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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CA-348-COA

JAMES RODGERS

VS.

STATE OF MISSISSIPPI

FILED

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SUPREME COURT
COURT OF APPEALS

APPELLANT

APPELLEE

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judge of the Court of Appeals may evaluate possible disqualifications or recusal.

James Rodgers

Appellant/Defendant
Parchman, MS

John L. Long

Attorney for Appellant
Saltillo, MS

Jim H. Hood

Attorney General
Jackson, MS

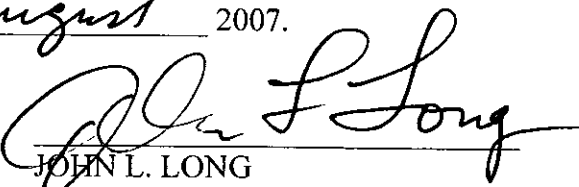
Honorable Thomas Gardner, III

Circuit Court Judge
Tupelo MS

Honorable John Young

District Attorney
Corinth MS

So certified, this the 11 day of August 2007.


JOHN L. LONG

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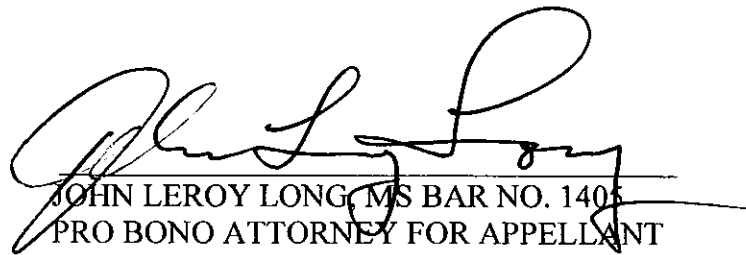
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ORAL ARGUMENT REQUESTED

James Rodgers, appellant in the above styled and numbered cause, by and through his attorney, John L. Long, hereby makes this formal request for oral argument in this matter.



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STATEMENT OF THE ISSUES

- Issue 1:** Whether the trial court erred as a matter of law by failing to order a new trial upon learning that the state and defense attorney failed to disclose relevant medical information to the Court prior to trial thereby depriving James Rodgers throughout the entire case of his Constitutional Rights to a fair trial as secured by the due process clause of the State of Mississippi and of the United States.
- Issue 2:** Whether the trial court erred as a matter of law by failing to ascertain if a meaningful retrospective competency hearing is still possible after more than seven years and without contemporaneous medical information.
- Issue 3:** Whether the trial court erred in holding that the defendant was competent to stand trial, notwithstanding the total lack of contemporaneous medical evidence and the passage of time since the trial of the case.

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STATEMENT OF THE CASE

A. Nature of the Case:

This case involves the appeal of the trial court's ruling that James Rodgers was competent to stand trial on February 16, 2000. Prior to the trial no competency hearing was held for James Rodgers even though his defense counsel had made affidavit and the trial court had filed an Order requiring a complete psychiatric examination of James Rodgers prior to trial. The trial Court did not hold a competency hearing pursuant to MRCCC 9.06, and such failure by the State of Mississippi and James Rodgers' trial counsel to inform the Court of the report of an examination held at the VA Hospital in Memphis, Tennessee, on October 26, 1999, resulted a violation of due process of the law.

After James Rodgers was convicted of murder, Rodgers filed for post conviction relief, which relief was granted by the Supreme Court of Mississippi in Cause No. 2003-M-01999. As a result of this Order James Rodgers was given a retrospective competency hearing on December 12, 2006. The hearing was held more than seven years after the trial of the case and without any contemporaneous medical information available for James Rodgers concerning his mental status and his ability to rationally assist his

attorney in his defense. These circumstances required the Court to speculate about James Rodgers' mental capacities in his trial for murder.

The trial Court denied James Rodgers' post conviction relief on January 30, 2007. James Rodgers now appeals from that decision. (See Exhibit 1, Record Excerpt, page 1.)

B. Course of the Proceedings:

1. James Rodgers was indicted for murder of Walter Stolz in February 1999, in Lee County, Mississippi.
2. James Rodgers' defense counsel filed a pre-trial Motion for a Psychiatric Examination on August 6, 1999. The trial Court thereafter entered an Order for a Psychiatric Examination of James Rodgers. (See attached Exhibits 2 and 3.)
3. As a result of the trial Court's Order James Rodgers was transported to the Veteran's Hospital in Memphis, Tennessee, to be examined by Dr. William Walker, Jr., on October 26, 1999. The Order also provided that the Court be informed of the results of that examination.
4. Dr. William Walker, Jr., stated upon his report the purpose of the examination and the fact that he did not perform a mental status examination. (See Exhibit 4.) This report was **withheld** by the defense attorney and the State of Mississippi from the lower Court prior to trial.
5. James Rodgers filed for post conviction relief on September 9, 2003, before the Mississippi Supreme Court in Cause No. 2003-M-01999. The Order, signed on March 24, 2004, grants James Rodgers' application to seek post conviction relief in the trial Court. (See Exhibit 5.)

6. This appeal is from the Order of the Circuit Court of Lee County, Mississippi, in Civil Action No. CV04-071(G)L denying post-conviction relief. (See attached Exhibit 1.)

