
In Re

JOSEPH M. GIARRATANO

Supplement to 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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INTRODUCTION

The purpose of this document is to catalogue the non-confession evidence introduced against Mr. Giarratano at his trial. It is supplemental to the Petition for Conditional Pardon, which also addresses the non-confession evidence, because it organizes the non-confession evidence differently. Rather than analyzing the evidence thematically and in relation to the confession, as the Petition does, the present document analyzes each area of non-confession evidence separately. Within the analysis of each area of evidence, we first state what the evidence was at trial (section A). We then analyze that evidence on its face (section B), discuss any new evidence related to it and analyze the meaning of the trial evidence as illuminated by the new evidence (section C), summarize the Commonwealth's response to this area of evidence (as supplemented by the new evidence) (section D), and finally, respond to the Commonwealth's position (section E). Although we have covered the same material in the Petition, we believe that the cataloguing done here may prove a helpful supplement to the approach taken in the Petition.

Photographs/Giarratano's Boots/Michelle Kline's Blood Type

A. Three items of evidence introduced by the Commonwealth at trial must be analyzed in conjunction with one another:

(1) Photographs and a videotape¹ of the crime scene, which revealed shoeprints in and emerging from a pool of blood near Barbara (Toni) Kline's body, App. 647-49, 652;²

(2) A pair of Joe Giarratano's boots, one of which had two drops of type "O+" human blood on the top and side, App. 390; 674-75; and

(3) A forensic report identifying the blood type of Michelle Kline as "O+". App. 410-11.

B. Presented as a whole, these three items of evidence implied that the blood on Giarratano's boot was that of one of the victims. A discerning factfinder would have questioned this implication, but the implication would still have been there.

The blood found on Giarratano's boot was shown to be the same general type as Michelle Kline's, who was strangled, and not Barbara Kline's, who was stabbed. Forty-five (45%) of the population has type "O" blood. There is some evidence that Michelle suffered some recent vaginal lacerations and some bleeding from the nose. App. 351, 652, 766. However, there is no evidence that she bled in quantities or in a manner which would have caused her blood to have appeared on Giarratano's boot. The blood type

¹ The videotape disappeared from the court record without explanation while the record was in the State Courts.

²References will be made in this document to various source material, which will be referred to with the following abbreviations: App. (three-volume appendix to the Petition for Conditional Pardon), Supp. App. (appendix to the present document), Br. AG (brief of the Attorney General in the Fourth Circuit, Nos. 89-4003, 89-4006), and Opp. Cert. (brief filed by the Attorney General opposing review in the United States Supreme Court).

of Barbara Kline, the stabbing victim, in whose blood the shoeprints appeared, was never determined, ostensibly due to decomposition of the blood. No evidence was presented that Giarratano's boots made the shoeprints in the photographs. No comparative measurements were taken and no other evidence suggested that the prints matched his boots.

Nevertheless, in the absence of any evidence concerning Barbara Kline's blood type, the combination of evidence left open the possibility -- and thus the implication -- that the blood on Giarratano's boot got there from his stepping in the blood of Barbara Kline, or somehow from the wounds suffered by Michelle Kline.

C. Since the trial, certain evidence has come to light which makes clear that the blood on Giarratano's boot did not come from his walking in the pool of blood and probably did not come from either of Michelle Kline's wounds.

June Browne Tillman, the Commonwealth's serologist and expert witness who determined Michelle's blood type and the type of blood on Giarratano's boot, has since submitted an affidavit revealing the following information:

-- Before trial, she tested the soles and welts of Giarratano's boots and did not find any traces of occult (hidden) blood on them. App. 768. This information was not given to the defense.

-- She was never shown photographs of the crime scene or of the bloody shoeprints before or during the trial. App. 769.

-- Having now seen the photographs, she can conclude that the footwear which made the shoeprints in the photographs would have shown traces of blood on the sole and welt, even if the footwear had been washed. Id. Her examination before trial revealed no such traces. Id.

-- Had she seen the photographs before trial, she would have recommended that the footwear of other suspects be obtained for similar examination and that a physical comparison be made between the suspected footwear and scaled photographs of the shoeprints. Id. (No such testing was done.)

Tillman's affidavit is bolstered by the report of Pat Wojtkiewicz, a serology and firearms-expert employed by the State of Louisiana at the North Louisiana Criminalistics Laboratory. Mr. Wojtkiewicz examined photographs of the crime scene and concluded the following:

-- The photographs were not adequate to determine shoe size or to identify specific footwear without comparative physical testing of the shoes. App. 771.

-- The footwear which made the bloody shoeprints in the photographs would have had detectable blood on the soles for at least a month, unless they were made of waterproof material or "extraordinary" measures were taken to clean them. App. 771-71.

No such comparative tests were performed on Giarratano's boots and it has been determined that they were not made of waterproof material. Clearly, if "extraordinary" measures had been used to

clean the boots, the small amount of blood on the top and side of the boot would have been removed as well.

