United States.

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\* Todd C. Peppers is a Visiting Professor of Law at the Washington and Lee School of Law and the Fowler Professor of Public Affairs at Roanoke College. He is the co-author of two books on Virginia's death penalty: TODD C. PEPPERS & LAURA TREVVETT ANDERSON, *ANATOMY OF AN EXECUTION: THE LIFE AND DEATH OF DOUGLAS CHRISTOPHER THOMAS* (Northeastern University Press 2009) and TODD C. PEPPERS & MARGARET ANDERSON, *REQUIEM FOR A COURAGEOUS FOOL: MARIE DEANS AND HER FIGHT AGAINST THE DEATH PENALTY* (Vanderbilt University Press, forthcoming 2016).

1. See *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.").

2. In a dissent from a denial of certiorari in *Callins v. Collins*, 510 U.S. 1141, 1143–46 (1994), Justice Harry Blackmun used the phrase "machinery of death" to describe what he viewed as a broken capital punishment system. *Id.* at 1145.

So who is Joe Giarratano?<sup>3</sup> He is a survivor whose childhood was a toxic mix of neglect, cruelty, and sexual violence.<sup>4</sup> With a father in prison, a drug-dealing mother who routinely physically and emotionally abused her young son, and a stepfather who sexually assaulted both Giarratano and his younger sister, it is hardly surprising that eleven-year-old Giarratano turned to alcohol and drugs to blot out the world.<sup>5</sup> Failed suicide attempts and futile efforts to run away from home followed.<sup>6</sup> And while social services fought to place Giarratano in foster care or inpatient therapy, they were thwarted by Giarratano's mother, who was afraid that her son might divulge her narcotics trafficking to others.<sup>7</sup>

When Giarratano was seventeen, an escape from a juvenile detention facility and a subsequent joy ride in a stolen vehicle resulted in a brief incarceration in a Florida prison.<sup>8</sup> There, Giarratano met his father for the first time in years. Their encounter in a visiting room was brief, with Giarratano's father offering to procure drugs for his son. After Giarratano's release

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3. Information on Joe Giarratano and his case are taken from his 1991 clemency petition and his 2009 petition for conditional pardon. See *In re Joseph M. Giarratano, Petition for Conditional Pardon By the Governor of the Commonwealth of Virginia* at 3–14 (1991) [hereinafter 1991 Petition] (describing how Giarratano was abused as a child by his mother and other people entrusted with the reasonability of caring for him, which lead to Giarratano turning to drugs and other substances later in his life); *In re Joseph M. Giarratano, Jr., Petition for Conditional Pardon* at 3–4 (Sept. 4, 2009) [hereinafter 2009 Petition] (describing the murder of Barbara and Michelle Kline and Giarratano's lack of memory of the events because of heavy drug and alcohol use during that time).

4. See 1991 Petition, *supra* note 3, at 3–7 (describing the abuse inflicted on Giarratano by his mother and her friends, including being burned, “shocked with a cattle prod,” and “handcuffed to a fence at night”).

5. See *id.* (“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.”).

6. See *id.* at 6–7 (explaining that after Giarratano's stepfather died, he attempted suicide, but doctors were not aware of the severity of Giarratano's condition because his mother minimized his illness, telling doctors that her son only overdosed to get attention).

7. See *id.* at 3–7 (“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.”).

8. *Id.* at 8.

from prison in 1976, the cycle of voracious drug consumption and reckless behavior continued.<sup>9</sup>

In the late fall of 1978, Giarratano moved to Norfolk, Virginia, and found a job as a waterman on a scallop boat.<sup>10</sup> The boats would be at sea for weeks at a time, and Giarratano found the work exhausting. When Giarratano and his crewmates returned to shore, they blew their hard-earned money on mind-numbing cocktails of illegal drugs.<sup>11</sup> It was there that Giarratano met Barbara “Toni” Kline, a single mother who let Giarratano spend the night in her run-down apartment in exchange for rent money.<sup>12</sup> Giarratano and Toni had a fleeting sexual, but not romantic, relationship.

