IN THE MATTER OF: JAMES E. RODDEN, CP-37
Potosi Correctional Center
Mineral Point, MO 63660

TO: THE HONORABLE MEL CARNAHAN,
Governor of the State of Missouri

APPLICATION FOR EXECUTIVE CLEMENCY AND/OR COMMUTATION OF A SENTENCE OF DEATH AND SUPPORTING EXHIBITS

Respectfully submitted,

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IN THE MATTER OF:	)	
	)	
	)	**THIS IS A DEATH PENALTY CASE.**
JAMES E. RODDEN, CP-37	)	**EXECUTION IS SET FOR 12:01 AM**
	)	**FEBRUARY 24, 1999**
Potosi Correctional Center	)	
Mineral Point, MO 63660	)	
	)	

APPLICATION FOR EXECUTIVE CLEMENCY AND/OR COMMUTATION OF A SENTENCE OF DEATH

TO: THE HONORABLE MEL CARNAHAN, Governor of the State of Missouri

I.

INTRODUCTION

James E. Rodden, by and through his attorney, respectfully submits this application, pursuant to Art. IV, Sec. 7 of the Missouri Constitution, and §§ 217.800 and 552.070 Mo. Rev. Stat., to the Honorable Mel Carnahan, requesting that he exercise his constitutional and statutory powers to commute his death sentence to the alternative sentence of life imprisonment without the possibility of parole for 50 years. In the alternative, Mr. Rodden requests that the Governor exercise his constitutional powers to grant a reprieve and impose a 90 day moratorium on Missouri executions to allow further inquiry into this case to examine, among other things, questions surrounding Mr. Rodden's guilt and the legal and ethical propriety of his sentence of death.

Mr. Rodden's appeals are now exhausted and his execution has been set by the Missouri Supreme Court for February 24, 1999. Mr. Rodden respectfully requests an opportunity to present evidence and argument in support of this application to Governor Carnahan and the Board of Probation and Parole, or to a board of inquiry.

Mr. Rodden also respectfully requests that Governor Carnahan stay his execution, as contemplated by Rule 30.30, so this application will receive the full and fair review which it deserves.

Mr. Rodden's case does not present the usual situation involving an obviously guilty defendant. The state's evidence upon which Mr. Rodden was convicted and sentenced to death was entirely circumstantial. In addition, the prosecuting attorney made several improper arguments to the jury that tainted his conviction and sentence, including prejudicial references to evidence that was never admitted.

The facts surrounding the deaths of both Joseph Arnold and Terry Trunnell were the same. Both were killed in the apartment that Mr. Rodden and Mr. Arnold shared; both died as a result of stab wounds; both died in the early morning of December 6, 1983. However, Mr. Rodden was inexplicably charged and tried separately for the Arnold and Trunnell murders. Mr. Rodden was first tried for the Arnold murder on a change of venue in Phelps County, Missouri. During this trial, the facts and circumstances surrounding both the Arnold and Trunnell homicides were presented to the Phelps County jury that heard the case. In fact, the evidence presented by the prosecution in the guilt phase was virtually identical in both trials. However, the Arnold jury gave Mr. Rodden life, while the second jury, after hearing the same evidence, gave Mr. Rodden death for the other murder.

Although, the evidence for both the Arnold and Trunnell murders was essentially the same, one significant deviation in

the evidence between the two trials dealt with the testimony of Saline County Coroner Bedford Knipschild who testified in the first trial that both Arnold and Trunnell died at approximately the same time sometime after 6:00 a.m. on the morning that the bodies were found. However, at the second Trunnell trial, Dr. Knipschild gave the opinion that Trunnell died sometime around 5:30 a.m. and gave no opinion about the time that Arnold died. (Tru. Tr. at 459). This omission is particularly significant in light of the fact that Prosecutor Finnical argued in his closing argument that Arnold was killed around 2:30 a.m. (Tru. Tr. at 676). This statement had absolutely no basis in fact from the actual testimony adduced at either trial. This false statement was then used to make the unsupported and false argument to the jury that Mr. Rodden had killed Arnold much earlier than Trunnell and had spent the few hours in between their deaths torturing Trunnell. There was absolutely no evidence introduced to support this contention. This constituted prosecutorial misconduct, involving the knowing use of false evidence, of the most egregious magnitude. Yet, the courts have turned a blind eye to this obvious injustice.

Prosecutor Finnical also delivered many other improper arguments which, among other things, made improper biblical references, that killing the enemy in wartime justifies the death penalty, and invoked the words of Harry Truman to support his plea that a death sentence be imposed. (Arn. Tr. 130-131, 134-135). However, probably the most egregious and prejudicial line

of argument involved the prosecutor's repeated statements that, in light of the fact that the jury in the Arnold case had given petitioner life imprisonment, he would receive no punishment at all for the Trunnell murder unless the jury gave him the death penalty. The arguments were improper and misled the jury, who literally had Mr. Rodden's life in their hands, as to the jury's responsibility and role in deciding Mr. Rodden's fate. The Eighth Circuit, when reviewing the same arguments by the same prosecutor in Robert Driscoll's case, found that Driscoll's death sentence was unconstitutional. Driscoll v. Delo, 71 F.3d 701 (8th Cir. 1995).

