

PETITION FOR EXECUTIVE CLEMENCY OF

JOSEPH JOHN SAVINO

INTRODUCTION

Joseph John Savino was convicted and sentenced to death for the killing of his lover, a murder which was the culmination of controlling and abusive behavior by his domestic partner. Savino confessed on the day of his arrest and pled guilty to the capital murder charge with no promise as to his sentence. He was sentenced to death on the basis of future dangerousness alone. Savino was sentenced to death based on inaccurate information regarding McWaters' death. Viewed as an act of domestic violence -- not as the robbery/murder charged by the Commonwealth -- the offense here merits clemency and the imposition of a life sentence.

THE CASE IN THE COURTS

Petitioner was indicted for capital murder on December 2, 1988, he pled guilty on April 24, 1989, and he was sentenced to death on July 20, 1989. His conviction and sentence were affirmed by the Virginia Supreme Court. Savino v. Commonwealth, 391 S.E.2d 276 (Va.), cert. denied, 498 U.S. 882 (1990).

Mr. Savino filed a habeas corpus petition in the trial court, which was denied on June 5, 1992, after an evidentiary hearing. Savino sought to appeal to the Virginia Supreme Court, which refused to grant the appeal. Savino then

filed his petition for writ of habeas corpus in federal court. The district court granted appellee's motion to dismiss. Savino filed a motion pursuant to Rule 59(e), F.R.C.P., the district court altered its opinion and denied the motion, and Savino was granted permission to appeal. The Circuit Court affirmed on April 30, 1996.

Savino filed a petition for writ of certiorari with the United States Supreme Court, and that petition is now pending. Savino v. Garraghty, No. 96-5164 (U.S. filed July 15, 1996).

What about the successor???

GROUND FOR CLEMENCY

Joe Savino was sentenced to death on the basis of inaccurate information regarding the circumstances of Tom McWaters' death. Two important witnesses to these circumstances, the Reverend Richard Boyce (who testified in a limited fashion at sentencing) and G.C. Martin (Joe Savino's Parole Officer, who prepared the pre-sentence investigation report for the judge) have now provided important new evidence regarding these circumstances, evidence which was not provided before because of its supposed sensitive nature. The new evidence serves to eliminate the sole aggravating circumstance found by the sentencer ("future dangerousness") and provides significant new mitigating evidence.

This new evidence reveals that Joe and Tom were involved in a homosexual relationship, that Tom was in control of that relationship, and that Tom was jealous of, abused, and threatened Joe. Tom was not, as portrayed at

sentencing, a caring and giving person who offered down-on-his-luck Joe a home and security, but a person who took advantage of Joe sexually by threatening to send him to prison unless Joe "performed."¹ While the newly revealed circumstances in toto do not completely excuse Joe's actions, they nevertheless cast his degree of culpability in an entirely different light and reveal that it is Joe's sexual orientation, rather than his conduct, which placed him on death row.

This new information did not come to light sooner for two reasons. First, Reverend Richard Boyce did not testify at trial to these circumstances because he was precluded from doing so by Virginia law. Second, the community where this offense occurred is a small one which does not openly discuss, but instead condemns and negatively stereotypes, male homosexual relationships. It is only because Mr. Savino is facing the imminent and real threat of execution that some are now willing to admit the seamy side of Tom McWaters.

THE RELATIONSHIP AND THE CRIME

Savino and his lover, Tom McWaters, first met in New York in 1980 while Savino was on parole. Savino was 20 and McWaters was 53. Savino was returned to prison in 1982 and remained there for six years. During that time, McWaters visited with and telephoned Savino in the prison, sent him numerous letters, and gave him money. Savino v. Commonwealth, 391 S.E.2d at 277-78. Although they were not yet lovers, McWaters pressed Savino to live with him

¹He raped Joe, in other words.

when he was released. While Savino was in prison, McWaters moved to Bedford County, Virginia. They exchanged many letters, which reflected their relationship as lovers. McWaters detailed a vision of their future relationship as one of sharing and domesticity, including joint ownership of the house and farm McWaters had purchased for them. The letters from McWaters to Savino were like those between fiancées. In February, 1988, Savino moved to the farm upon his release from prison, and he and McWaters lived together as lovers. 391 S.E.2d at 278. Within this domestic partnership, Savino had the authority to sign McWaters' checks and regularly used McWaters' car. On February 29, 1989, Savino and McWaters quarrelled over Savino's drug use and cashing McWaters' checks to purchase drugs. McWaters demanded sex, Savino refused, and McWaters announced he was through with Savino. Shortly thereafter, Savino bludgeoned McWaters' skull with a hammer as he slept and then stabbed him several times when it appeared he was still breathing. Savino left the house, returning later that evening to remove some of his possessions and some property from the house.

A CASE ABOUT DOMESTIC VIOLENCE

Reverend Boyce, who was Tom McWaters' minister, testified at trial, but the Court would not allow him to testify regarding what Tom McWaters had said to him. The Court ruled that it was hearsay and inadmissible.² Boyce knew first-hand of the

²The Court ruled that "I would not in any event allow any statements made by Mr. McWaters to be disclosed." R. 628.

relationship (and its dynamics) between Joe and Tom, but was foreclosed from disclosing the following pertinent evidence:

I am Reverend Richard Boyce of the First Presbyterian Church in Belmont, North Carolina. I was formerly at the Presbyterian Church in Bedford, Virginia. During my tenure there, I knew Thomas McWaters and Joseph Savino -- Tom as a member, and Joe as a visitor, in our church.