On February 6, 1979, Giarratano approached a sleepy deputy sheriff working the night shift at the Jacksonville, Florida Greyhound bus station.<sup>13</sup> The deputy was astonished when Giarratano announced that he had killed two people in Virginia and wanted to be arrested. The people who he confessed murdering: Toni Kline and her teenaged daughter, Michelle. Over the next two days, Giarratano gave four meandering and contradictory confessions to Florida detectives.<sup>14</sup> Giarratano would later provide a fifth confession to Virginia investigators. In his last confession, police detectives told Giarratano that they did not believe his story, fed him new details about the murder, and pushed Giarratano to parrot back the new information—despite the fact that Giarratano admitted that he really did not remember

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9. *See id.* at 8–9. (explaining that, although Giarratano exhibited good behavior in prison, when he was released he went back to his mother and back to drugs).

10. *See* 2009 Petition, *supra* note 3, at 3–4 (describing Giarratano’s move to Norfolk, Virginia, and the time shortly before the murder).

11. *See id.* at 3 (noting that Giarratano’s co-workers on the boat were heavy drinkers who abused drugs).

12. *See id.* (discussing Giarratano and Toni Klein’s relationship and how Giarratano moved into Toni’s house, which was a “drug haven”).

13. *See id.* at 4 (explaining that, despite Giarratano’s lack of memory, after a life of neglect he assumed the worst in himself and thus voluntarily admitted to the crime and turned himself in to authorities).

14. *See id.* (“The details in Joe’s various confessions were internally inconsistent, contradicted each other, and conflicted with the physical evidence at the crime scene.”).

the murders.<sup>15</sup> He simply assumed that he must have committed the murders because he considered himself a bad person.<sup>16</sup>

With a confession in hand and a double homicide apparently solved, the case of the *Commonwealth of Virginia v. Joseph Michael Giarratano*<sup>17</sup> raced towards trial—interrupted only by two suicide attempts by Giarratano and a brief psychological examination at the Central State Hospital to determine Giarratano’s competency to stand trial.<sup>18</sup> Despite the multiple efforts to kill himself and the manifest signs of mental illness, Giarratano was deemed fit to assist in his own defense.

Within three months of his first confession, Joe Giarratano entered the Norfolk Circuit Court for a bench trial, which would barely last four hours. As Giarratano fought to understand the proceedings through a Thorazine haze (the medication courtesy of the same system which deemed him competent), his court-appointed counsel, who had little experience defending serious felony cases, unsuccessfully mounted a half-hearted insanity defense.<sup>19</sup> The trial court judge summarily rejected the argument, and pronounced Giarratano guilty of rape, murder, and capital murder in May 1979. Two perfunctory sentencing hearings were held within weeks of the trial, in which little-to-no mitigating evidence was offered to show that Giarratano’s life was worth saving. Giarratano himself wrote the trial court judge and asked to die—a request which the judge swiftly granted.<sup>20</sup>

Many prisoners’ stories end with a death sentence. For Giarratano, his life was just beginning. With the assistance of

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15. See 1991 Petition, *supra* note 3, at 30–32 (explaining that Giarratano’s confessions can be spilt into two categories that show the inconsistencies).

16. See *id.* at 32–35, 38–39, 40–48 (“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.”); 2009 Petition, *supra* note 3, at 16–18.

17. See *Giarratano v. Commonwealth*, 266 S.E.2d 94, 95 (Va. 1980) (detailing Giarratano’s appeal of his capital murder conviction from the Norfolk Circuit Court, where Giarratano was indicted and sentenced in just over six months).

18. See 1991 Petition, *supra* note 3, at 14–15 (describing Giarratano’s condition during the trial).

19. See *id.* at 70 (explaining that there was no evidence that supported Giarratano’s insanity defense, but that Giarratano insisted on going to trial and rejected a plea deal for a life in prison sentence).

20. See *Giarratano*, 266 S.E.2d at 95 (noting that Giarratano was indicted, tried, convicted, and sentenced to death in just over six months).