Mr. Rodden has consistently maintained that he is innocent of murder and presented, during the guilt phase of the Arnold trial, the defense that Arnold had killed Trunnell and then Rodden was forced to kill Arnold in self-defense. After killing Arnold, Rodden panicked, set fire to the apartment, and fled in Arnold's car. (Arn. Tr. at 450-482). Although the jury determined that Mr. Rodden was guilty of Arnold's murder, his self-defense testimony obviously convinced the jury to recommend a life sentence instead of the death penalty. Rodden did not testify in the second trial. It is important to note that studies have shown that when a jury has lingering doubt about guilt they often elect to return a verdict of life imprisonment rather than the death penalty. Lockhart v. McCree, 476 U.S. 162, 181 (1986). This is precisely what occurred at the Arnold trial when the jury heard Mr. Rodden's self-defense testimony. When there is doubt about a

man's guilt, an ordered and civilized society should give a condemned man the benefit of the doubt and spare his life.

Mr. Rodden's death sentence was the result of the prosecutor severing the trial of two murders that occurred at the same time and were based on the same evidence to give the state two chances to secure a death sentence. In the first trial, Prosecutor Finnical sought to get the death penalty imposed at the first trial but, after hearing all the evidence, the jury sentenced Mr. Rodden to life in prison. After failing in his objective to obtain a death verdict in the first trial, the prosecutor used the second trial as an opportunity to get a "second bite at the apple," this time successfully convincing the jury (by arguing, in part, subjects and theories that were inflammatory and unsupported by any evidence) to return a sentence of death.

Double jeopardy precludes a defendant from being tried for the same offense twice. Furthermore, the United States Supreme Court has held that a prosecutor cannot seek the death sentence in a case that has already been tried to a jury that recommended life in prison if the case is then later remanded for retrial. The Court concluded that allowing a prosecutor to seek the death penalty after a jury had already heard the same facts and recommended life in prison, violated the double jeopardy clause of the Fifth Amendment. Bullington v. Missouri, 451 U.S. 430, 444 (1981).

Mr. Rodden was not provided with due process in this case because the prosecutor sought the death penalty in a second

murder trial based on essentially the same facts in which a prior jury had already concluded that life in prison was the appropriate punishment. This is the same factual scenario that the Supreme court addressed forty (40) years ago in Ciucci v. Illinois, 356 U.S. 571 (1958). In Ciucci, the Court held in a 5-4 decision that due process was not violated when state prosecutors severed multiple murders which occurred in the same episode for separate trials.

Obviously, the legal landscape has changed in the forty years since the Court decided Ciucci. In fact, a strong argument exists that Ciucci was overruled by Benton v. Maryland, 395 U.S. 784 (1969)(holding that the double jeopardy clause is applicable to state prosecutions through the "incorporation" doctrine). If faced with the same issues today, the Court might likely follow the position taken by Justice William O. Douglas who wrote in Ciucci that, "by using the same evidence in multiple trials the state continued its relentless prosecutions until it got the result it wanted. . . . This is an unseemly and oppressive use of a criminal trial that violates the concept of due process." Ciucci, 356 U.S. at 575. Nevertheless, both the Eighth Circuit and the Supreme Court refused to reexamine the holding in Ciucci and left Mr. Rodden's death sentence undisturbed. This application for clemency is Mr. Rodden's last hope of avoiding an unconstitutional execution imposed at the conclusion of a seriously flawed and fundamentally unfair trial.

II. PROCEDURAL HISTORY

James E. Rodden was charged in the Circuit Court of Saline County, Missouri for the capital murders of Joseph Arnold and Terry Trunnell.[1] State v. Rodden, 728 S.W.2d 212 (Mo. banc 1987). Both homicides occurred in the early morning hours of December 6, 1983 in an apartment located at 24 West College, Marshall, Missouri. Id. at 213. Both victims died of multiple stab wounds. Arnold had been stabbed nine times. (Arn. Tr. at 406). Trunnell died of eleven stab wounds. (Arn. Tr. at 399).

The two murders, despite the fact that they occurred in the same episode, were charged and prosecuted separately. Rodden retained Kansas City attorney Lee Nation to represent him. (27.26 Tr. at 10). Mr. Rodden was convicted of capital murder for the murder of Joseph Arnold in the Circuit Court of Phelps County, on a change of venue, in June of 1984. (Arn. Tr. at 521). Assistant Attorney General Tim Finnical represented the state. (Arn. Tr. at 1). At the penalty phase of this trial, the jury rejected the death penalty for Arnold's murder and sentenced Rodden to life imprisonment without the possibility of parole for fifty years. (Arn. Tr. at 557). See also State v. Rodden, 713 S.W.2d 279 (Mo. App. 1986).

In March of 1985, Mr. Rodden was tried for the murder of Terry Trunnell, on a change of venue, in the Circuit Court of

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[1] References to transcripts from previous trials and hearings will be as follows: (1) the Joseph Arnold trial will be cited as "Arn. Tr."; (2) the Terry Trunnell trial as "Tru. Tr."; and (3) the 27.26 hearing as "27.26 Tr."

Clay County, Missouri. (Tru. Tr. at 1). At the Trunnell trial, Mr. Rodden was convicted of capital murder and sentenced to death. (Tru. Tr. at 727, 759). On direct appeal the Missouri Supreme court affirmed Mr. Rodden's conviction and sentence for the Trunnell murder in all respects. See State v. Rodden, 728 S.W.2d 212 (Mo. banc 1987). Mr. Rodden's motion for post-conviction relief under Rule 27.26 (repealed 1988) was denied in circuit court and subsequently affirmed on appeal in Rodden v. State, 795 S.W.2d 393 (Mo. banc 1990).

Rodden commenced a federal habeas corpus action by filing a pro se petition in 1991 in the United States District Court for the Western District of Missouri. The case was assigned to District Judge D. Brook Bartlett, who later referred the matter to Magistrate Robert Larsen for disposition. On December 8, 1995, Magistrate Larsen issued a report and recommendation recommending that the writ be denied in all respects. Judge Bartlett, on December 12, 1996, issued an order adopting in part and modifying in part the magistrate's report and denied the petition in all respects.