Based upon my knowledge of the relationship between Tom and Joe, Tom's death was not under circumstances which justify a capital conviction. I do not now -- and never did -- believe the death penalty was the appropriate sentence in this case.

While Tom and Joe were living on the farm in Bedford, I was repeatedly called out by Tom to offer guidance and counsel in their relationship. I would describe their relationship as deeply involved, intense and volatile. It was a complex relationship that had lasted over many years and many varied circumstances.

While Tom did not share with me in explicit terms his sexual relationship with Joe, I certainly perceived the situation as being a domestic one, and treated it as such.

Tom sought my advice regarding his relationship with Joe several times. He expressed to me that he feared the relationship was not going the way he believed it should be going. Tom also said that his efforts to watch over Joe and direct him were simply driving Joe further and further away. Tom could be an extremely dominating and determined man, and he knew this about himself. He had tremendous difficulty controlling these qualities, especially when it came to Joe.

I cannot fathom how this case was not treated as a classic case of domestic violence. If this had been a man and his wife, I have no doubt that the death penalty would not be an issue now. Knowing the two of them as I did, it is patently absurd to me that this was a drug-related homicide in the course of a robbery. This was yet another one of Joe and Tom's many similar blow-ups that tragically was not resolved before it became violent.

Although I was under the impression that this case was

going to be presented and defended as a domestic violence case, it seems to me that this was never honestly addressed or presented by the Commonwealth or defense counsel. The presentation of Tom McWaters as solely a kind, gentle, good Samaritan who gave without any thought of receiving is inaccurate, because Tom was very controlling and domineering with Joe. And the presentation of Joseph Savino as nothing more than a drug-taking ex-con who abused the kindnesses of Mr. McWaters is equally unfair and inaccurate.

See Attachment 1, hereto, Affidavit of Reverend Richard Boyce (emphasis added).³

G.C. Martin, Joe Savino's Parole Officer who prepared for the sentencing court a pre-sentence report, now states as follows:

I was Joseph Savino's parole officer in Bedford, Virginia from February of 1988 until September of 1989 when the case was close, although my supervision ended on November 30, 1988.

Joe's parole was successfully transferred from New York to Virginia primarily because of the lobbying efforts of Thomas McWaters. As early as 1986, I was contacted by Mr. McWaters, who was arranging to have Joe paroled to him upon release. Mr. McWaters was never truthful with me regarding his reasons for seeking to have Joe paroled to him, nor was he truthful about his intentions regarding the home and job situation that he would be providing for Joe. McWaters set in motion the chain of events that resulted in his own death.

I always suspected that there was a sexual relationship between Tom McWaters and Joe Savino. When I received the first letter regarding a possible parole transfer for Joe from New York to Virginia, I went out to

³Dr. Centor, who testified for the Commonwealth at sentencing, was offered the opportunity to consider Reverend Boyce's affidavit to determine whether it would affect the opinion Centor gave at trial regarding Petitioner's "future dangerousness," and Centor stated that no matter what he was shown he would not change his sentencing testimony. See Attachment 5, hereto, Affidavit of Deirdre M. Enright.

Balmoor, the residence on Route 43, to meet Mr. McWaters and evaluate the offer. At that time, Mr. McWaters made a remark that I thought was strange for someone who claimed to be offering simply room and board to a parolee. He picked up a framed photo of Joseph wearing only shorts and a tank top and asked me if Joe wasn't a good looking kid.

Initially, all seemed to go well between Joe and Tom out at Balmoor. Joe seemed very happy and animated about living in Bedford, farming and taking care of the animals. I talked casually with Tom as well, and he seemed happy with Joe too. As time went on, though, Joe became less and less content with Tom and Tom became more jealous and possessive of Joe.

....

Joe was completely dependent on McWaters for everything -- food, income, shelter and security. For instance, Tom McWaters' letter offering a home and a job to Joe stated that Joe would be paid \$80.00 a week. Joe did not actually wind up being paid this amount while he worked for McWaters, though. While Mr. McWaters would give Joe gifts, and sometimes even extravagant gifts -- i.e., a car, a horse, a dog -- Joe had no steady income to speak of as long as he only worked with McWaters on that farm which was what McWaters clearly was demanding.

I knew from the beginning that the farm couldn't sustain either Joe or Tom, much less both of them. Joe wanted very much to get work off the farm, and I considered it a measure of his successful parole that he was trying to branch out and get off the farm by getting a job off the farm and getting active in Roanoke. Tom, on the other hand, was clearly distressed by Joe's increasing freedom. Tom contacted me directly in an effort to enlist my assistance in imposing a curfew on Joe -- which I told him I could not, and would not, impose. I had to remind him that Joe was an adult, and Roanoke was a place Joe was allowed to go to socialize. This disturbed McWaters, and he continued to try to control Joe's behavior, and to try to use me to control Joe as well.

I did not ask Mr. McWaters whether or not his relationship with Joe was sexual because I believed that the information was not relevant to my job as his parole officer. As my relationship with Joe and Tom progressed, I became certain that their relationship

was not that of an employer to an employee and that it was also more than a friendship. I still did not inquire about it. I believe I was wrong in taking this approach because had I known the true nature of their relationship, and the depth of their problems, I would have been able to intervene in some way, to help Joe get out of the relationship.