Additionally, there is evidence that the bloody shoeprints may not have been a legitimate part of the crime scene. A licensed private investigator, Walton T. Peters, interviewed Duane Moore, the Klines' downstairs neighbor, who was asked by police to identify Toni Kline's body shortly after it was discovered. An affidavit submitted by Mr. Peters reveals that Mr. Moore "said there were no footprints anywhere, through the blood or anywhere that he could see." Supp. App. 4. This raises the possibility that, not only were the shoeprints not made by Giarratano, but that they had no connection to the crime whatsoever, and were made by one of the many people who entered the apartment after the murders.

With regard to the amount of bleeding Michelle Kline, the strangulation victim, may have suffered, there is new evidence as well. In a taped interview with an investigator, Barbara Kline's boss, Peter Mohrmann, who had also been requested by police to identify the bodies, revealed that there was no external bleeding of any quantity:

- Q. When you saw Michelle in the bed, was it a bloody scene?
- A. No, not at all, she was sprawled over the bed, her legs, from the knee on was hanging down, so eh, there was no blood. You would have spotted it. I mean, white bed sheet and blood, no, you would have spotted it.

App. 766. The sheet in question is shown in the autopsy photos, App. 651-52, and was sent to the laboratory, but no lab report on the sheet is in the record.³

Finally, the affidavit of Officer Mooneyham, one of the arresting officers in Florida, confirms that the blood later discovered on Giarratano's boot was not likely connected to the crime. He states that Giarratano did not have any blood on his clothes or person when he was arrested in Florida. Supp. App. 7. Certainly it is possible that Officer Mooneyham missed the blood on Giarratano's boot. However, it is unlikely that a police officer, confronted with a person confessing to a stabbing murder, would have failed to see the blood. It is more likely, in light of all the other evidence, that the blood found its way on to the boot after Giarratano's arrest.

D. The Attorney General has responded that it was not the Commonwealth's intention to create the impression that Giarratano's boots made the prints, nor was it trying to create a false impression with regard to the source of the blood found on his boots. Br. AG 15-16. The Attorney General contends that the Commonwealth merely presented the evidence in a "straightforward manner" and that "nothing in the record supports [Giarratano's] claim that the Commonwealth was attempting to create a false picture of events." Id. at 16.

³ This report on the sheet is an item of evidence that the Attorney General has refused to allow the defense to see.

With regard to specific items of evidence, the Attorney General asserts as follows:

-- The photographs of the bloody shoeprints were not intended to imply that Giarratano made them, since his presence in the apartment was not in issue. Id. at 15-16.

-- Giarratano ignores the record in asserting that Michelle Kline did not bleed in sufficient quantity for him to have had her blood on his boots. She points to the autopsy report which noted fresh bleeding from the vagina as well as injuries indicating sexual abuse; there was blood, she contends as well, on the towel which covered Michelle's face. Id. at 16.⁴

-- Barbara Kline's blood could not be typed because it was too decomposed. Id.

E. The protestation that the Commonwealth merely presented isolated pieces of evidence with no intention that they be read as a whole ignores what happened at trial. There can be no other explanation for such a presentation. What possible reason could there be for introducing a photograph that shows nothing but the bloody shoeprints, or the boots with drops of blood? The pieces of evidence are meaningless individually and only become meaningful as part of an attempt to create the impression that Giarratano made the bloody shoeprints. The Commonwealth's own serologist has eliminated Giarratano's boots as those which made the shoeprints. The arresting officer states that Giarratano had no blood on him

⁴ Again, no test report seems to exist on the towel, or, at least, the defense has never been allowed to see it.

or his clothes when he was arrested, so the blood probably did not come from the crime scene at all.⁵ Thus, the impression created by the Commonwealth's evidence was false.

The Commonwealth emphasizes that Giarratano's presence in the apartment has never been disputed. That is true. However, rather than establishing guilt, his presence in the apartment explains why he had knowledge of those facts which were readily apparent to anyone viewing the crime scene after the fact, but had no knowledge of those facts which only the murderer would know, such as the location of the weapon.

The Attorney General's assertion that Barbara Kline's blood could not have been typed was discredited by June Brown Tillman in her post-trial affidavit. It is simply false; Barbara Kline's blood could have been typed notwithstanding decomposition.

The blood on the towel found over Michelle's face in no way explains the presence of blood on Giarratano's boot. The blood type is consistent with her own; the crime scene photographs show traces of blood coming from her nose; therefore, the towel does nothing to help identify the killer. In addition, there is no indication that any blood was found on the sheet, even though it was submitted to the lab. To the contrary, the statement of Mr. Mohrmann indicates that there was no blood on the sheet. It is difficult to imagine how Michelle's blood could have made its way

⁵ There is no evidence that Giarratano changed his clothes, and, of course, he never did anything to hide what he believed was his participation in the crime. In fact, he turned the boots over to the police while in jail when he discovered the blood.

to Giarratano's boot without even soiling the sheet on which her body was found.