After briefing and argument, a three judge panel of the Eighth Circuit (McMillan, Fagg, and Bowman), affirmed Rodden's conviction and sentence in all respects. Rodden v. Delo, No. 97-2100 (8th Cir. 5-3-98). On June 24, 1998, the court of Appeal denied petitioner's timely petition for rehearing and suggestion for rehearing en banc. The United States Supreme court thereafter

denied petitioner's timely petition for a writ of certiorari on November 9, 1998. See Rodden v. Bowersox, 119 S. Ct. 452 (1998).

III. REASONS JUSTIFYING EXECUTIVE CLEMENCY

1. Commutation is Warranted Because the Evidence Does Not Foreclose All Doubt About Guilt.

The impending execution of James E. Rodden does not present the typical issues that are usually presented in clemency applications in death penalty cases. In most death penalty cases, the evidence of the prisoner's guilt is strong, and the primary issue presented for judicial and executive review is the legal and moral propriety of the sentence of death in a particular case. Although many condemned prisoners often go to their deaths professing their innocence, there is an extraordinary amount of doubt that still exists in Mr. Rodden's case. The circumstances indicate that the State of Missouri may put Mr. Rodden to death despite the fact that a Phelps County jury has shown doubt about the propriety of the death penalty in this case. In the paragraphs which follow, Mr. Rodden will set forth in greater detail the facts surrounding his case, including the facts presented at both of his trials in support of his request that his life be spared.

The state's case at both the Arnold and Trunnell trials consisted of the same circumstantial evidence which lacked conclusive proof that Mr. Rodden committed the murders. Rather, the evidence taken from the crime scene was consistent with Mr. Rodden's contention that Trunnell was killed by a violent attack

from Joseph Arnold. Arnold also attacked Mr. Rodden with a knife and he had to kill Arnold in self-defense.

When Mr. Rodden was arrested, he immediately gave this account of the tragic events to the police. The officer recorded his statement but it was not allowed to be admitted into evidence during either trial. In the statement, Rodden unequivocally told the police that he had killed Arnold in self-defense after Arnold killed Ms. Trunnell. This statement was the first opportunity that Rodden had to discuss what transpired in the apartment during the early hours of December 6, 1983. The statement was taken very shortly after the killings took place and it is entirely consistent with the defense that Mr. Rodden offered during his first trial.

While this statement was not allowed into evidence during the trials because of evidentiary rules, it is certainly relevant to Mr. Rodden's innocence. The prosecutor was able to get the police report that contained Mr. Rodden's self-defense statement excluded from the proceedings on the grounds that it was hearsay. The police officer who took that statement would have been able to bolster Mr. Rodden's self-defense testimony had that statement been admitted. A statement that is given contemporaneous with the circumstances it describes is generally considered to be credible under the "res gestae" rule. Mr. Rodden did not have a great deal of time to "concoct" a false statement prior to his interrogation by police. Rather, he gave the self-defense statement to the officer soon after the killing took place and that is the story

that he has retold and has continued to maintain as true in the many years since his conviction.

In his first trial, Mr. Rodden took the stand and told the jury that he had killed Arnold while trying to defend himself and Ms. Trunnell. Mr. Finnical, the prosecutor, was allowed the opportunity to cross-examine Mr. Rodden. After this had taken place, the jury convicted Rodden but unanimously spared his life. The jury could have chosen to sentence Mr. Rodden to death but instead decided to sentence him to life in prison. Even though the prosecutor introduced evidence aimed at showing aggravating circumstances worthy of a death sentence, the Arnold jury responded to Rodden's testimony and the other guilt phase testimony by recommending that Rodden be sentenced to life in prison.

In the second trial, Rodden's counsel made a "strategic" decision not to offer Mr. Rodden's testimony. As such, the jury was not allowed to hear the testimony from the only eyewitness as to what happened during the early morning of December 6, 1983. They were not allowed to make their decision based on all of the available evidence. They were not allowed to weigh the credibility of Mr. Rodden and take his self-defense testimony into account during deliberations. Instead, they heard a barrage of misleading and prejudicial arguments during Finnical's overreaching and unethical plea for the death penalty.

The case against Mr. Rodden for both homicides was based entirely on circumstantial evidence. The prosecution, by its own

admission, (Tru. Tr. at 22), conceded that their case was based solely on their interpretation of the circumstantial evidence. They admit that there is no direct evidence that implicated Mr. Rodden. Their case began and ended with their questionable theory of what happened based upon the evidence collected at the scene.[2] However, they have failed to recognize that a witness exists to this crime and that witness, Mr. Rodden, has remained steadfast in his contention that he did not murder Terry Trunnell and stabbed Joe Arnold in self-defense.

Mr. Rodden has retold his account of the events that took place in the early hours of December 6, 1983, several times and during each occasion the facts have been consistent. During the first trial, Rodden gave fairly specific details about the struggle that ensued between himself and Arnold. He discussed coming back to the apartment shortly before 2:00 a.m. that morning and seeing both Arnold and Trunnell in his bedroom. He gave details about where he saw blood and the condition of the apartment at that time. However, he was unable to answer questions about what either person was wearing or precisely what he was able to see in the dim lit bedroom where Arnold and Trunnell were when he came home. These omitted facts were utilized by the prosecution as inferences of guilt. They thoroughly cross-examined Mr. Rodden hoping to incriminate him

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[2]According to prosecutors, Rodden killed the two victims during a jealous rage after returning to the apartment. This theory of motive was questionable for a number of reasons that will be discussed later.

because of his incomplete memory. Nonetheless, Mr. Rodden, a man who lacks a high school diploma, did not waiver. He held firm in his account of his fatal struggle to defend himself.