As my notes on Joe's probation reflect, both Joe and Tom did discuss with me the arguments that they were had. Joe was trapped and smothered by Tom's demands, and each time there were problems I spoke to them about the situation. There were also many times when I spoke to Tom alone and asked him how things were going. Each time he insisted either that there was no problem, or that the problems were minor and that he could handle things. One time, I recall that Tom said something to the effect that Joe just liked to talk a lot of trash, but he could handle him fine. One thing was clear: Tom didn't want Joey to leave and he didn't need outside help unless it was of the kind that would help him to isolate Joe and keep him on the farm.

Joe and Tom did have a fight that was serious enough that Joe called me and said he was leaving and going back to New York. I told him that I could arrange for a parole transfer and he could go as soon as he wanted. At that point, I wasn't glad to see Joe leave because he was a problem, because he wasn't a problem at all. I was glad, though, because I thought he needed to branch out more, and I didn't see how he could continue to exist on that farm.

Until McWaters' death, Joe was practically what I would call an ideal parolee. He came for all his scheduled meetings, and he came often just to say hi and check in. He talked freely about many subjects and seemed open and friendly and eager to do well. He had a tremendous need for approval and love. I did not inquire into areas I suspected were potential problems -- and had I to do it over today, I would. Everyone in our office liked Joe a lot. He even brought in visiting friends to meet the office. In these ways, he was an unusual -- and promising -- parolee.

I do not believe the death penalty in this case is justified. While this case has many dynamics, it is primarily domestic in nature between two consenting adults. I have been a Probation and Parole Officer in excess of eighteen years and, as part of my job, I must

recognize domestic abuse situations and distinguish true domestic abuse cases from false ones. But for the gender of the lovers, I view this as a classic abuse case, which was allowed to continue until it became uncontrollable. I see Joe Savino as an individual who was using the relationship for financial gain and the victim Tom McWaters, who had complete control of the finances, controlled Mr. Savino to meet his sexual and emotional needs.

Bedford is a small Virginia community with conservative values and traditional views of marriage and sexual relationships. Male homosexual relationships are not accepted or even acknowledged here.

I have never believed that Joseph Savino's killing of Tom McWaters was motivated by an intent or a desire to rob Tom McWaters. I believe that Tom McWater's death was the product of Tom and Joe's stormy relationship, a relationship which Tom McWaters in large part controlled.

Until Deirdre Enright approached me and asked me, I had not told all that I knew or suspected about Tom and his relationship with Joe. I had not told it because in this community we did not speak openly about homosexual relationships between men. When Ms. Enright told me that Joe Savino will actually be executed Wednesday, July 17, 1996, for Tom's killing, I shared with her all the information I could recall about the case.

See Attachment 2, hereto, Affidavit of G.C. Martin (emphasis added).

Dr. Henry O. Gwaltney, Jr., a former employee of Central State Hospital (and colleague of the Commonwealth's expert at sentencing, Dr. Centor), would testify as follows:

I am a clinical psychologist specializing in forensic psychology. I received my doctorate in psychology from the University of Missouri in 1959, and I am licensed to practice clinical psychology in the state of Virginia. I am a member of the American Psychological Association, and I am a former member of the Virginia Psychological Association. I am a member and past-president of the Virginia Academy of Clinical Psychologists. From 1976 to 1995 I was employed as a

forensic clinical psychologist at Central State Hospital. I retired from Central State a year ago, and now practice clinical psychology as a private practitioner.

For over twenty years, I have conducted forensic examinations in Virginia, and have provided in-court testimony regarding issues of competency, sanity and future dangerousness. I have performed evaluations and have appeared in more than 30 capital murder trials in Virginia. I have also consulted in criminal post-conviction cases on issues of future dangerousness and competency to waive appellate rights prior to execution. I have assisted both prosecution and defense attorneys in these matters.

In June, 1990, I was appointed by Judge Sweeney of the Bedford County Circuit Court to evaluate Joseph Savino for competency to waive his remaining appeals. I met with Mr. Savino and reviewed materials provided by the Attorney General's Office, including the direct appeal opinion from Mr. Savino's case, the pre-trial report of defense psychiatrist Lisa Hovermale, and the pre-trial report of Commonwealth psychologist Arthur Centor. I also spoke to attorneys from the Attorney General's Office and to an attorney for Mr. Savino.

Although I believed at the time of my evaluation that Mr. Savino was competent to waive his appeals, I was deeply disturbed, based upon Mr. Savino's psychological make-up and the facts of his case, that Mr. Savino had been charged with capital murder in what was clearly a case of domestic abuse. It is very clear from evidence introduced at trial and observations of witnesses then and now that Tom McWaters and Joseph Savino were a couple whose domestic arguments escalated into a violent situation that was characteristic of neither party at that point in time. The facts of the case showed that Mr. Savino and Mr. McWaters had been involved in a homosexual relationship and Mr. Savino was being controlled by Mr. McWaters, who was jealous and manipulative. In my professional opinion, this killing was not motivated by a desire to rob but by heat of passion.