In sum, the three pieces of evidence which have been considered here jointly -- (1) views of the crime scene, including bloody shoeprints, (2) the drops of blood on Giarratano's boot, and (3) Michelle Kline's blood type -- have no probative value, individually or collectively. They only serve to create the false impression that Giarratano made the bloody shoeprints, had one victim's blood on his boot, and therefore, committed the crime. This house of cards built by the prosecution was clearly unstable at the time of trial. As a result of information obtained since then, it has now collapsed. The fact that Giarratano's boots could not have made the prints, the fact that the shoeprints may not have been part of the crime scene, the fact that Giarratano was observed to have no blood on his person or clothes at the time of the arrest, and the fact that there is no evidence of blood on the sheet where Michelle lay, all render these three pieces of evidence meaningless.

Strangulation

A. Two items of evidence were introduced by the prosecution at trial regarding the strangulation death of Michelle Kline:

-- Giarratano's final confession, in which he states that he strangled Michelle with his hands, App. 641-46; and

-- The report and testimony of Dr. Presswalla, the pathologist who performed the autopsy on Michelle, which indicated that she had

been strangled either manually or by partial ligature. App. 351, 660-65.

B. Dr. Presswalla's report and testimony seemingly corroborated Giarratano's confession. However, Dr. Presswalla's original conclusion, dated February 7, 1979, was that Michelle had been strangled by partial ligature (an object other than the hands); he never mentioned a manual strangulation. App. 660. By February 26, 1979, Dr. Presswalla changed his conclusion to include manual strangulation, in addition to strangulation by ligature, as a possible cause of death. App. 662. There were no apparent medical reasons for Dr. Presswalla's supplemental shift in diagnosis. The only relevant intervening event was Giarratano's final confession, which indicated that he had strangled Michelle Kline with his hands.

C. In 1989, Dr. John Smialek, Chief Medical Examiner for the State of Maryland, reviewed the documents describing Michelle Kline's death and concluded that "the pattern of injuries on the face and neck, both externally and internally is most consistent . . . with strangulation by a broad object such as a forearm." App. 756. Smialek went on to say that in addition to these observations, he noted that the classic signs of manual strangulation -- including "discrete bruising produced by the assailant's fingers and fingernail marks" -- were absent from Michelle's body. Id. This conclusion is consistent with Dr. Presswalla's original conclusion, and of course, inconsistent with Giarratano's confession.

D. The Attorney General asserts that Dr. Presswalla's two differing conclusions were not in conflict. Br. AG 22. The first conclusion was on page one of his report, which was completed on February 7, App. 660; the second was on page three, which contains the case summary, and was completed on February 26. App. 662. She claims that page three does not contradict page one, but is merely Dr. Presswalla's "opinion restated with the basis for his conclusion." Br. AG 22. She discounts the significance of the differing dates on page one and page three by stating that page three was intended to incorporate lab results which came out five days earlier. Br. AG 23. She points to these lab results as the relevant intervening event, rather than the confession. She also states that Dr. Presswalla had no knowledge of Giarratano or of his confessions, id., and therefore, would not have changed his conclusion in light of those confessions. Finally, she states that the necklace markings on the victim are consistent with a manual strangulation. On the basis of this analysis, the Attorney General argues that Giarratano's confession is not inconsistent with the established cause of death.

E. The assertion that Dr. Presswalla's conclusion did not change from page one to page three of his report blinks at reality. Page one says strangulation by partial ligature. Page three says strangulation by partial ligature or manually. These are manifestly different conclusions, with significant consequences. Page three clearly allows for a very different theory as to the cause of death.

The Attorney General attempts to explain away the difference by pointing to lab results which came out in the interim and were incorporated into page three. However, the lab report to which she refers is completely irrelevant to the strangulation issue, except perhaps that the negative finding with regard to Michelle's fingernails would not support a finding of manual strangulation. See Supp. App. 8-9. The rest of the report involves such matters as blood typing, which is clearly irrelevant to the issue. Thus, the only relevant event which occurred during this three week period -- which provides the only explanation for the change in conclusion -- is Giarratano's final confession to the crime. This confession was inconsistent with the physical evidence of the strangulation until February 26, when Dr. Presswalla changed his conclusion to accommodate Giarratano's confession. At a minimum, this scenario indicates that Dr. Presswalla changed the conclusion in his report in response to a suggestion by the police.

The Attorney General's belief that Dr. Presswalla had no knowledge of Giarratano's confession is untenable. Indeed, it is difficult to imagine that Dr. Presswalla and the police were not in communication. The routine, and necessary, practice is the free exchange of information between the police and the medical examiner. If that exchange did not occur here, it would be very unusual.

Finally, the Attorney General's assertion that the necklace markings are consistent with manual strangulation is made without any evidentiary support or reference to any expert opinion. The

Attorney General simply ignores the affidavit of Dr. Smialek which establishes that those markings are not consistent with such a conclusion.

Rape

A. The prosecution presented the following evidence at trial with regard to the alleged rape of Michelle Kline:

-- Dr. Presswalla's autopsy report documenting injury to the vaginal area as well as intact spermatozoa in the vagina and on the cervix, App. 351, 354;

-- The presence of Michelle's underwear and pants on the floor near her body, App. 668;⁶

-- The testimony of a Florida police officer, Wells, who maintained that Giarratano had orally confessed to the rape before returning to Norfolk, App. 442-43; and

-- Giarratano's final confession, taken by Norfolk officers, in which he claimed to have raped Michelle Kline. App. 643.

