

Legal Scholar on Death Row Fights to Halt Own Execution

By DAVID MARGOLICK

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BOYDTON, Va., Feb. 28 — Joseph Giarratano has spent most of the last 10 years in his cell in Mecklenburg Correctional Facility here, in the undeviating and claustrophobic universe of death row. But more than any of the nation's 2,500 other condemned inmates, his name has traveled beyond the prison walls.

It has resonated in the courts, where the 33-year-old Mr. Giarratano has fashioned novel legal arguments to broaden the constitutional rights of prisoners, notably their right to counsel. In the tightly knit community of lawyers, scholars and opponents of capital punishment, he is considered more a colleague than a convict.

But now, Mr. Giarratano, convicted of murdering two women, is running out of appeals. There may be only a decision by the United States Supreme Court, and the two-hour drive up Interstate 85, standing between him and the electric chair in Richmond, where seven of his friends have already been executed. Impressed by his intelligence, confident of his innocence, or convinced of his rehabilitation, his friends are frantically seeking to save him.

"Joe is unique among folks on death row," said Richard Burr of the NAACP Legal Defense and Educational Fund. "He's metamorphosed from a confused, erratic addict to someone who's extraordinarily strong and empathetic, as well as strategically brilliant. No one else has done that."

Gerald T. Zerkin of Richmond, one of Mr. Giarratano's lawyers, added: "Whether or not he committed these crimes, there's no question Joe's a completely different human being than the one that existed in 1979. No one in his right mind could say now that he's a future danger to anyone."

In 1979, Mr. Giarratano confessed to killing a 44-year-old Norfolk woman and raping and killing her 15-year-old daughter. At the time, he now says, he was high on drugs. He was so convinced of his own evil, he says, that he admitted the crimes, even though he

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could not remember committing them. After a one-day trial that was actually over by lunchtime, he was convicted.

To this day, Mr. Giarratano says he does not know whether he killed the mother and daughter, Toni and Michelle Kline. But his lawyers say that conflicting statements he made in five confessions and evidence obtained in the last two years suggest he did not. They have moved to reopen his case.

This is what the lawyers say the new evidence suggests: that Michelle Kline was strangled by a right-handed person, while Mr. Giarratano is left-handed; that the footprints at the crime scene could not have been made by his boots; that the blood found on his boots did not match that of Toni Kline, and that hair found on Michelle Kline did not match his.

Bert L. Rohrer, a spokesman for Attorney General Mary Sue Terry of Virginia, who oversees the case, dismissed Mr. Giarratano's new evidence. "What we have maintained in court is that this new evidence is, frankly, old evidence in different wrapping," he said. "The courts have shared this view."

Three months ago, in fact, the United States Court of Appeals for the Fourth Circuit, in Richmond, turned down his appeal. His next, and probably last, judicial stop is the Supreme Court.

International Interest in Case

In the meantime, the campaign to spare Mr. Giarratano has attracted international interest. Reporters from Britain, West Germany, the Netherlands, Spain and Sweden have visited him here, as have camera crews from the ABC News program "20-20" and the CBS News program "Nightwatch."

Amnesty International has bought billboard space on his behalf in Richmond. It says: "Virginia: Is Joe Giarratano innocent? Will we kill him with-

out knowing?"

The campaign is directed principally at two people: Attorney General Terry and L. Douglas Wilder, the state's new Governor, who can either pardon Mr. Giarratano, commute his sentence or order a new trial.

Newspapers in Fredericksburg, Culpeper and Charlottesville have endorsed Mr. Giarratano's drive. "Terry is afraid of appearing to be weak on a law-and-order issue," The Charlottesville Daily Progress said in an editorial. "She is not afraid, it seems, to risk the death of a possibly innocent man, sacrificed for her own ego and political ambitions."

Mr. Rohrer, the Attorney General's spokesman, called such an assertion ridiculous.

Governor Could Decide Fate

Governor Wilder opposed the death penalty when he visited Mecklenburg prison a few years ago, but reversed on the issue in his gubernatorial campaign. A lawyer in the Governor's office did not return the telephone call of a reporter who sought the Governor's position on the case.

If the past is any precedent, Mr. Giarratano's prospects of prevailing in Virginia, either judicially or politically, are not good. Virginia's procedural rules in criminal cases are among the most stringent anywhere, severely limiting the introduction of new evidence and raising of objections after the trial.