I disagree with the opinion of my former colleague, Dr. Centor, that Mr. Savino would most certainly be dangerous in the future if incarcerated. I have reviewed all of the materials reviewed by Dr. Centor, including Mr. Savino's statements, a Bedford Sheriff's

Department report, the medical examiner's report, the report of defense psychiatrist Dr. Lisa Hovermale, an FBI report of Mr. Savino's prior offenses, and arrest warrants for the forgery and uttering offenses. I have also reviewed a transcript of Dr. Centor's testimony at Mr. Savino's trial. Mr. Savino's criminal record, while lengthy, indicates that Mr. Savino apparently engaged in no overt criminal acts of physical violence before the incident which resulted in Mr. McWaters' death. It is my expert opinion that Mr. Savino would be highly unlikely to commit criminal acts of violence in the future, unless he was in a controlling relationship similar to his relationship with Mr. McWaters. I believe that while incarcerated, Mr. Savino poses a very low risk of future danger. It is clear, based on Mr. Savino's record, that he has adapted extremely well to life in the penitentiary and has apparently been a danger to no one.

See Attachment 3, hereto, Affidavit of Dr. Henry O. Gwaltney, Jr. (emphasis added).

Finally, William Sibilica, who appeared as a witness at the plea proceeding, would testify as follows:

I live in the Squire Village apartment complex at 40 Cedar Lane in New Windsor, New York.

I first met Joseph Savino when we were both incarcerated at Valhalla Westchester County jail in Valhalla, New York. I had pled guilty to arson, was sentenced to 5 to 15 years, and ending up serving six years. I was released from prison in 1988, just before I came down to visit Joe Savino and Tom McWaters. I spent almost two years in prison, and for a year, Joey and I were there together. We were both trustees and shared a cell on 1G. During that time, we were very close friends. After that, I was transferred to several different prisons and Joey went to the Bronx house, to Downstate Correctional, and then to Arthurkill, but Joey and I maintained contact by mail.

I met Tom McWaters at Valhalla, too, since he would come visit Joey and sometimes I'd have a visit at the same time and we could all talk. He also wrote me letters occasionally. Joey and Tom had been planning how they would buy a farm somewhere in the south and live there and take care of animals. Even after Joey

and I got split up and sent to different prisons, Joey wrote me letters that described the farm he and Tom had chosen. One time he even sent me a picture of their place in Bedford. He and Tom were really excited to have the chance to live in a place like that -- a nice house, lots of land, and animals.

Tom didn't want other people to know that he was gay. I don't recall Joey ever telling me why.

There was another young boy who spent a lot of time at Tom's farm named David. Joey had told me in letters while we were in prison that Tom had a young boy on the farm who did a lot of work. Joey worried that Tom was sexually abusing the boy. Tom talked a lot about the boy in his letters, and said things that made Joey think that Tom was having sex with him. Joey was not a pedophile, and he really hated stuff like that because he had been sexually abused a lot when he was a child. Joey wasn't sure what was going on, because he also thought it was possible that Tom just talked about David a lot to make Joey jealous and to make sure Joey still cared about him. When Joey actually got to Balmoor, David told him that Tom had sex with him and he wrote me about it. It made him sad and angry, and he tried to protect David from further advances by Tom. I know Tom gave David pretty expensive presents, like the white Blazer David was driving around when I visited. Tom touched David a lot. It's my opinion that Tom was having a sexual relationship with him.

While we were in prison, though, Tom told Joe that he was messing around with a young boy who was living on his farm. Joe wrote that to me in a letter, and I wrote him back about it. I think it bothered Joe that Tom would do something like that with a kid, but he wasn't sure whether it was true, or just something Tom was doing to make him jealous. That was the type of thing Tom would do to Joe, I think in the hope that this would make him mad or jealous or just show he cared.

Things seemed to be going pretty well for them when Joey first got to the farm -- Joe truly loved the farm and the animals and Tom. The only things Joey seemed bothered by were Tom's possessiveness and sometimes, the sex. But by the time I got there to visit, things had obviously gotten out of hand. Tom was so jealous of Joey that he followed him around every minute.

An example of the way Tom was behaving was that one day when I was there, Tom asked Joe to return these videos we had rented. Joe said he'd be gone ten minutes and left to return them. A few minutes after he was gone, Tom started wandering around, asking if Joe was coming back down the drive yet and wondering how long it would be before he'd come back. I told Tom to take it easy, that Joey would be right back like he said. Then Tom started walking in and out of the room, pacing around and looking out the windows. He kept asking why he was gone so long. He literally was making himself sick over the whole thing. Then when Joey came back, Tom started working him over, asking where he'd been, what was he doing, how come it took so long. That was typical of the way he would treat Joe while I was there.

Tom and Joe didn't admit to anyone that he and Joey were lovers. I think they were both private people, although Joey didn't really mind people knowing he was bisexual before. I thought it might also have been that Tom didn't think they'd be accepted in Bedford if they were open about their true relationship. But Tom was also telling people that Joey was just some poor ex-convict that he was attempting to save. Joey was humiliated by this type of lie, but it happened all the time. It's surprising to me that Joey didn't just come out and tell people the truth about his and Tom's relationship.

I think that part of Tom's anger and suspicion of Joe when I was around had to do with me. Although Tom had invited me to come, it was clear he didn't want me there when I got there. He was very threatened by my relationship with Joey, because he knew that Joey and I were extremely close. I think Tom was afraid that Joey and I would be sneaking around, trying to sleep together. He also knew that I could talk to Joey like no one else could, and he and Joe had gotten to the point where he tried to start an argument with Joe all the time. So I think my presence made everything escalate -- Tom was getting harder on Joe and more possessive, and Joe was feeling more trapped than ever because we couldn't do anything together without Tom losing it.