Marie Deans, a devoted death penalty abolitionist who befriended him, Giarratano began to slowly emerge from drug addiction and mental illness.<sup>21</sup> He picked up his appeals, thereby postponing his pending date with the electric chair. He started reading books on philosophy, religion, history, and the law. He began advising fellow inmates on their pending appeals.<sup>22</sup> He wrote a steady stream of articles and essays. And Giarratano started fighting for the rights of all death row inmates by filing pro se lawsuits about dehumanizing prison conditions, denial of access to attorneys and legal mail, and the right to court-appointed counsel in state and federal habeas proceedings.<sup>23</sup> Giarratano's efforts on behalf of his fellow inmates included a Virginia death row inmate named Earl Washington, a mentally-disabled former farmhand who came within eight days of being executed for a crime he did not commit.<sup>24</sup>

Throughout Giarratano's first decade on death row, his appeals slowly made their way through the state and federal courts. A factual innocence claim was not the cornerstone of his appeals until 1988, when a team of private investigators hired by Marie Deans concluded that there was substantial and compelling physical evidence that Giarratano did not murder Toni and Michelle Kline.<sup>25</sup> In fact, the evidence pointed to a different suspect.<sup>26</sup> This discovery, however, was bittersweet; because of

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21. See *id.* at 5–6 (describing how Giarratano's outlook on life changed when he met Marie Deans).

22. See *id.* at 50–59 (“Joe’s relative success as a jailhouse lawyer and pro se litigant was used by both the majority and dissent of the U.S. Court of Appeals for the Fourth Circuit in concluding whether Virginia provided adequate resources to meet the inmates’ right to meaningful access to the courts.”).

23. See *id.* at 60 (“Joe’s maiden steps as a prison condition reform advocate came in his role as a named plaintiff in a prison conditions lawsuit filed by the National Prison Project, an arm of the ACLU.”).

24. See *id.* at 9 (“With no one else coming to Earl Washington’s assistance, Joe researched, drafted, and filed a federal lawsuit challenging the constitutionality of executing unrepresented inmates.”).

25. See *id.* at 21 (explaining that the evidence supporting the theory that Giarratano murdered Toni and Michelle Kline consisted of finger prints in the Kline house, where he also lived, a single pubic hair “consistent” with a sample of Giarratano’s hair, and type O blood on Giarratano’s boots). While Michelle Kline had type O blood, so does “45% of the Caucasian population.” *Id.* The blood was not tested to determine to whom it belonged because DNA testing did not exist at the time. *Id.*

26. See 1991 Petition, *supra* note 3, at 59–61 (noting that a driver license of an unidentified male was found in the Klimes’ house).

Virginia procedural rules, which dictated that evidence of factual innocence was inadmissible twenty-one days after entry of final judgment, it was unlikely that any court would consider the exculpatory evidence.

As Giarratano's final appeals were denied, his desperate legal team turned to the last option available to them—clemency from then-Virginia Governor Douglas Wilder.<sup>27</sup> While Marie Deans and a small team of lawyers drafted the clemency petition, Giarratano's supporters held rallies and buried the Governor's office in thousands of letters and telephone calls. In the end, however, their efforts were only partially successful. On February 19, 1991, Governor Wilder granted Giarratano a conditional pardon, in which he reduced Giarratano's sentence to life in prison and requested that Virginia Attorney General Mary Sue Terry give Giarratano a new trial.<sup>28</sup> Any happiness Giarratano felt was fleeting, however, as the Attorney General quickly refused Governor Wilder's request—telling reporters that she believed that Giarratano was factually guilty of the crimes.<sup>29</sup>

Within days of the pardon, Giarratano was transferred off death row. Over the next twenty-five years, he bounced from one maximum security prison to another. Giarratano has struggled to make a life within the prison walls, and many of his efforts—including the creation of a peace studies program—have been stymied by corrections officials who remain hostile to Giarratano's efforts at prison reform.<sup>30</sup> Due to the loss of his right leg,

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27. See *id.* at 73–83 (explaining that the Governor's power to grant clemency "is fully discretionary and exercisable without the approbation of the General Assembly of the courts").