"Virginia is the most iron-fisted and mean-spirited of the death penalty states," Mr. Burr said. "In any other state, I'm absolutely certain that Joe wouldn't be on death row anymore."

Mr. Giarratano is counting heads on the Supreme Court, just like constitutional scholars and death penalty litigators outside. He needs four Justices for the Court to take the case and five to win.

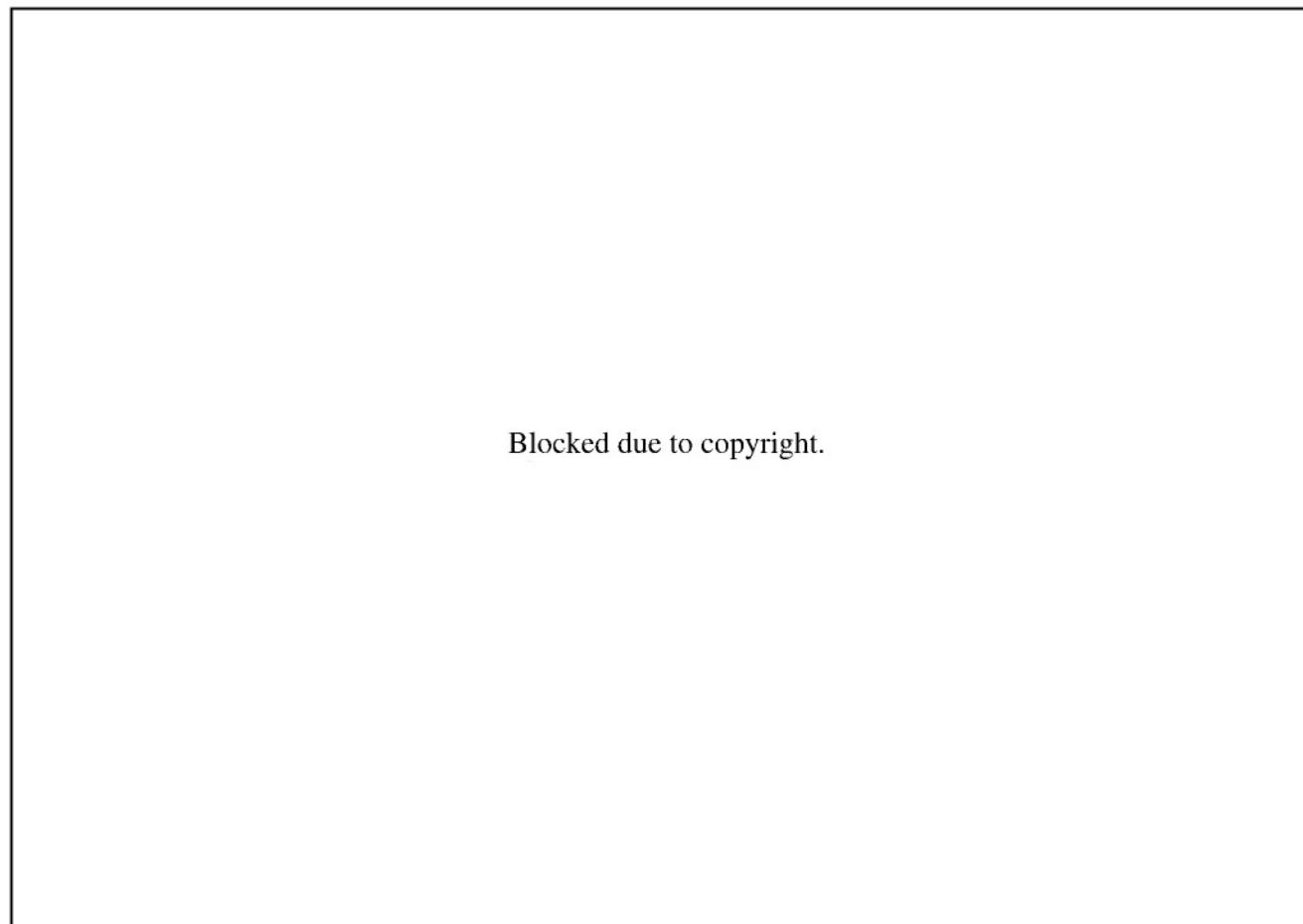
"Right now, I'm hyper," he said. "I think I can get four votes, but the fifth, I don't know where it's going to come from, if at all."