Tom did something to Joey the week I there that was both stupid and unforgivable. Joey had cashed some of Tom's checks, which he had permission to do. But Tom got mad about some of them and started in on Joe in

front of me and Kathy and David Goff, telling Joey he was going to tell his parole officer and send him right back to prison. He wasn't letting Joey explain anything and he didn't want to talk about it. You have to have served time to know what a frightening thing it is to be threatened with prison.

The night before I left to come back to New York, Kathy and I planned to make a big dinner for everybody -- Tom McWaters, David Goff, the young boy who was always hanging around with Tom at the farm, Joey, myself and Kathy. We had made Fettucine Alfredo, Italian bread, salad and wine. I think we might have bought a cake for dessert. We bought firecrackers -- Roman Candles and stuff like that -- to set off later after dinner. Joey showed me around town and we bought everything for dinner. Tom made it obvious in the beginning that he didn't want me there, and he didn't like me and Joey going out and doing things like this together. During dinner, Tom started in on Joey about the checks. Joey kept trying to explain to Tom about the checks, but Tom wouldn't listen to anything he said and just kept yelling at him in front of us and treating Joey like a child. Joey finally stood up and said that he was going to leave. Tom said that if he did, he'd call his parole officer and send him back to jail and he could think about it all for a long time there. Joey told him "Listen, Tom, there's no need for all this-" but Tom kept at him. Joey just let him yell and yell, and then he ate his dinner and got up and left.

Later that evening Joey called in from wherever he was to talk to Tom. I don't know what they said to each other, but Tom came and asked me to talk to Joe too, to find out what was going on with him and to try and get Joey to come home. That's when Joey and I agreed to meet later at the Lucky Seven store and talk it over.

Tom then told me to go after Joey, to find him and talk to him and bring him back. This seemed weird, since he had just told him that he was going to jail minutes before. When I came back from talking to Joey, I told Tom that things hadn't really gone that well with Joe, and that he didn't seem like he was going to come back. I said that he was really afraid that Tom was going to call his parole officer and put him in jail and I told him Joe just wanted his clothes and wanted to leave. Then Tom said, "Well, go tell him that's not going to happen, I'm not going to call his parole officer." I was totally shocked, because then I realized that Tom

wasn't really serious about the parole violation thing, he was just doing it to mess with Joey's head and control him. I told Tom that I didn't think Joey would come back to the house, and then he seemed really in a panic about that.

Maybe Tom wasn't serious about threatening Joey with more jail time, but Joey sure took it that way. Every talk we had after that, Joey just kept saying over and over that he couldn't go back to jail, he just couldn't go back. I told Joey that he should just get in the car and come back to New York and live with me at my dad's house -- that we could leave right then. But Joey didn't believe that, and said that he knew Tom better than me, and he knew that Tom would follow him no matter where he went. Joey told me that he was freaking out about how everything was falling apart. He said it was scary how Tom was trying to control every move he made and he was finding it more and more difficult to tolerate having sex with him, even though he knew he had to have sex with Tom to stay out of jail. Joey admitted that he started using coke, too, but he thought he had it under control. He kept saying over and over that he couldn't go back to jail and he didn't know what to do.

One of the last nights I was visiting, I was talking to Joey in the parking lot of a little convenience store in Bedford, because Tom had asked me to. At first I thought I was going to get him to come back to Balmoor and get his stuff and leave. We got to the driveway of the farm, but Joey got out of the car at the end of the driveway like he was just paralyzed and wouldn't go. He just couldn't go back in the house, period. He had become so paranoid that he thought that I might be part of Tom's plot to trap him and that I was leading him back to the house where his parole officer and the police would be waiting to take him in. While we were talking, Joey had told me how he wanted to get work off of the farm, so that he could be more self-supporting, but Tom kept trying to make that impossible by insisting that Joey still do a lot of work around the farm. He would also tell Joey that if he didn't have sex with him, he would make up things and tell his parole officer that he was violating his parole. Joey was losing his respect for Tom, and was falling out of love with him but he felt trapped in his situation.

I tried to talk to Tom the next night after dinner about the situation between him and Joe. I had to wait

until then because Tom had been working that day. Tom was getting ready to go to the symphony or opera with this friend of his, Paula, who wrote a book called Patchwork Quilt. Tom wanted me to come upstairs and talk to him, he didn't want to talk to me downstairs, so I went up. My friend Kathy was downstairs at the time, watching tapes we had rented on TV. While I was standing there, trying to talk to him about the checks and this fight with Joey, Tom just took off his pants and stood in front of me, smiling a little bit and asked me what was going on and I realized he was asking for sex. He was just standing still by his closet, naked, staring at me and smiling. I was shocked. I was trying to handle what I thought was a serious problem and he was trying to come on to me. Then I realized he really didn't care about the checks, that he only talked about the checks when Joey was around because it was a way to control Joey. I kept trying to talk to him about the checks, but he didn't care, all he wanted was sex. It was a little scary, to watch him, to tell the truth.

Finally, I said listen, if there's a problem, Joey would really like to speak to you and I told him that I could get Joey back to the house like he had asked and have all of us sit down and talk about this situation. I told him Joey was worried sick that Tom was going to call his parole officer and set him up to go back to jail. Tom was still annoyed I wouldn't have sex with him, and he just started putting his clothes back on and said he didn't want to talk about it and he really didn't care.