The most significant deviation between the circumstantial evidence presented by the state and Mr. Rodden's account of the events was the actual time of death of both victims. Mr. Rodden's story was that both victims would have been killed sometime before 3:00 a.m. when he returned to the apartment. Saline County Coroner Bedford Knipschild testified in the first and second trial that he believed the time of death was approximately 6:00 a.m. or perhaps a little earlier. The prosecutorial misconduct issue relating to the prosecutor's misleading use of Knipschild's testimony will be noted later in this petition. In any event, in counsel's view, this was the most significant fact of the state's circumstantial case which deviated from Mr. Rodden's story and, in all likelihood, motivated the jury to convict him as charged.

However, Knipschild's testimony is suspect for a number of reasons. First, it is clear that he was not an expert pathologist who was experienced in matters of forensic science. To the contrary, he was merely a small-town doctor who happened to be the elected coroner of Saline County, a jurisdiction that has a low homicide rate. Second, the time of death is always an illusive concept that is subject to varying interpretations by different experts. This is particularly true under the facts of this case, in which there was other testimony that the heat in the apartment was turned up to the maximum and a fire was set

which, as a matter of common sense, could create a "super-hot" environment in which normal rigor mortis would set in as soon as it would have under normal conditions. Apart from the time of death deviation, the other circumstantial evidence was substantially consistent with Mr. Rodden's story that Arnold killed the victim and then he was forced to kill Arnold in self-defense by stabbing him.

One final issue deserves mention with regard to the plausibility of Mr. Rodden's story. The jury did not hear the testimony of Angel Duffy, who was a material witness to the events that occurred just prior to the murder. As was set forth in applicant's 27.26 hearing, Ms. Duffy testified that she was with Arnold at the apartment where the homicide occurred between approximately 5:00 and 10:00 p.m. on the evening of December 5, 1983. Ms. Duffy testified that Arnold was drinking heavily, breaking things in the apartment and acting in a very strange manner. (27.26 Tr. at 63). Ms. Duffy also testified that prior to leaving the apartment, Arnold claimed to have been committed to an insane asylum and that he used to kill people for the government. (27.26 Tr. at 64-65). Ms. Duffy's testimony, which went unheard by the jury, would have provided substantial corroborating evidence that Rodden killed Arnold in self-defense. Undoubtedly, evidence that Mr. Arnold was acting in a bizarre and violent manner the evening of the homicides would have been

pertinent to the issue of self-defense.[3] Had this testimony been presented, there is a reasonable probability that the jury would have either chose not to convict Mr. Rodden or, at a minimum, there would have been sufficient residual doubt to spare Mr. Rodden from a death sentence.

In upholding the constitutionality of death penalty statutes in the 1970's, the United States Supreme Court indicated that the death penalty would be constitutional only if it genuinely narrowed the class of eligible murderers, thus insuring that only the most heinous killers received society's ultimate punishment. Most persons from all political spectrums would agree that the death penalty is not appropriate unless the evidence forecloses all doubt of the condemned man's guilt. Because the case against Rodden was entirely circumstantial and his defense was certainly plausible, Mr. Rodden does not fit the category of a convicted murderer who deserves to die. A life sentence will adequately protect society in the circumstances of this case. For this reason, Mr. Rodden's execution would be a travesty of justice.

2. Commutation is Warranted Because of Infringements Upon Mr. Rodden's Constitutional Rights and Because Prosecutorial Misconduct Tainted the Integrity of the Proceedings.

This application for clemency does not rely squarely on the same basic philosophical challenges to the death penalty that are

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[3]Arnold's bizarre behavior would have also undermined the state's theory of motive, making it much more plausible that Arnold, not Rodden, was the perpetrator who committed these acts during some sort of psychotic or jealous rage. Duffy's testimony would have demonstrated Arnold's propensity for violence and emotional instability, thus pointing to him as the more likely killer of Ms. Trunnell.

often presented in clemency applications for death penalty cases. Rather, this clemency application presents a final opportunity for the State of Missouri to avoid putting a man to death in violation of the Constitution[4] and the fundamental motions of fairness.

As discussed above, two tragic deaths occurred in the apartment that Mr. Rodden and Mr. Arnold shared back on December 6, 1983. Two deaths left a trail of identical circumstantial facts. Despite the fact that both deaths occurred at the nearly the same time, Mr. Rodden was tried separately for each one. He was forced to defend his life in two separate trials in front of two separate juries for crimes that required the same circumstantial evidence to prove. James E. Rodden was in effect, "twice put in jeopardy of life" for the same offense in violation of his Fifth Amendment protections against double jeopardy.

There is no real fact-based dispute that the deaths of Mr. Arnold and Ms. Trunnell took place at nearly the same time. There is certainly no doubt that both were killed in the same apartment with the same weapon. There is also no argument that the evidence collected for each killing was necessarily used to prosecute the other. The tragic circumstances and resulting trail of circumstantial facts for both deaths were the same. As such, when Mr. Rodden was tried for the Trunnell killing, the evidence used

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[4]Rodden's substantial constitutional claims, which were cavalierly rejected, by the Republican-dominated state and federal judiciaries, are set forth in the certiorari petition, attached as an exhibit to this application.

to convict him was nearly identical to that which had already been introduced during the Arnold trial.