Mr. Giarratano, going down the list of Supreme Court Justices, assessed his chances this way: "I've got Brennan and Marshall for sure, just because it's a death case. I think we've got a shot at Blackmun and a good shot at Stevens. That fifth vote's going to be tough. O'Connor seems to have a streak of fairness in her at times, and White could go either way. I don't know enough about Kennedy to know where he fits in. Scalia and Rehnquist seem to be walking together hand in hand on all this; their attitude in death cases is 'kill 'em.' So forget them."

'Scares the Hell Out of Me'

Mr. Giarratano himself vacillates on his chances. "Some days my gut tells me I'm going to win," he said. "But last night it told me, 'Go ahead and pack up your boxes, you're going to the chair.' The bottom line is that I could be dead by the end of the year. The prospect of sitting in the electric chair scares the hell out of me. It's frying. That's got to be a hell of a way to go."

Even those who oppose any capital



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Joseph Giarratano in the library of the Mecklenburg Correctional Facility in Boydton, Va. The death row inmate is considered more of a colleague by some legal scholars and opponents of capital punishment.

punishment view Mr. Giarratano's case as extraordinary. "There is the run-of-the-mill injustice you get used to in this kind of work, but Joe's case is different in kind and quality and magnitude," said Michael Mello, a professor at the Vermont Law School who has represented many death row inmates. "Executing him would be an absolute outrage, not only because of his innocence, but because it would mean the loss of a very sensitive and intelligent commentator."

But some, like Lawrence C. Lawless, who prosecuted Mr. Giarratano 10 years ago, are convinced neither of his rehabilitation nor his innocence. Mr. Lawless, now a judge in Norfolk, told The Richmond Times-Dispatch that he is still haunted by the photographs of the two victims. He added that while he is not not a strong proponent of capital punishment, "if they needed a volunteer to push the button, I'd do it off duty, on the weekend. I'd pay my own expenses to Richmond."

Mecklenburg Prison could pass for a community college campus, but for the Slinky-like coils of security wire surrounding it. It houses 340 inmates, including 40 on its death row, an all-time high facing the electric chair in a state that has executed eight prisoners since the Supreme Court reinstated capital punishment in 1976. Mr. Giarratano admits that no matter his fate, death row

has already saved his life.

Mr. Giarratano's story has many of the hallmarks of juvenile offenders: a fractured family, an abusive mother, a father he did not meet until they were inmates in the same Florida prison 16 years ago. It also includes an early exit from school and an even earlier introduction to drugs.

"The only interest I had from age 10 was sticking a needle in my arm," he said.

Only when he got to death row was he able to free himself from drugs: first the ones he had taken himself, then the Thorazine tranquilizer the state psychiatrists gave him. He also stopped attempting suicide. And he found a new calling. It began, he recalled, when a fellow inmate, who has since been executed, lent him a law book.

Since then, he has studied the law incessantly, even rapturously. Mr. Giarratano has become a sophisticated student of constitutional law. A right-to-counsel case that he undertook on behalf of another inmate employed a novel legal argument that he helped fashion: an inmate is guaranteed a lawyer while pursuing his last legal remedies beyond normal appeals, not just by the fair trial guarantees of the Sixth Amendment but by the due process clause of the 14th Amendment.

He does not actually take cases to court, but helps develop the arguments.

which are then presented in court by his lawyers. His argument in that case, won in the United States Court of Appeals but lost in the Supreme Court.

Life on Death Row

Death row at Mecklenburg is surprisingly quiet. During a recent visit, faint rock music from a solitary radio was the only sound. A guard offered an explanation: many inmates were doing legal work.

None work harder than Mr. Giarratano. His cell could pass as a law student's carrel, but for its bars, bed and toilet. It has a typewriter, texts, file folders, legal pads, a copy of Black's Law Dictionary and a collection of tobacco pipes.

A few hours a week, Mr. Giarratano can visit the law library, where he sits in a cage and is handed books through a slot. Mr. Giarratano has fought for things like increased access for visitors and confidentiality of communications with lawyers. Even guards drop by to ask his legal advice.

Should all else fail, Mr. Giarratano is already grooming another death row inmate, Joe Payne, to take his place at Mecklenburg, and Mr. Payne, he said, is proving to be an apt student.

"He still believes too much that the system always does what's right," Mr. Giarratano said. "But he's learning."