When Joey didn't come back the next day, I told Tom that Kathy and I felt awkward, and that we were going to leave. I told him I thought he should talk to Joey and settle things. Then all of a sudden he was back to where we'd been the day before -- he wanted me to talk to Joey and get him back.

Tom called me after I returned to New York to tell me that Joey had gone to jail because of the checks, and because he'd had a car accident. But he told me not to worry, because he was going to get together the money to bail Joey out. I couldn't believe this, after he'd spent so much time telling Joey this was what he was exactly what he was going to do to him.

I think Joey called me twice the night it happened from Balmoor. One time, it was early in the evening, and he

said things were going bad, he was really worried and stressed out. The next time he called he was like breaking down, saying that Tom wanted to have sex with him, and he kept pushing him to do that. Joey didn't want to have sex, but he kept saying if he didn't, he'd have to go back to jail. Joey told me that Tom told him if Joey would have sex with him, he'd make good on the checks.

Joey called again two or three hours later and he was somewhere else, in that motel or something. He was just gibbering about Tom being dead. He was crying and babbling, and he kept saying how scared he was. He said goodbye to me, and said that it had been good knowing me, and that he loved me, but it was all over. I didn't know what to do. No one ever asked me whether there were any phone calls other than the two on the Balmoor phone bill or I would have told them.

I then talked to Joey for a whole day, maybe even two days after Tom was dead. We kept calling each other because I was trying to get him out of there. I talked to him at a hotel, he gave me a number to call him at and I would ask the front desk for Room 104 and they would give me Joe's room.

The next thing I know I get a subpoena from the state. The police came to my father's house at 20 Estate Boulevard. They said they were BCI homicide detectives, and they came in plain clothes. We thought they were there to arrest me. My girlfriend Kathy Gillen and I were taken down to the police station in Newburgh and we both had to give statements. I was told that the Virginia authorities were interested in my involvement in the murder, and that, if I did not cooperate, I might be charged in connection with the murder. I was also told that my parole status would be jeopardized if I did not cooperate.

I came to Bedford for the trial, at the insistence of the Commonwealth. Updike, the prosecutor, came to my room at the Best Western Motel and told me to come to his car and talk to him. He told me what I was going to testify to from the beginning. First off, he told me that he knew that I had been in on planning the murder, and maybe even doing it, and if I didn't testify the way he wanted, I was going to be facing charges too. He told me he didn't care about my version of what was going on, and he didn't care what some con from New York had to say. I told him that

Joey didn't plan to rob Tom, that he didn't need to rob Tom, and that Joe didn't leave the house that night with anything that wasn't his. Mr. Updike didn't care about that.

I also told Mr. Updike that there was no way I would testify against Joey if he was seeking the death penalty. He assured me, loud and clear, that nobody was seeking the death penalty in this case, it wasn't even an issue.

The first time that I talked to Joey's lawyers, I was too scared by what the cops had told me, how if I didn't testify the way the prosecutor wanted me too, I could forget my parole and go back to jail. After I learned that the prosecutor had lied to me, and he was really seeking the death penalty, I phoned Hugh Jones' office and said I needed to talk to them. This was when they'd brought me down there to testify. Hugh Jones was Joey's attorney then. He would never come to the phone to talk to me and he never called me back.

See Attachment 4, hereto, Affidavit of William Sibilia.

Thus, the complete evidence that is now available casts an entirely different light on the events that culminated in McWaters' death. At the plea proceeding the Commonwealth presented several witnesses including William Sabilia. Sabilia had met Savino while both were serving sentences in the Westchester County Jail. Sabilia also met McWaters while in Westchester as McWaters visited Savino during the period when Savino was incarcerated.

In his earlier testimony that he now admits was false, Sabilia stated that he had had no indication that there were any prior problems between Savino and McWaters. He also testified that he had no indication that his visit to Savino provoked any

jealousy on McWaters' part.

Contrary to Sabilia's sworn testimony, McWaters was in fact jealous of Sabilia and of his close friendship with Savino. Sabilia and Savino were unable to do anything together without provoking McWaters' controlling behavior. Aff. at ¶ 12.

Sabilia's observations concerning the relationship between McWaters and Savino were independently confirmed by the Reverend Richard Boyce who was the minister at the Presbyterian Church in Bedford. McWaters' efforts to control Savino were also documented by G. C. Martin.

At the sentencing hearing held on June 13, 1989, the evidence about McWaters' and Savino's history of domestic conflict resulting from McWaters' manipulation was not developed. The Commonwealth presented several witnesses to testify to Savino's temper and offered his criminal record, which included several of robberies in New York but no weapons offenses. Most importantly, however, the Commonwealth's expert, Dr. Arthur Centor, testified that Savino would likely be a future danger.

The defense presented the testimony of Dr. Lisa Hovermale from the Institute for Law and Psychiatry at the University of Virginia. Dr. Hovermale stated that, at the time of the killing of Mr. McWaters, Savino was suffering from a cocaine induced psychosis. She declined to give an opinion on future dangerousness, stating her professional view that such predications to be beyond the abilities of forensic science.

The presiding judge found the aggravating circumstance of future dangerousness and sentenced Savino to death.