B. The physical evidence does not connect Giarratano to the rape of Michelle Kline. Moreover, the reported confessions are unreliable.

None of the physical evidence at the scene links Giarratano in any way to the rape of Michelle Kline. Seminal fluid can often yield the blood type of the rapist, but there was no seminal fluid recovered here. App. 413-14. The only other evidence which in any

⁶ The odor of urine was detected by the laboratory in each; however, no blood or semen were found in either.

way connected Giarratano to the rape was a pubic hair, similar to his, found on Michelle Kline's body. App. 410-11. However, this hair was not reliable evidence connecting Giarratano to the rape. See pages 19-21, infra. No other crime scene evidence connected him to the rape.

In addition, Giarratano's confessions have been shown to be generally inconsistent and unreliable. Giarratano did not even mention a rape until the last confession, after he had heard detailed information about the crime from the Norfolk investigators. The Jacksonville officer's testimony in response to the prosecutor's leading question at trial that Giarratano also confessed to the rape in an earlier confession is highly suspect, as the officer did not record this information anywhere even though four written statements were taken from Giarratano by the Jacksonville police, nor did he inform Officer Mooneyham about it, nor did he relate it on direct examination. It seems highly unlikely in a state (Florida) which imposes the death penalty, or for that matter in any state, that a police officer would fail to record a confession to a rape, which would either bring the murder within the scope of the capital murder statute, or at the least, serve as an aggravating circumstance. In addition, once Giarratano reached Central State Hospital, he again denied any rape.

C. Since trial, certain evidence has come to light which raises doubt about whether an actual rape occurred in the course of Michelle Kline's murder. In Virginia, there must be penetration by the assailant's penis for a rape to occur. Here, the only

unequivocal evidence of penile penetration -- the presence of spermatozoa -- is as consistent with intercourse occurring many hours before death as with it occurring in the course of the homicide. Forensic expert Pat Wojtkiewicz has explained that the physical evidence here -- the presence of spermatozoa, but the absence of semen, in Michelle's vagina -- suggests that intercourse, consensual or otherwise, may have taken place up to 72 hours preceding death, and, therefore, may be unrelated to the murder. App. 759. He has further explained that the presence of urine on Michelle's underwear and trousers strongly suggests that she was wearing them, and voided, at the time of death. App. 759-60. These facts lead Mr. Wojtkiewicz to posit a reasonable alternative inference from the evidence -- that her clothing was removed in order to simulate a rape-homicide. App. 760. Taken together, these facts raise reasonable doubt about whether Michelle Kline was raped in the course of her murder.

D. The Attorney General maintains that a rape did occur and that the circumstances of Michelle's body and clothing confirm Giarratano's admission that he committed the act. She acknowledges Mr. Wojtkiewicz' statement that spermatozoa could have remained intact for several days, but characterizes the possibility as "remote." Br. AG 20-21. She suggests alternative explanations for the urine on Michelle's underclothes, such as voiding brought on

by fear during the attack and the possibility that the attacker removed her wet clothing before raping her. Br. AG 21.⁷

E. The Attorney General has either overstated or mischaracterized the evidence of rape in this case. The report of Mr. Wojtkiewicz indicates that the possibility that spermatozoa could remain intact for 72 hours was not "remote," but that "there is actually some support for this possibility...." App. 759.

The Attorney General's contention that the physical evidence in the case confirms the confession and precludes any possibility other than rape is unsupported by reference to actual facts. She makes sweeping statements and absolute conclusions without any factual support. She does not explain why the evidence confirms the confession; she does not explain why a rape is the only conclusion the evidence supports. She does not explain how a police officer would omit reference to a rape admitted by a murder suspect. She does not explain why a suspect who is more than willing to confess, omits any reference to a rape until it is suggested by the police, then quickly abandons that idea once the police are gone, has provided a trustworthy admission as to the rape.

Murder Weapon

⁷ In another setting, the Attorney General has publicly stated that Giarratano must have been the killer because of the serene look on the victims' faces. That suggestion, of course, is directly contrary to her suggestion in court that Michelle voided out of fear.

A. The murder weapon used to kill Barbara Kline, presumably a knife, was never recovered. Investigator Mears testified at trial, at the suggestion of the Commonwealth's Attorney, that it was not recovered because the dumpster in which Giarratano said he had thrown it had been emptied prior to the arrival of the police on the scene. App. 390.

B. This evidence is not probative of Giarratano's guilt. The police testimony is a clear misstatement of the confession and not a viable explanation for why the weapon was not recovered. Giarratano confessed to having thrown the knife into the backyard, not in the dumpster. App. 644. It was never found in the backyard, even though the yard is small and largely barren. The confession is once again, inconsistent with the physical evidence of the crime. It is also another example of Giarratano's lack of knowledge of those pieces of the puzzle that the actual murderer should know and would be expected to divulge accurately in a voluntary confession.