28. See Tony Germanotta, *Wilder Offers Pardon to Giarratano*, ROANOKE TIMES, Feb. 20, 1991, at A1 ("Wilder left it to Giarratano to decide whether he would die, spend at least the next 13 years in prison, or risk another death sentence by pressing for a new trial and freedom.").

29. See John F. Harris, *Terry Rules Out New Trial for Pardoned Killer*, WASH. POST (Feb. 20, 1991), <https://www.washingtonpost.com/archive/local/1991/02/21/terry-rules-out-new-trial-for-pardoned-killer/f123b9b6-5216-49a1-9602-b16581d555ce/> (last visited Sept. 7, 2016) ("Terry said in a statement, 'Like Governor Wilder, I am intimately familiar with the facts in the case, and I am convinced that Mr. Giarratano committed the crimes of which he stands convicted. He is not entitled to a new trial, and I shall initiate no further legal proceedings.'") (on file with the Washington and Lee Law Review).

30. See 1991 Petition, *supra* note 3, at 87 ("[Giarratano] explained that he had no memory of committing the crimes in his case and asserted his innocence.

Giarratano was finally removed from the violence and despair of the aforementioned prisons and is now housed at the Deerfield Correctional Center—a low-level security facility for geriatric prisoners.<sup>31</sup> Almost sixty years old, Giarratano is blooded and bowed. The fires, however, still burn bright and his fight for justice continues.

I first met Joe Giarratano in March 2010, when I travelled to the Wallens Ridge State Prison in Big Stone Gap, Virginia, at the request of Marie Deans. Giarratano was assaulted without provocation by a young prisoner, who broke both of Giarratano's wrists. I was still a practicing attorney at the time, and Marie asked me to interview Giarratano and document the incident in case his legal team wanted to file suit.

I was fairly nervous when a series of metal doors closed behind me, and I was deposited in a spartan visiting room with bored-looking guards. While I knew the basics of Giarratano's case through my conversations with Marie, I did not know Giarratano the individual. In fact, I had never met a former death row inmate, and I frankly did not know what to expect from the visit.

Three hours later I sat in my parked car, mentally running through my conversation with Giarratano. The man that I met was intelligent, well spoken, and quick-witted. He quoted from a series of authors and thinkers during our conversation, from Lutheran theologian Dietrich Bonhoeffer and French philosopher Albert Camus to American satirist Ambrose Bierce. He smiled often and seemed at ease in the surreal world in which he lived. He spoke without bitterness about the assault, his capital murder conviction, and his time on death row.

What followed from that first visit was an enduring friendship and a vow that I would share Giarratano's story with the world. My symposium proposal to the *Washington and Lee Law Review* was an effort to fulfill that pledge, as is a book manuscript that I am currently writing about Giarratano. Simply put, his story is a cautionary tale of how we, as a people, have not provided equal justice under the law to those citizens who we deem to be monsters.

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The Examiner cut [Giarratano] off and . . . stated in a hostile tone that 'You're guilty. Innocent people don't confess to things they didn't do.'")

31. *Virginia Department of Corrections*, VA. GOV., <https://vadoc.virginia.gov/facilities/eastern/deerfield/> (last visited Sept. 7, 2016) (on file with the *Washington and Lee Law Review*).

The essays contained in this symposium issue examine some of the key issues involved in both Giarratano's case and the modern death penalty, including: wrongful convictions, coerced confessions, mentally ill defendants unable to assist in their own defense, overzealous prosecutors, disinterested judges, poorly trained defense attorneys, and the constitutionality of the conditions of confinement of death row inmates and the methods used to kill them. Collectively, the panel discussions at the 2016 symposium and these essays are a powerful reminder that many of our prosecutors, judges, and jailors have not learned from the historical lessons provided by inmates like Joe Giarratano. Winston Churchill once remarked, "The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation [sic] of any country."<sup>32</sup> Read as a whole, what do the essays that follow say about our society?

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32. MARTIN GILBERT, CHURCHILL: A LIFE 214 (1991).