The prosecutor, James Updike, presented to the trial judge a powerful portrayal of Joseph Savino as the manipulator of Tom McWaters, of a man who used sex and the prospect of sex to entice McWaters into a relationship with him, to send him money in prison and, ultimately, to buy him a farm in Virginia. It painted McWaters as the innocent victim of Savino's manipulations. That vision was terribly distorted, however.

In reality, this relationship was about an older man, obsessed with sex with young men generally, and with Savino in particular. As the object of his most intense sexual obsessions, McWaters was obsessed with the need to control Joe Savino. It was a classic case of an emotional abuse, of the need for one party in a relationship to control every aspect of the life of his partner, and of the inability of the other party to identify the solution to his problem. It is, quite frankly, a classic case of an abusive relationship which, had it involved a heterosexual couple, would never have resulted in a death sentence.

During his closing argument at sentencing, the prosecutor told the sentencing judge:

Your Honor, we know about [Savino's] prior prostitution, how he will use that for gain. We know that back when he went into the penitentiary in '82, into the system, that he had this lover named Chris that he loved, about how he knew the effects upon somebody he lover, he terminated that relationship.

But he didn't care anything about Tom McWaters. Tom did love him from all indications. But Joe Savino didn't care because Joe Savino saw in Tom McWaters not a meaningful relationship, he saw an opportunity, and that's how he's described as being opportunistic.

Now he can see that kind of opportunity and benefit from it. He can't see somebody trying to get him off drugs or keep him out of crime. But that type of opportunity, he sees at that time. And after Tom McWaters does all of this between '80 and '82, giving him money, giving him a job, assisting him in that fashion, when Savino goes into the penitentiary then, he drags Tom along in terms of emotions. He writes him these letters which I won't read again of course. But he writes him, and he ways things such as I'll be getting out on parole later and we'll be together, and he sends him the picture, and he promises the actual nudity live in five and a half months. He's taking advantage of this man, he's tantalizing him, he's playing with his emotions, he's using him.

And why? Well Tom McWaters told him that he would buy him this place in Virginia, Balmoor, a beautiful estate as we can see from the photographs. Savino seized on that opportunity.

Savino also wanted money from McWaters as he was there in the penitentiary, and he got that. He wanted his assistance in getting out of the penitentiary as far as meeting parole, he got all of that. In the meantime, he'd write these love letters.

And then, when he comes out, Your Honor, and as we get to this point where he says things are so bad, well what is Tom McWaters doing, is he acting like a jailer? Of course he's concerned about Joseph Savino being out late at night. We know what he was doing at least later on. He was running up spending weekends in Roanoke, staying out all weekend, at times hanging out with transvestites, participating in illegal drug use. Tom McWaters knew what had happened in the past, he knew Joe Savino, he knew what was going to happen, he was concerned about him, he wanted that to stop. And he wasn't about to go tell the probation officer, at that point that he was using drugs, then they might lock him up, he didn't want that either. He just wanted Joe Savino to stay out of trouble, to stay away from drugs and be happy.

* * *

Now, Your Honor, again he keeps talking about he wants to be rid of Tom and somehow he just can't bring himself to do it. He claims that Thomas McWaters wanted to have sex with him. Well we can't hear Tom McWaters' recollection of that or his testimony on that issue. But accepting what Savino says in that regard, he goes upstairs, he will not have sex with him. He does not leave the house as he can and as he does later, and Tom McWaters says I'm washing my hands of you, I'm through with you, you can rot in jail.

* * *

And besides, Thomas McWaters is ending it, he realizes well I thought this place was mine, I thought you bought it for me. All this silverware and all these nice items, these luxurious items, the paintings, the life on the estate, the animals, I thought this was mine. Tom say's I'm through with you.

This then, is the theme of the prosecutor's argument for the death penalty. It is this portrayal of the relationship between Savino and McWaters -- Savino the manipulative seducer and McWaters the loving, generous victim -- which dominates his argument.

This argument, as we now know, was a long way from the truth. McWaters' attempts to control and possess Savino began many years before his murder. Joe Savino was only 21 years old when he first became involved with McWaters in 1980. McWaters was already in his mid- fifties. By the time Savino came to live with him, McWaters was 63 years old. While Mr. Updike portrayed Savino as the seducer of McWaters, dangling love and sex before him in his letters from prison, the letters from McWaters clearly demonstrate that he was sexually fixated with Savino. Thus,

while Mr. Updike cited to the trial judge Savino's comment concerning his "nudity," McWaters, in January, 1986, wrote a lengthy and graphic description of a dream he had had about a prolonged sexual encounter with Savino, involving both anal and oral sodomy. And even as he complained "Have had no mail from you in ages and was disappointed not to get a Christmas card this year-do not understand no letters," McWaters asked Savino to write to him "all about" the details of his sexual prowess, "so that my dreams will get better - and I can get ready for the big day [Savino's release]." Nothing even remotely comparable appears in Savino's letters to McWaters. Thus, not only was Savino not the great seducer, as Mr. Updike portrayed him, it is clear that McWaters' interest in Savino was not innocent affection or love, but perverse sexual obsession. Nor was his interest simply to make Savino "happy," as Mr. Updike claimed. His interest was in satisfying his sexual cravings through Savino, an obsession which was, for him, the focus of Savino's potential release. It was ultimately that obsession -- the demand for constant sexual gratification -- and his manipulative use of the threat of returning him to prison, that drove Savino to take the life of his tormentor and self-appointed jailor.