This is of particular significance given the fact that the jury in the Arnold case had heard the same evidence and found that Mr. Rodden should not be put to death. The second jury, the one sitting in judgment during the Trunnell trial, should never have been asked to determine whether Mr. Rodden should be put to death. Such determination had already been made by the jury in the first trial and Mr. Rodden should be protected against being twice held in jeopardy of losing his life during a second trial. This is the very type of multiple prosecution that the Fifth Amendment to the United States Constitution was intended to preclude.

The United States Supreme Court has already spoken on this issue in factually similar cases. Some forty (40) years ago, the high court was confronted with the same factual situation when it decided Ciucci v. Illinois, 356 U.S. 571 (1958). In Ciucci, the Court held that no due process violation occurred where the state prosecutors severed multiple murders which occurred in the same episode for separate trials, which culminated a death sentence after a third trial after Ciucci's two previous trials ended in convictions and sentences of imprisonment. *Id.* at 572-73. Ciucci was a 5-4 decision in which the minority opinion pointed out that by "using the same evidence in multiple trials the state continued its relentless prosecutions until it got the result it wanted. . . .This is an unseemly and oppressive use of a criminal

trial that violates" the constitution. While the minority opinion was based in due process problems, it nonetheless upheld that such severance and multiple trials based on the same evidence were violative of the Constitution. Ciucci, at 575. (Justice Black dissented separately on double jeopardy grounds.) The narrow majority based its opinion on a case, Palko v. Connecticut, 302 U.S 319, 328 (1937), which was later explicitly overruled by Benton v. Maryland, 395 U.S. 784 (1969). As such, a strong argument exists that the majority holding in Ciucci has already been overruled.

As further evidence that the Constitution's double jeopardy clause protects Mr. Rodden and others against the type of multiple trials in which the prosecutor seeks the death penalty after a jury has already recommended a life sentence based on the same evidence, consider the case of Bullington v. Missouri, 451 U.S. 430, 444 (1981). In Bullington, a Missouri prosecutor attempted to seek the death penalty at a retrial following Bullington's successful appeal of his capital murder conviction where the jury, after hearing all the evidence, decided to sentence him to life imprisonment without parole instead of the death penalty. 451 U.S. at 446. The Court held that allowing a prosecutor to seek the death penalty after a jury had already heard the same facts and recommended life in prison, violated the double jeopardy clause of the Fifth Amendment. Bullington, at 444.

It is beyond dispute that in Mr. Rodden's first trial for the Arnold murder, a Missouri jury which heard evidence of both murders, unanimously sentenced Mr. Rodden to life imprisonment without parole for fifty years. Mr. Rodden's right to protection from double jeopardy was violated because he was subjected to the death penalty in a second murder trial based on the same facts in which a jury had already concluded that life in prison was the appropriate punishment. There can be little doubt that the only reason that the two homicides charged against Mr. Rodden were severed into two separate trials was to give the prosecution a "second bite of the apple," to obtain a death sentence. The constitutional protection against double jeopardy lacks any meaning if Mr. Rodden is forced to defend his life as many times as there are victims of a single episode.

The scenario under which Mr. Rodden was made to suffer the death penalty after already being determined that life in prison was the proper punishment not only infringes on his Constitutional rights but it contravenes the framer's primary concern in enacting the double jeopardy clause and holds all citizens answerable to the same unjust treatment. The divergence between the sentencing recommendations of the two juries also raises troubling questions regarding the arbitrariness inherent in the capital punishment system. Former Justice Potter Stewart said that the death penalty is arbitrary and capricious and is analogous to "being struck by lightening." Rodden's case uniquely

illustrates this problem with America's and Missouri's capital punishment system.

Executive clemency is also warranted because the manner in which the prosecution sought and obtained the death penalty in this case. In addition to the Constitutional infringement involving double jeopardy, Mr. Rodden received an unfair trial due to prosecutorial misconduct.

In the first trial, the prosecution introduced the testimony of Saline County Coroner Bedford Knipschild who testified that both Arnold and Trunnell died at approximately the same time sometime after 6:00 a.m. on the morning that the bodies were found. However, at the Trunnell trial (the second trial), Dr. Knipschild estimated that Trunnell died sometime around 5:30 a.m. and gave no opinion about the time of death for Arnold. (Tru. Tr. at 459). Without any supporting evidence, Prosecutor Finnical utilized this omission to falsely argue in his summation that Arnold was killed around 2:30 a.m. (Tru. Tr. at 676). This false impression was used to argue that Mr. Rodden must have killed Arnold and then tortured Trunnell for the next three hours before killing her. Such an argument was completely false and unsupported and was used to mislead the jury into recommending a death sentence. This terribly misleading, false line of argument alone rendered the trial a violation of due process. Mr. Rodden should not be put to death when the very arguments that the prosecutor made and the jury relied upon were utterly false.

The United States Supreme Court has held that prosecutorial statements which mislead a capital jury in a way which minimizes its sense of responsibility for imposing a death sentence by leading them to believe, in their collective minds, that the responsibility for determining the appropriateness of a capital defendants' death sentence rests elsewhere, are unconstitutional. Caldwell v. Mississippi, 472 U.S. 320 (1985). Even technically correct statements, such as the statement made in Caldwell itself that the jury's sentencing decision was reviewable by the Mississippi Supreme Court, nevertheless violate the Eighth Amendment and due process if those statements are misleading and fail to inform the jury of the limited bases upon which a sentencing decision may be overturned. *Id.* at 341-343 (O'Connor, J. concurring). In Romano v. Oklahoma, 512 U.S. 1 (1994), the Supreme Court reaffirmed the core principles of Caldwell in holding that the Eighth Amendment prohibits comments which "mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for its sentencing decision." *Id.* at 9. This is precisely what occurred in the case against Mr. Rodden.