C. No new evidence was discovered in connection with the location of the knife used to kill Barbara Kline.

D. The Attorney General explains the police testimony regarding the murder weapon as "confusion" on the prosecutor's part, Br. AG 24, and submits the following excerpt from the trial transcript (direct examination of Investigator Mears by Mr. Lawless, the prosecutor):

Q. He mentioned in this statement throwing the knife and some keys in the dumpster. Did you-all have occasion to check several of the dumpsters in the area?

A. Yes. We didn't locate any keys or knife.

Q. Had the dumpsters been emptied that morning?

A. Yes, sir.

App. 390.

The Attorney General characterizes the exchange as the product of the prosecutor's confusion, not as an attempt to misrepresent Giarratano's statement as to the location of the weapon. She points out, as well, that Giarratano's statement had just been read to the court by Investigator Mears. She claims that the inability of the police to recover the knife does not constitute a discrepancy in the confession. Id.

E. The prosecutor's "confusion" as to Giarratano's statement regarding the location of the murder weapon is not as insignificant as the Attorney General claims, since it was quickly confirmed by the investigator's similar "confusion." It certainly tests the limits of credulity to believe that neither the prosecutor nor the chief investigator (who took Giarratano's confession) would have had the facts straight as to the failure to locate the murder weapon.⁸ But whether the misrepresentation was intentional or not, the ultimate significance of the exchange remains clear: the Commonwealth offered no legitimate explanation for the failure to

⁸ While in a case in which defense counsel was performing effectively and the trier of fact was not willing to simply ignore discrepancies in the evidence, such an error might be thought to have had little impact in light of the reading of the confession itself, it is clear that Giarratano's counsel was largely oblivious to inconsistencies in the evidence and the court was not overly troubled by them. Therefore, it cannot be assumed here that this misrepresentation was of no moment.

recover the murder weapon. Despite the Attorney General's rationalization, it is clear that once again, Giarratano's confession was inconsistent with the physical evidence as to a critical fact.

In addition, Giarratano's confession says the weapon was a kitchen knife approximately seven (7) inches long, App. 645, yet none of the stab wounds inflicted on Barbara Kline were deeper than 3 1/2 inches. One would expect a seven inch knife to have inflicted wounds at least twice as deep. Again, Giarratano's confession was inconsistent with the physical evidence.

Hair

A. At trial, one pubic hair was introduced into evidence which was consistent with Giarratano's pubic hair. App. 410-11.

B. This piece of evidence is simply not probative of Giarratano's guilt. The hair was one of 34 human hairs found in the apartment and the only one found to be "consistent" with Giarratano. App. 667-69. Most of the hairs were found to be inconsistent with Giarratano and with the head hairs of the victims:⁹

-- Ten of the hairs were found near Barbara Kline's purse and all of those were hers. App. 668.

⁹ Incredibly, no pubic hair samples of either of the victims was submitted to the lab. It is difficult to imagine any competent investigator who was genuinely interested in determining the identity of the killer not taking pubic hair samples from a rape-homicide victim when a number of hairs had been found at the scene.

-- Five of the hairs were recovered from the afghan over Michelle Kline's body, none of which were consistent with Giarratano's. Id. One pubic hair was found near Michelle's leg and that was not consistent with Giarratano's. Id. Twelve head hairs were found at Michelle's right hand and head area, and those were consistent with hers. Id. Two pubic hairs were found on her trousers and one in or on her panties, none of which were consistent with Giarratano's. Id. Three pubic hairs were found on Michelle Kline's left hand, stomach, and pubic area, only one of which was consistent with Giarratano's and two of which were not. Id.

We know only that the hair was "consistent" with Giarratano's hair, not that it was his hair, or even that it was likely his hair. Prior to the advent of DNA testing, hairs could not be matched like fingerprints. Rather, it was possible only to determine that a found hair and a standard sample were similar in various observable characteristics. Finding one hair at the crime scene which is consistent with Giarratano's hair is thus of little significance, particularly in light of the fact that he had lived in the apartment. In such circumstances, it is common for the hair of the residents to appear anywhere. App. 758 (report of Pat Wojtkiewicz, forensic evidence examiner for the State of Louisiana).

C. Other than the opinion of Mr. Wojtkiewicz concerning the insignificance of the hair evidence, there is no new evidence concerning the hair found at the crime scene.

D. The Commonwealth has never responded to Giarratano's analysis of this piece of evidence.

Fingerprints

A. The police lifted twenty-one (21) fingerprints from the Klines' apartment. App. 356. One was identified as belonging to Giarratano. App. 366-68. This print was found on the closet door in the northeast bedroom, App. 367 -- a location unconnected to the crime, as Michelle Kline's body was found in the southeast bedroom and Barbara Kline's body was found in the bathroom. No other prints were identified as Giarratano's.

B. The fingerprint is not probative of Giarratano's guilt because he lived in the apartment. One would expect to find his fingerprints all over the apartment.

C. No new evidence was discovered in connection with the fingerprints.

D. The Commonwealth has noted this evidence as evidence of guilt, see Opp. Cert. at 6, but has never responded to Giarratano's analysis of it as non-incriminating.

Apartment Keys

A. Introduced as a part of Giarratano's confession was his statement that he locked the doors on his way out of the Klines' apartment and threw the keys in a nearby dumpster. App. 645. Police testified that the keys were never recovered because the

dumpster where Giarratano had thrown the keys had already been emptied. App. 390.