Moreover, while Mr. Updike portrayed Savino as the great manipulator while he was in prison, enticing McWaters to help him gain his freedom, it was actually McWaters who, during that same period, enticed Savino into his world of sexual obsession by

offering the prospect of that freedom.

In August, 1989, McWaters wrote to Savino about the home and farm he had purchased for the two of them in Bedford, Virginia:

Now that we own Balmoor my thoughts are always about you - and our being together and working together at our house. The thoughts of being with you always and of working on projects and planning things and of not being alone or cold again is so exciting and maybe so soon to be - How long ago was it we [illegible] talked of the Va. ranch? 5 yaers maybe - seems like a Thousand years -

While Mr. Updike told the judge that Savino was motivated only by the money McWaters would send him in prison and the prospect of his help in connection with parole, the fact is that Savino often did not cater to McWaters. McWaters repeatedly complained that he had not heard from Savino and attempted to manipulate him with "guilt" for failing to maintain contact. Thus, for example, in McWaters wrote to Savino as part of his Thanksgiving greetings in 1983:

Had been in hope of phone call Sunday nite [sic] but no such luck - Maybe you are still a bit dissappointed in me for some reason. I hope not as I do not want you even to be of such thoughts. But then of course you have only one call? so why not to some other place for word and news, etc. ok I know that I am not the only one in your mind or heart.

In September 5, 1985, McWaters wrote:

Another thing concerns me - something is wrong between us - I do not know what it is. I have noticed it for sometime - you do not write much - and on our last visit - which well may have been our last visit for a long time . . . I was in hope that we would talk of personal things between us - and that you would do some thing special for the occasion - or that at least you would have held me for a moment - maybe I expect too much of this friendship! Maybe I read in things that

are not there, at least not there for you to me. Maybe too much time has passed and words are just words and that they may never be any thing else - we may never spend any more time together in any other way than we already have.

So, too, McWaters wrote to Savino in February, 1986:

I have worked so long and so hard with very little help - I am tired, Joseph, and I can not get away from it - not even for one full 24 Hr. day. I am also in a prison - except I have to work. - Take some of hundreds of Bills - Lawyer's fee, etc. Have the personal responsibility for my mother and the continued home for her to live - a guaranteed security for as long as she lives - even if it is longer than me. You do not seem to be interested enough to keep letters coming. Oh well - don't worry about it -

A review of all the evidence concerning the relationship between Savino and McWaters underscores the injustice of a death sentence in this case. Petitioner was sentenced to death when others under similar circumstances would not be. Women who have killed their abusive partners have increasingly been acquitted or, more recently, had their sentences commuted, based upon a "domestic violence," "spouse abuse," or "battered-women syndrome" defense. As the newly discovered evidence indicates, Petitioner was abused by the "victim." Petitioner was forced, i.e., under threat of being sent to prison, to have sex with an elderly man. This elderly man isolated the Petitioner from his family and friends, stalked him, controlled all of the resources the Petitioner needed to live, increasingly controlled the Petitioner's environment, and showed Petitioner that he had complete control over his well-being. This is a classic "spouse abuse" scenario, as the actors close to the scene now

acknowledge. See Attachments 1⁴ and 2.⁵ However, it is not

- 4 Tom also said that his efforts to watch over Joe and direct him were simply driving Joe further and further away. Tom could be an extremely dominating and determined man, and he knew this about himself. He had tremendous difficulty controlling these qualities, especially when it came to Joe.

I cannot fathom how this case was not treated as a classic case of domestic violence. If this had been a man and his wife, I have no doubt that the death penalty would not be an issue now. Knowing the two of them as I did, it is patently absurd to me that this was a drug-related homicide in the course of a robbery. This was yet another one of Joe and Tom's many similar blow-ups that tragically was not resolved before it became violent.

- 5 Joe became less and less content with Tom and Tom became more jealous and possessive of Joe.

....

Joe was completely dependent on McWaters for everything -- food, income, shelter and security.

....

Tom, on the other hand, was clearly distressed by Joe's increasing freedom. Tom contacted me directly in an effort to enlist my assistance in imposing a curfew on Joe -- which I told him I could not, and would not, impose. I had to remind him that Joe was an adult, and Roanoke was a place Joe was allowed to go to socialize. This disturbed McWaters, and he continued to try to control Joe's behavior, and to try to use me to control Joe as well.

....

Joe was trapped and smothered by Tom's demands, and each time there were problems I spoke to them about the situation.

....

until now that the nature or the relationship has fully surfaced. The only reason that Petitioner is scheduled for execution, when other similarly situated persons are not even in prison, is that he is male and was involved in a homosexual relationship.

CONCLUSION

The Governor should grant clemency given the substantial doubt about the appropriateness of a death sentence in view of new evidence not previously available and given the substantial punishment imposed by a life sentence. Mr. Savino respectfully requests that the Governor grant him clemency.

Tom didn't want Joey to leave and he didn't need outside help unless it was of the kind that would help him to isolate Joe and keep him on the farm.

....

I do not believe the death penalty in this case is justified. While this case has many dynamics, it is primarily domestic in nature between two consenting adults. I have been a Probation and Parole Officer in excess of eighteen years and, as part of my job, I must recognize domestic abuse situations and distinguish true domestic abuse cases from false ones. But for the gender of the lovers, I view this as a classic abuse case.