The following statements by the prosecutors, Tim Finnical and Chad Farris, during the voir dire process typify the substance of Caldwell violations that permeated the trial in this case and denied Mr. Rodden due process.

> Q: Do you understand that it's just a recommendation, that unlike in earlier years juries don't sentence people to death?

A: Yes

Q: They make a recommendation to the judge and the judge is the one who sentences a person to death. Do you understand that?

A: Yes

Q: So, even though the jury makes the recommendation for the death penalty that only allows the judge to consider death as one of the two alternatives when he sentences?

A: Yes

(Tru. Tr. at 59).

Q: Do you understand that one of the possible punishments in this case is death, a recommendation of death?

A: Yes

Q: You understand that, all right. Okay, now, do you understand that when you make a recommendation, when you sign on the dotted line and say we recommend that this man get the death penalty, that you are making a recommendation to the judge. Do you understand that?

A: Right

Q: That the judge can still give the defendant 50 years in prison without parole or life in prison without parole for 50 years, do you understand that?

(Tru. Tr. at 66)

The prosecutor's descriptions of a diminished jury sentencing role continued into closing argument in the penalty phase:

> If a sentence, or at least a recommendation from this jury, saves one innocent life and saves one mother and one father from having to live through the grief and the misery and the ruin that James Rodden and people like him cause, a recommendation

> of the death penalty by you whether the judge actually sentences him to death or not, sends a message.

(Exh. 1).

As the above quoted passages indicate, the prosecutor repeatedly drove the point home to the jury that the decision to sentence Rodden to death would be made by the judge and not the jury, so long as the jury gave the judge that option by returning a "recommendation" of death.[5]. These comments were highly misleading and inaccurate. The prosecutors repeatedly reinforced the erroneous notion that juries do not sentence a capital defendant to death under Missouri law. According to the prosecution, the judge has veto power over a jury's death sentence and is in effect, a thirteenth juror. (Tru. Tr. at 185). The prosecution also implied that the judge would have more information and would therefore be able to make a more informed and correct decision as to the appropriate punishment.

Such statements were plainly inaccurate, because if even one juror had held out for a life sentence, under then existing Missouri law, the judge would be required to impose life imprisonment and could not impose a death sentence. *See* RSMo. §565.008 (1978), *repealed* (1984). Contrary to these arguments, trial judges in Missouri capital cases do not have a vote and do not act as a thirteenth juror, because a trial judge must follow

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[5] During the course of the trial, prosecutors used the words "recommend" or "recommendation" in the same sentence with "death" or "death penalty" eighty four (84) times.

the recommendation of the entire jury if it unanimously recommends a life sentence. *Id.*

The comments that the prosecutors made throughout the trial certainly were made to diminish the jury's understanding of their role in deciding the sentence of Mr. Rodden. The jury was made to feel like their decision had little to do with the ultimate fate of Mr. Rodden. It was the judge and appellate courts who the prosecutors stated would be the final sentencers.

The lead prosecutor in Mr. Rodden's case has had another death sentence overturned because of his misconduct. In the mid-1980's, assistant attorney general Tim Finnical prosecuted three Missouri capital cases, including Mr. Rodden's case, that resulted in death sentences. The other two cases involved co-defendants Robert Driscoll and Roy Roberts. A panel of the Eighth Circuit Court of Appeals held in the Robert Driscoll case that Finnical's misleading and inaccurate arguments to the jury, which are almost identical to those made in this case, violated Caldwell. Driscoll v. Delo, 71 F. 3d 701, 711-713 (8th Cir. 1995). Mr. Rodden should be given the same consideration that Robert Driscoll received. Mr. Rodden should be granted clemency, if for no other reason, because his death penalty was the result of improper, constitutionally improper remarks by the prosecutor.

In addition, there can be little dispute that the prosecutor in this case delivered several outrageously improper arguments during his penalty phase summation of the Trunnell trial. The prosecutor directly appealed to the jury's fears and prejudices,

invoking religious imagery as well as making analogies to wartime and famous historic and public figures.[6] Even in his guilt phase argument, the prosecutor told the jury: "we're being crucified on a cross of violent crime." And further, the prosecutor stated that the jury should not show mercy because convicting Rodden would be analogous to "killing an enemy during war time." (Tru. Tr. at 676-678).

The prosecutor's arguments during the penalty phase were even more flagrantly improper. Prosecutor Finnical made repeated attempts to obtain death by emphasizing the prior jury's life verdict by delivering the following improper arguments during his penalty phase summation:

> Now, if James Rodden killed two people and he got fifty years in prison without parole for killing one person, does he get the murder of the second person free?

(Exh. 1).

> Now, if he gets fifty years in prison with no probation and parole for killing Joe Bob Arnold, my question to you is should he get the second one free? Should he not be punished for the murder of Terry Trunnell? For to return a verdict strapping the judge to, forcing him to consider only fifty years without parole, is no punishment whatsoever.

(*Id.*).

> But, I ask you, when you go back and you say, if he got fifty years for killing one person, if we give him fifty years for killing another one and

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[6] Finnical also made references to wartime in voir dire, drawing improper analogies to killing during wartime and the use of the death penalty against convicted murderers. In particular, Finnical spoke of killing the British in the Revolutionary War and that killing Nazi's in World War II was justified because of the atrocities they had committed. (Tru. Tr. at 87-88).

> don't let the judge even consider your recommendation of the death penalty, what punishment is there for murdering that girl, for murdering the second person? I think you'll realize to bring back a recommendation of fifty years, then he gets the second one free. And James Rodden doesn't deserve anything free. He hasn't earned it.