B. & C. This evidence is inconsistent with new evidence discovered after trial -- that the Klines' landlord found the apartment doors unlocked when he discovered the bodies, Supp. App. 2 -- and is yet another example of the inconsistency of Giarratano's confessions with the physical evidence at the scene.

D. The Commonwealth has not commented on this aspect of the evidence.

Crime Scene

A. At trial the prosecution entered crime scene photographs showing Barbara Kline's body face up on the bathroom floor with her head under the sink and her feet toward the bathtub. App. 647-49. Blood was splattered on the wall behind the sink and a large pool of blood coming from her right side was on the floor in front of her body. App. 647.

B. & C. The crime scene photographs and autopsy report were sent to Pat Wojtkiewicz, Supervisor of Serology and Firearms, North Louisiana Criminalistics Laboratory. Mr. Wojtkiewicz has done extensive work for the State of Louisiana in the area of blood stain/pattern interpretation. On the basis of the blood stain patterns on the bathroom wall and the shape of the stab wounds, Mr. Wojtkiewicz concluded that Barbara Kline was assaulted from behind by a right-handed person:

On the bathroom wall above the victim's head (Barbara Kline) there appear to be bloodstain patterns consistent

with blood spurting against the wall. That would mean that her neck wounds would at one time [have] been toward the wall, indicating that [her body] would have been [found] face down (e.g., on her hands and knees).

Examination of the photographs of the stab wounds (Barbara Kline) and the autopsy report (Dr. Presswalla) indicates that the sharp edge of the knife (or object which caused the wounds) was upward. This is typical of a right-handed person assaulting the victim from behind.

App. 772.

In one respect, the crime scene photographs are inconsistent with Mr. Wojtkiewicz's analysis: Barbara Kline's body is face up, not face down, on the bathroom floor. App. 647. However, the crime scene photographs do not appear to reflect accurately the position in which Barbara Kline's body was found. Two eyewitnesses -- Peter Mohrmann and Duane Moore, both of whom were brought in to identify the bodies -- stated that when they first observed Barbara Kline's body, it was face down in a fetal position. App. 763; Supp. App. 4.

The significance of Mr. Wojtkiewicz's analysis becomes apparent in light of one other area of new evidence. Dr. Jeffrey Barth, a neuropsychologist at the University of Virginia, evaluated Giarratano's neurological functioning, App. 794-97, and made two findings relevant here. First, Dr. Barth determined that Giarratano is left-handed. Second, he determined that Giarratano's use of his right hand is further compromised by neurological impairment: "Deficits were noted in the right upper extremity motor speed and coordination in relation to the left (dominant), [even though] his motor strength appeared essentially intact bilaterally." App. 796. Dr. Barth was unable to determine

the cause for this deficit, unlike another deficit Giarratano displayed in the right arm/hand -- a deficit in sensory functioning -- which Dr. Barth thought might have been caused by Giarratano's laceration of his right wrist in the 1983 (post-trial) suicide attempt. App. 796.¹⁰ In the absence of data indicating when and why Giarratano began to have the deficit in motor speed and coordination of his right arm, it is fair to assume that the deficit existed at the time of the crime. There is no identifiable injury or illness which occurred after the crime that could explain this deficit, unlike the post-crime injury which might explain the sensory deficit.

Obviously, if Giarratano was left-handed and his right hand was even more poorly coordinated than would be expected in left-handed people, there is little likelihood that he would have assaulted Barbara Kline with his right hand. Under Pat Wojtkiewicz's analysis of the evidence, therefore, Giarratano was very likely not the killer.

D. The Attorney General has not disputed the theory of the assault advanced by Pat Wojtkiewicz. See Br. AG 17-20. What she disputes is whether Giarratano had any neurological deficit in his right arm at the time of the crime. Id. at 19. The Attorney General argues that Giarratano had no such deficit at the time of

¹⁰ Whether the 1983 suicide attempt was the source of this deficit is clouded, however, by the lack of neurological data concerning Giarratano following his 1973 suicide attempt when he was fifteen years old. In that attempt, he also lacerated his right wrist. App. 35. Thus, the sensory deficit in his right arm/hand could have pre-dated or post-dated the crime.

the crime because Dr. Barth suggested that the sensory deficit in Giarratano's right hand/arm was attributable to his suicide attempt in 1983. Id. She then argues that Giarratano has ignored his own expert's (Barth's) evaluation and that such a "remarkably selective reading of his own 1986 evaluation provides no support for his claim." Id.

E. As our explanation of Dr. Barth's findings has revealed, however, the Attorney General's concerns are misplaced. Dr. Barth did not determine that Giarratano's right-sided motor speed and coordination deficits were probably attributable to the 1983 suicide attempt. He determined only that the right-sided sensory deficits were probably caused by this incident. By the very terms of Dr. Barth's report, sensory deficits are different from motor speed and coordination deficits. Simple lay logic tells us the same thing. Dr. Barth offered no hypothesis for the origin of the motor speed and coordination deficits, despite his awareness that the wrist laceration post-dated the crime. Accordingly, it is reasonable to assume -- in the absence of any contrary data -- that Giarratano's motor speed and coordination deficits pre-dated the crime. Doing so is not giving a "remarkably selective" reading to Dr. Barth's report.

