

**Application to the Honorable Mel Carnahan
for Clemency in the Matter of
Gary Lee Roll**

On November 16, 1993, Gary Lee Roll was sentenced to death on each of three counts of murder in the first degree. He is scheduled for execution at 12:01 a.m. on August 30, 2000.

I was appointed by Judge Sachs to represent Mr. Roll on a federal habeas corpus petition challenging those sentences on December 5, 1997. Based on my work on that case and conversations with Mr. Roll, I would respectfully suggest four areas that appear to be particularly appropriate for consideration in connection with this Application. Those are: (1) Mr. Roll was under the influence of voluntarily ingested alcohol and drugs at the time of the crimes, (2) his experimentation with, and eventual addiction to, those drugs resulted, at least part, from sustaining sufficiently severe nerve damage while having teeth removed in the Armed Forces that he became entitled to a 50% service connected disability, followed by at least two subsequent Veteran's Administration Hospital surgeries that only exacerbated the problem, (3) the private counsel who represented Mr. Roll at trial, during the guilty pleas and at sentencing did not act in Mr. Roll's best interest and exercised what could most charitably be called poor judgment, and (4) Mr. Roll is an honorably discharged veteran with no violent or criminal history prior to these crimes.

The sentencing court indicated a belief that it could not consider the first factor in mitigation, and did not specifically address the second factor apart from its comments regarding the first. While the sentencing court did address some aspects of the third factor in connection with an argument that counsel rendered ineffective assistance under a constitutional standard, it did not address concerns, expressed below, that counsel simply used poor judgment and implemented ill-conceived strategies. The fourth factor was considered as mitigating by the sentencing court.

The fact of Mr. Roll's voluntary intoxication at the time of the crimes is not questioned. The Missouri Supreme Court's conclusion that he had ingested "alcohol, marijuana and four to six hits of LSD" is a fair reading of the transcript. Although such voluntary intoxication is not a legal defense under Missouri law, it is an appropriate consideration in mitigation. Such consideration is particularly appropriate in Mr. Roll's case when viewed in the context of how he was drawn to illegal drugs.

Mr. Roll's medical history is described in some detail in *Roll v. United States*, 548 F.Supp. 97 (E.D.Mo. 1982) (attached hereto as Exhibit A), which involved a Federal Tort Claims Act claim by Mr. Roll and his wife arising from a failure to provide informed consent prior to a surgery performed at a Veteran's Administration Hospital. That decision is important both because it documents the nature of the problem, and that it was a real problem that Mr. Roll had been attempting to address for 15 years prior to these crimes, and not just something he dreamed up as a defense or factor in mitigation of these crimes. The following narrative is a summary of Judge Nangle's Findings of Fact therein.

Several of Mr. Roll's teeth were pulled while he was in the Armed Forces in 1974. The procedure resulted in damage to the nerves of his jaw, "which has caused him a great deal of pain subsequently." He was therefore honorably discharged on September 7, 1974 and awarded a 50% service connected disability. By December of 1976, the pain "had reached such intensity that he was unable to maintain a normal social life." As of that time, the pain, burning and numbing sensation was limited to his lower lip. On June 24 1977, he underwent a right mental neurectomy, which is a surgical procedure to remove a portion of the nerve that supplies feeling to the entire face. 548 F.Supp. at 98-99.

By August of 1977, Mr. Roll was taking decadron, delmane and demorol to alleviate pain radiating up and around his ear. Neurological examination "indicated that the new pain might be associated with the earlier neurectomy." Over the next two weeks he experienced increasing right and left jaw pain, despite his doctor's attempt to provide relief through various drugs, pain medication and steroid injections. Mr. Roll therefore underwent a bilateral mental neurectomy, in the hopes numbing his lower lip. Unfortunately, the surgery did not have the desired effect, and by the time of trial Mr. Roll was experiencing "chronic pain in his chin, lip, high neck, jaw, gums and anterior part of his lower jaw." The severity of the pain had a substantial impact on the lives of Mr. and Mrs. Roll, preventing him from performing work that he might otherwise perform and limiting their social life. 548 F.Supp. at 99-100.

Over the next 10 years the VA Hospital amassed hundreds of pages of records reflecting the prescription and administration of various combinations of narcotic analgesics and anti-anxiety agents, none of which were really effective. Mr. Roll became concerned about addiction to these drugs and, through an in-patient hospital stay, was able to get off of them in early 1992. Then, in March of 1992, Mr. Roll was working on the roof of his house and fell, breaking and

splitting through the joint in his ankle where the long bones come together. The prognosis for total healing was not good at the time, and the injury has in fact never healed. Mr. Roll's cane was recently taken from him and, as of yesterday, August 21, 2000, his ankle was swollen to approximately three times normal size.