(*Id.*).

It cannot be seriously disputed that such arguments were improper and prejudicial. It is well settled under the law in every jurisdiction that it is improper for a prosecutor, or for that matter a defense lawyer, to argue that a jury should be influenced by the outcome of a previous trial in a related case. An analogous situation is presented when either side attempts to argue that a co-defendant's acquittal or conviction, as determined in a previous proceeding, should have some bearing upon the jury's decision in the case at hand. Addressing an almost identical factual situation, the Supreme Court of Tennessee reversed death sentences in two cases where the prosecutor argued that because a previous jury had given the defendant life imprisonment on another murder, that unless the jury imposed death in the instant case, the defendant would not be punished at all for the second murder. State v. Bigbee, 885 S.W.2d 797, 810-11 (Tenn. 1994); State v. Smith, 755 S.W.2d 757, 767 (Tenn. 1988). These "freebie" arguments further intensified the improper and highly over-prejudicial nature of the proceedings.

In addition, during the penalty phase in the context of one of his improper Caldwell arguments, the prosecutor went so far as

to suggest that Rodden would probably never be executed, but the jury should sentence him to death anyway so he would suffer by spending time with others who are sitting on death row. Finnical also delivered improper arguments regarding the deterrent effect of the death penalty, in essence suggesting to the jury that they should sentence Rodden to death or else other innocent lives would be placed in jeopardy. Finnical further delivered another improper general deterrence argument to the jury, suggesting that by sentencing James Rodden to death, this could somehow prevent others from committing future murders. Finnical also invoked improper images of a supposed friend of his who died in the Vietnam War suggesting, that if his friend had died "honorably" in the service of his country, the jury should not hesitate to order Rodden to die "dishonorably" for committing the crime of murder. Similar arguments were deemed improper in Newlon v. Armontrout, 885 F.2d 1328, 1342 (8th Cir. 1989) and Hance v. Zant, 696 F.2d 940, 952 (11th Cir. 1983)(reversing death sentence because of improper arguments regarding deterrence and killing during wartime). Finnical also suggested to the jury that death by lethal gas would be instantaneous.

In the final stages of his argument, Finnical also unconscionably invoked Biblical imagery in support of his argument for a death sentence stating that: "Blessed are the merciful for they shall receive mercy. It [the Bible] doesn't say blessed are the wicked and brutal and the mean and cruel for they shall receive mercy. And even if God didn't give mercy for that,

why should you." (A - 134). The pervasive use of religious arguments in favor of death sentences by prosecutors has been universally condemned by the reviewing courts. Last of all, Finnical invoked the name of Missouri's only president, Harry Truman, in arguing to the jury that they should reject mercy in this case by thinking of the oft-cited "Trumanism:" "the buck stops here." (A - 135). As one can easily see, prosecutor Finnical made numerous remarks that crossed the line. He crossed the line so many times that Mr. Rodden's trial became fundamentally unfair, prejudicial and a total disregard for Constitutional rights. If due process and fairness are to have any continued vitality in the context of an accused's rights during a capital trial, Mr. Rodden must be granted clemency in this matter.

3. Mr. Rodden Received Ineffective Assistance of Trial Counsel.

As previously noted, Mr. Rodden believes he received ineffective assistance from his trial counsel, Mr. Lee Nation, due to his failure to call Angel Duffy as a witness in the guilt phase of trial. She would have substantially bolstered his story that he killed Arnold in self-defense after Arnold had killed Ms. Trunnell. The failure to call Ms. Duffy is not the only deficiency in Mr. Nation's performance at trial. As noted previously, Mr. Nation failed to object to the inflammatory barrage of improper arguments offered by Prosecutor Finnical throughout the trial. It was simply inexcusable for Mr. Nation not to know that these arguments were inflammatory and improper

and interpose a timely and meritorious objection. Mr. Nation also failed, as previously noted, to recognize and object to the prosecutor's misleading arguments regarding both victims' time of death which allowed the jury to get the false impression that Ms. Trunnell was killed several hours later after Mr. Arnold.

The other egregious instance of ineffective assistance of counsel was trial counsel's failure to investigate and present available mitigating evidence in the penalty phase of trial. In this respect, Rodden's case is factually similar to the case currently under review by the Governor's office involving death row inmate William "Ted" Boliek. At the first trial, Nation called Mr. Rodden's mother, Mary Rodden, as a witness at the penalty phase. Undoubtedly, it was Mrs. Rodden's testimony coupled with residual doubt of guilt that convinced the jury to spare Rodden's life in the Phelps County trial. Inexplicably, Mr. Nation called absolutely no witnesses in mitigation of punishment at the second Clay County trial. Such a failure is simply inexcusable and certainly taints the reliability of the second jury's sentencing recommendation, particularly when viewed side-by-side with the result of the first trial.

Mr. Nation testified at the 27.26 hearing that he supposedly had a trial strategy of not calling any mitigating evidence witnesses because of the late hour the penalty phase commenced and his unsubstantiated belief that the jury would be more likely to return a life sentence because of the late hour and their fatigue. (27.26 Tr. at 30). Nation also stated that he didn't

call Angel Duffy because he believed, without specifying why, that she could give information that would hurt the defense. (Id. at 41). Both of these excuses ring hollow. There was no rational explanation as to why a tired jury wouldn't be just as likely to quickly return a death sentence as opposed to a life sentence. Moreover, Ms. Duffy's testimony, as previously noted, was clearly helpful to Rodden's claim of self-defense.