Driver's License

A driver's license which did not belong to Giarratano was found at the scene and was shown to Giarratano and to Duane Moore by the Norfolk officers in the course of their investigation.

Supp. App. 5-6. The license was not admitted into evidence and apparently was not provided to trial counsel. The Attorney General's office has admitted in an interview on German television that such a license was found and is in its possession but will neither admit nor deny to Giarratano's counsel that it has the license. When approached about the license, the Attorney General responded that it was not necessary to turn it over to the defense, because the Commonwealth had "cleared" the person to whom it belonged. There has been no indication as to what kind of investigation was performed, or for what reasons the owner of the license was eliminated as a suspect in the murders.

Clearly, this piece of information constitutes exculpatory evidence which should have been turned over to the defense long ago. Its existence points to the possibility of another suspect and the defense was not given the opportunity to conduct its own investigation into this possibility, but has had to settle for the Commonwealth's word that the owner had nothing to do with the crime.

Other Suspects

In the course of their investigation, counsel for Giarratano developed a theory that the murders were committed by another person who had both the opportunity to commit the crime as well as a history of violence against and sexual abuse of women, including young women such as Michelle Kline. App. 774-83 (submitted under seal to governor). Counsel attempted to file an affidavit under

seal in the United States District Court in order to protect their sources of information, but were denied this opportunity by the court. As a result, this aspect of the case has never been fully developed or explored.

Fraud re: Pre-sentence report

A. The pre-sentence report prepared by the Norfolk probation officer, John Jacknik, portrays Giarratano as a violent young man who posed a danger to those around him and who lied to counselors and mental health professionals regarding his family during his childhood and teenage years. App. 606-614. Much of the background information on petitioner was supplied by Florida probation officer Jarilyn O'Hara, who received her information from Giarratano's mother, Carol Parise. App. 799-805. Ms. Parise characterized her son as a problem child who suffered from depression because he was obese. App. 803-04. She stated that Joe was violent and stole from her. Id. She cited numerous instances to support her contention that, despite her best efforts as a mother, Giarratano was frequently in trouble with the law. Id. These statements were bolstered by letters solicited by Ms. Parise from friends and acquaintances attesting to her dedication and skills as a mother. App. 616, 807-814.

B. & C. The information relied upon by Mr. Jacknik in writing the pre-sentence report is in direct conflict with statements from Giarratano's neighbors and friends that he was a caring and non-violent child who was severely abused by his

parents. App. 57-69. Additionally, what Mr. Jacknik had requested from Ms. Parise was letters from friends and acquaintances providing background information about Giarratano, not letters about herself.

It has been discovered since Giarratano's sentencing that the bulk of the information supplied by Ms. Parise, which Mr. Jacknik relied upon in writing his pre-sentence report, was untrue or distorted. Investigation into the sources of that information has revealed the following:

-- Giarratano's mother, the primary source of background information used in the pre-sentence report, was, at the time, heavily involved in the Ward/Von Eberstein/Lehder drug ring, one of the most extensive drug rings in the country. Supp. App. 10-11.

-- Mr. Barry Zisser, a Florida attorney, who wrote to Mr. Jacknik attesting to Carol Parise's dedication as a mother, App. 807-08, now reveals that he had been asked to write this letter by Carol Parise because she claimed that Giarratano was spreading rumors about her; he was not aware that information had been requested regarding Giarratano's background. Supp. App. 10-11. He also indicates that he did not know of Ms. Parise's involvement in the Ward/Von Eberstein/Lehder drug ring at the time, although he is aware of that fact now. Id.

-- Mr. and Mrs. Glen Quick wrote on Ms. Parise's behalf, praising her as a model mother. App. 809. Their letter was written on Florida Department of Commerce letterhead. Id.

Investigation since the letter was written reveals that this department has no record of employment for either of the Quicks. Supp. App. 12-14.

-- Bill Freeman wrote on behalf of Ms. Parise on letterhead which reads "Bill Freeman's Sunshine Company." App. 810. Later, a William Nicholas Freeman was indicted as a member of the Ward/Von Eberstein/Lehder drug ring and the Sunshine Company was listed as a forfeiture in that indictment. Supp. App. 15-35. Mr. Freeman is now imprisoned in Lompoc Prison in California.

-- A letter of support was received from a Linda Lewis, App. 813-14, who now claims not to have written the letter. She was married at the time to a Richard Lewis, whose gun shop was listed as a source of most of the weapons forfeited in the same drug ring indictment. Ms. Lewis was acquainted with Ms. Parise through her husband, but says that she did not write a letter of support for her, and that if such a letter exists, someone must have used her name without her permission. See Supp. App. 36-37. (It is worth noting that in both this letter and in Ms. Parise's letter to Mr. Jacknik, the word sincerely is misspelled "sincerly.") Ms. Lewis revealed the above information to a private investigator, but when asked to sign an affidavit to that effect, she refused, stating that she "did not want to get involved with those people." Id.