Immediately following the leg injury, Mr. Roll was placed back on narcotic pain medications, and began a downward spiral. The pain and resulting depression that had been haunting him for the last seventeen years, coupled with the new pain from the leg injury, became unbearable. He began using marijuana and LSD, and found that those drugs did provide some level of relief.

Thus, Mr. Roll came to the night of November 9, 1992, under the influence of alcohol, marijuana and four to six hits of LSD. As noted above, this voluntary intoxication does not relieve him of legal responsibility. He was, however, undoubtedly suffering from substantially impaired judgment, and that factor, along with an understanding of how he came to be in that position, certainly merit consideration of a lessening of moral responsibility, warranting commutation of his sentences. This conclusion is reinforced by his lack of criminal or violent record, indicating that he is not a career criminal or a criminal on a track of increasingly serious offenses. He is a man who exercised extremely poor judgment under extreme circumstances, culminating from years of pain, on a single night. He thereby put himself in a position to commit the crimes to which he ultimately pled guilty.

Perhaps the most disturbing aspect of this case is the treatment Mr. Roll received from his privately retained lawyer. (1) The Federal District Court was "not comfortable with concluding that trial counsel had satisfied his constitutional responsibilities" to Mr. Roll with respect to the presentation evidence regarding Mr. Roll's mental condition at sentencing, but concluded that there was no prejudice because the sentencing judge ultimately heard such testimony at the post-conviction hearing and was "distinctly unimpressed." It is worthy of note, however, that by the time the sentencing judge heard the testimony he had already stated that he did not believe the law allowed him to consider the commission of one crime (i.e. taking illegal drugs) in mitigation of another, and had already imposed, and committed himself to, death sentences. (2) More

importantly, the standard for constitutional ineffective assistance of counsel is much higher than simple bad lawyering.

The record is replete with examples. The general tenor of Counsel's representation, and his desire to cover and pad his own backside rather than honor his explicit ethical obligation to zealously represent his client, are reflected in a "Statement of Defendant on Eve of Trial" (attached hereto as Exhibit B) that he required Mr. Roll to sign. A few of the more onerous paragraphs recite that Mr. Roll was totally sane (in direct conflict with potential defenses or mitigation evidence), that Mr. Roll was entirely satisfied with Counsel's performance but wanted him to withdraw at the conclusion of the case and seek to have a Public Defender appointed, that he irrevocably assigned all of his assets to Counsel, and, most egregiously, that he permitted his attorney to make the entire statement public, thereby waiving the attorney client privilege.

Counsel did not seek any form of mental evaluation, with respect to defenses or mitigation, but put in writing to Mr. Roll's brother that he was likely a "zombie" or "time bomb" at the time of the crimes. Counsel testified that he had consulted with Dr. Agnew, one of Mr. Roll's treating physicians at the VA, regarding legal sanity issues prior to trial, but Dr. Agnew testified at the post-conviction hearing that no such conversations ever occurred.

Despite reportedly coming to town ready for trial on August 29, and being surprised by his client's decision to plead guilty, Counsel clearly was not ready for trial. When an attempt to enter a guilty plea on the morning of August 30 failed, Counsel did not ask questions on voir dire, did not make an opening statement, and did not cross examine the State's first witness.⁽³⁾

Over the course of my representation of Mr. Roll, I have probably discussed his case with fifteen or twenty criminal law practitioners. Every single one of them has looked on in disbelief when told that counsel advised or allowed his client to waive a jury as to both trial and sentencing, and plead straight up to three counts of first degree murder, knowing that the prosecution is continuing to seek the death penalty. While the client clearly has the right to make the decision and enter into a guilty plea, there is no reason to waive the jury as to sentencing.⁽⁴⁾ If even one member of the twelve-person jury refuses to recommend the death penalty, the court

cannot impose it. In a jury-sentenced case, a defendant has twelve chances to avoid the death penalty. In a judge-sentence case, a defendant has one chance to avoid the death penalty.

The only relief Mr. Roll seeks is to have his sentences commuted to life in prison, with the possibility of probation or parole. In consideration of the foregoing, the undersigned respectfully submits that such relief is mete and proper.

Respectfully Submitted,
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ATTORNEYS FOR GARY LEE ROLL

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1. Although Mr. McManaman never revealed a total figure he received, he did acknowledge receiving a power of attorney and thereby obtaining Mr. Roll's house, truck, bank account and monthly VA disability checks.
 2. The death sentences were originally imposed on November 16, 1993, and the judgement following the post-conviction hearing was not entered until December 29, 1995.
 3. In pondering why counsel would not make an opening statement or cross examine the witness, one almost overlooks the question of why those issues even arose on the first day of trial, in that jury selection alone normally takes several days in a capital murder trial.
 4. Technically, a defendant may not enter a plea of guilty to the court and have punishment assessed by a jury, except by agreement of the state. As a practical matter, however, if the state is unwilling to so agree a defendant can proceed with trial, but not dispute guilt, or simply confess in his testimony, thereby effectively pleading guilty to the jury.