Last of all, Mr. Nation is no stranger to controversy surrounding his performance as counsel in high profile murder cases in the State of Missouri. Over the last two decades, Mr. Nation was the original attorney in two celebrated cases, in which innocent persons were convicted and sent to prison. The first, involved the notorious case arising out of St. Joseph, Missouri involving Melvin Lee Reynolds and Charles Hatcher. An account of this case was published in a book entitled ST. JOSEPH'S CHILDREN. Mr. Reynolds, a mentally impaired man, was represented by Mr. Nation at trial in a capital murder case. Although Mr. Reynolds escaped the death penalty, he was convicted and sent to prison for the murder of a young girl. See State v. Reynolds, 619 S.W.2d 741 (Mo. 1981). Mr. Reynolds would undoubtedly still be languishing in prison if not for the fortuitous fact that the actual murderer, serial killer Charles Hatcher, confessed to the murder for which Mr. Reynolds was convicted.

Mr. Nation also originally represented Stacy Simpson, a fourteen-year old girl, who was charged on the basis of extremely tenuous evidence that she had killed her mother. Mr. Nation

convinced Stacy to plead guilty to a crime which she did not commit and she subsequently served many years in prison before finally being permitted to withdraw her plea of guilty. See e.g. Simpson v. Camper, 743 F.Supp. 1342 (W.D. Mo. 1990), rev'd on other grounds, 927 F.2d 392 (8th Cir. 1991); State v. Simpson, 836 S.W.2d 74 (Mo. App. S.D. 1992). After being permitted to withdraw her guilty plea, Ms. Simpson was acquitted after taking her case to a trial by jury.

Given Mr. Nation's track record and the obvious deficiency in his performance, the state cannot have much confidence in the reliability of the outcome of Mr. Rodden's trial. This fact, coupled with the other grounds contained in this petition, strongly suggests that the death penalty is not appropriate in this case.

4. In light of the political firestorm surrounding the Governor's decision to commute the sentence of Darrell Mease, the interests of justice and fairness require a temporary reprieve and a 90-day moratorium on executions to insure that clemency decisions are not perceived to be tainted by political factors.

Since Governor Carnahan commuted the death sentence of Darrell Mease at the request of Pope John Paul II two week ago, the Governor's decision has come under attack from death penalty proponents and the Governor's political enemies. Less than 48 hours after the Pope left St. Louis, the Missouri Supreme Court set Mr. Rodden's execution date for February 24, 1998, less than

four weeks after the warrant issued.[7] The Court has since set the execution of Roy Roberts for March 10, 1999.

Counsel for Mr. Rodden would respectfully request that the Governor grant temporary reprieves to Mr. Rodden and Mr. Roberts and use his legal authority and persuasive powers to urge a 90-day moratorium upon the setting of future execution dates in order to allow the politically charged atmosphere surrounding the Mease commutation to wane. Otherwise, it will be perceived by many Missourians that the Governor's decision on these subsequent cases in the aftermath of the Mease decision were motivated solely by political factors. A brief moratorium would further allow the Governor to consider the merits of each inmate's case in a calm and rational manner and reach a fair and just decision.

A moratorium on executions is certainly not a novel or radical idea. The usually staid and conservative American Bar Association overwhelmingly urged such a moratorium nationwide some months ago due to the justifiable perception of obvious injustices and arbitrariness in the imposition of the capital punishment system in America. To use an analogous term from labor relations, a "cooling off period" would allow the passions stemming from the Mease case to subside and promote the public perception that the chief executive of this state treats all requests for clemency from condemned men in a fair and evenhanded manner.

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[7]Normally, executions are set 6-10 weeks in the future.

5. Mr. Rodden is no threat to anyone if he remains incarcerated.

Mr. Rodden has served more than 15 years in prison awaiting execution. During that period he has been a cooperative and peaceful inmate. He has been active in prison activities and is well liked by other inmates and prison personnel. Mr. Rodden poses no threat to his peers or to the prison guards. The Governor may rest assured that if his sentence is commuted, Mr. Rodden will pose no threat to the safety of prison staff or other inmates.

CONCLUSION

James E. Rodden will certainly be put to death if the Governor does not exercise his constitutional and statutory powers to commute Mr. Rodden's sentence of death to the alternative of life imprisonment without the possibility of parole for 50 years. There remains doubt as to whether James E. Rodden committed the murders. The jury's verdict at the first trial demonstrates the plausibility of Rodden's self-defense claim. Furthermore, Mr. Rodden was sentenced to life in prison by a jury that had heard all of the evidence only to have his life sentence superseded after an unconstitutional and fundamentally unfair second trial. In counsel's view, to echo the sentiments of former Justice Harry Blackmun, this case evidences the unwillingness of the federal judiciary in the "Rehnquist/Scalia" era to intervene in capital cases despite irrefutable evidence of constitutional error.

James E. Rodden, by and through his attorney, respectfully requests that the Honorable Mel Carnahan exercise his constitutional and statutory powers to commute his death sentence to the alternative sentence of life imprisonment without the possibility of parole for 50 years. In the alternative, Mr. Rodden requests that the Governor exercise his constitutional powers to grant a reprieve or appoint a board of inquiry. However, in light of the politically charged atmosphere following the Pope's visit and the commutation of the sentence of Darrell Mease, fundamental fairness dictates that a temporary reprieve and moratorium of ninety days be imposed precluding any further executions, so Mr. Rodden and Missouri's other condemned men can receive the careful and rational consideration of their clemency requests that the law and due process contemplates. Otherwise, it will be perceived, and probably rightly so, that the clemency decision in this case and others, was motivated solely by political considerations.

Respectfully submitted,

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