It is clear from the above evidence that the bulk of the background information relied upon in the pre-sentence report was carefully engineered by Carol Parise to discredit her son. Ms. Parise lied about Giarratano's propensity for violence and about

his family situation as a child and as a teenager. This information was relied upon by the probation officer and by mental health practitioners who evaluated Giarratano. Letters of support to bolster Ms. Parise's claims came from non-existent or criminal sources. Ms. Parise herself was heavily involved in criminal activity. At best, the information relied upon in the presentence report is highly suspect and from easily impeachable sources; at worst it is absolutely false.

In addition, further investigation has revealed that specific information about Giarratano's allegedly violent past provided to Dr. Miller Ryans by Carole Parise was false. Ms. Parise told Dr. Ryans of an incident in a State hospital in which her son had become extremely violent. The relevant hospital records, however, demonstrate that no such incident occurred. Dr. Ryans, of course, provided the expert testimony that Giarratano was a future danger to society.

D. When presented with the fraudulent nature of the information upon which the trial court relied, the Commonwealth responded that any allegation of fraud is "preposterous." Br. AG 29. The Attorney General contended that it was already known that Carol Parise was not a model mother through her own admissions, and that there was no reliance upon her statements to show Giarratano's violent nature. Id. at 30. She maintained that mention of the supporting letters in the pre-sentence report is minimal and that the probation officer noted that they were lacking in information about Giarratano, id. at 29; she further

contends that any notion that the letters had "any effect on the pre-sentence report or sentencing determination is preposterous." Id. at 28-29. Finally, the Commonwealth contends that Giarratano's criminal history was well-documented through his own statements as well as through court reports. Id. at 30.

E. Clearly, it is not "preposterous" to suggest that fraud is present where a death sentence is based in part on a pre-sentence report which relies on false statements and fraudulent letters of support. The Attorney General's argument that this false information had "no effect" on the pre-sentence report or sentencing determination is predicated on the assumption that a statutorily mandated report is generally ignored by judges before imposing sentence. One must assume that any information in a pre-sentence report is intended to and does have an effect on the outcome of the case. That is the purpose of such a report. The letters of support regarding Carol Parise are summarized in the report. We must assume that the judge read and was influenced by their conclusions, which have been shown to be false or fraudulently obtained. Even though these letters provided little direct information about Giarratano, they bolstered the egregiously false impression created by Ms. Parise -- that her son was incorrigible, violent, and self-centered, and that her occasional abuse of him was the result of her being stretched to the limit, not of her malice or misdirected anger. And finally, one must ask: if Carol Parise's true character was "well known" in 1979 as the Commonwealth claims, why were these letters

portraying her as a model mother included in the report with no explanation or qualification?

Ms. Parise's statements about her son and other background information supplied by her are included in the report. We must assume that the judge read and was influenced by this information. Ms. Parise has since been shown to be heavily involved in criminal activity and a highly incredible source of information. Interestingly, the Commonwealth does not appear to dispute the fraudulent nature of the information received, only the impact that it had on the court.

The prediction of "future dangerousness"

A. In his testimony in State habeas corpus proceedings on September 25, 1981, Dr. Ryans testified that his prediction at trial that Giarratano was a future danger was only "a prediction for right now" and not "a prediction for the future."

B. Thus, even at the time the finding of future dangerousness was made, the expert upon whose testimony that conclusion was based knew that his prediction was not one of "future" conduct. Giarratano was sentenced to die for being a "future danger" only at the immediate point in time at which the prediction was made. Giarratano's history since he was sentenced demonstrates how appropriate that time limitation was, for he has neither engaged in dangerous behavior nor posed a danger to anyone since his trial.

Significantly, even Dr. Ryans' opinion "for right now" that Giarratano would be dangerous in the future could have been generated only by focusing myopically on Giarratano's verbal threats rather than on his overall behavior. Dr. Ryans based his opinion that Giarratano was a future danger primarily on his suicidal behaviors and threats of violence in connection with those behaviors. As Dr. Ryans testified, "Further, I would like to bring up the fact that I think that Mr. Giarratano might take his own life possibly at any time, and that has to be put into the equation as well." It was this suicidal disposition, coupled with Giarratano's threats, that lead Dr. Ryans to hypothesize that Giarratano posed a threat of future violence: "[He] told me that he wanted to kill himself and if one of my aides tried to stop him, he would make sure he would take the aide with him, that is, kill the aide."

Dr. Ryans neglected to tell the court, however, that he had concrete evidence that Mr. Giarratano's threat to kill anyone who tried to prevent him from committing suicide had been unmasked as idle talk. Five days after Mr. Giarratano made his threatening statement, he attempted to hang himself. He was stopped by aides. Mr. Giarratano made no effort to harm those aides or anyone else during his hospitalization at Central State or any time thereafter.

Thus, Giarratano's threats were not real; his subsequent behaviors did not tend to establish that he was likely to be dangerous in the future. To the contrary, they established that

he was not likely to be dangerous in the future. Dr. Ryans' opinion, and the court's finding of future dangerousness based upon it, were fatally flawed.

Respectfully submitted,

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