C. Statement of the Facts:

James Rodgers was first admitted to the Veteran's Hospital in Memphis, Tennessee, on or about October 9, 1974, and diagnosed with a personality disorder with antisocial pyclothymic features, and possible manic depressive disease. By June of 1990, James Rodgers' manic depressive disease had evolved into bipolar disorder, type III. By September 8, 1998, records of the VA Hospital in Memphis, Tennessee, indicate that James Rodgers' diagnoses were PTSD, bipolar, depression. (See Exhibit 6.)

Prior to being tried for murder on or about February 16, 2000, James Rodgers was in the Lee County Jail for approximately seventeen months. At no time during the seventeen months did James Rodgers receive psychiatric treatment and went to trial with a jury verdict of guilty of murder the next day, February 17, 2000.

At the time of the trial James Rodgers was tried without benefit of proper medications for his several mental conditions, as the medical personnel in the Lee County Jail had stopped James Rodgers' medication. (See Exhibit 6.) James Rodgers was tried without benefit of a psychiatric examination by a psychiatrist or psychologist for seventeen months prior to trial.

At no time prior to trial was the Court informed of the report by Dr. William Walker, Jr., dated October 26, 1999. (See report as Exhibit 4.) As a result the trial Court was without benefit of all the facts surrounding the mental capacities of James Rodgers.

The result of this failure to inform the Court prevented the Court from being able to follow MRCCC 9.06.

James Rodgers filed a Motion with supporting affidavit to determine if it was possible to hold a competency hearing without medical evidence seven years after the trial. (See Exhibit 7.) The meaningfulness of a retrospective competency hearing in this case was not addressed by the trial Court. Said Motion was supported by an affidavit from Dr. Joe E. Morris, which in effect states that no meaningful competency hearing can be held in this matter without resorting to speculation about James Rodgers' mental capacities before and during trial. (See supporting affidavit to Exhibit 7.) The Affidavit of Dr. Joe E. Morris was unopposed by the State of Mississippi.

James Rodgers was diagnosed with post traumatic stress disorder, bipolar, manic depressive, depression. The only time James Rodgers saw a psychiatrist in the seventeen months he was held in jail before trial was when Dr. William Walker, Jr., did not perform an evaluation on October 26, 1999. (See Exhibit 4.) This report included only a GAF (Global Assessment Functioning) Score of 45, which indicates severe depression. A GAF rating measures the level of functioning at the time of the evaluation and indicates Dr. Walker's subjective judgment of James Rodgers' psychological functioning on that date.

At the hearing on December 12, 2006, Nat Collins, a nurse practitioner, testified that prior to the hearing in 2006, he prescribed Elavil, which is used to treat major depression. (See hearing transcript dated December 12, 2006, page 57, marked as Exhibit 8.) Nat Collins also testified that a person with major depression has a condition which is not always visible to the naked eye.

Even through speculation, one could reasonably conclude that James Rodgers was and has been suffering from severe depression based upon the VA computer generated medical record of September 1998; the one page report of Dr. William Walker, Jr., and the examination made at the Lee County Jail in 2006, by the nurse practitioner, Nat Collins. Major depression or severe depression affects the mental capacities adversely by causing the individual to use poor judgment, reducing concentration, and affecting memory.

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SUMMARY OF THE ARGUMENT

The argument may be summarized into three basic issues. The first issue calls for a determination or argument based upon the failure of the State and Trial Court to inform the Court of the results of a psychiatric examination made as pursuant to a Court Order. The Court Order requires that the report be made to the trial Court to determine the mental status of the defendant, James Rodgers. There was a total failure of the State and defense attorney to obey this Order. The failure to appraise the Court and follow its Court Order deprived the Trial Judge of critical knowledge surrounding the mental status of James Rodgers before and at the time of trial in this case.

Secondly, James Rodgers filed a Motion to determine the accuracy of his proposed retrospective competency hearing. This Motion was supported by an Affidavit of a licensed psychologist, Joe Edd Morris, who opined that such a competency hearing in this case could not be held without resorting to speculation as to the mental status of James Rodgers. This Affidavit was unopposed by the State.

Thirdly, the retrospective competency hearing, which was held on December 12, 2006, clearly showed that there was no available medical information upon which to base an accurate determination of the mental status of James Rodgers seven years earlier and

prior to the trial of this case. The trial Court ignored over twenty years of psychiatric treatment and based its judgment solely upon a reading of a cold record and the testimony of the defense counsel. Again, depression does not always manifest itself to the observer as a psychotic condition. The defense counsel's testimony is incredulous in that he attempts to say that James Rodgers, though suffering from a psychotic condition and under psychiatric care, was able to make his own personal determination to waive a psychiatric examination in this matter. No record of this event, if it happened, was made.

Any of these arguments summarized above should be sufficient for this Court to order a new trial, as James Rodgers clearly "fell through the cracks" and was not afforded due process of law.

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ARGUMENT

Standard of Review: It should be noted that clear error and abuse of discretions are separate standards of review. Where questions of law arise the standard of review is de novo. A lower Court's factual findings, unless they are found to be clearly erroneous, will not be disturbed. *Pace v. State*, 770 So. 2d 1052 (Miss. Ct. App. 2000.)

Issue 1:

James Rodgers contends that he was denied a fair trial, in violation of the due process clause in two ways; 1) He was denied a fair trial when James Rodgers' retained attorney and the State of Mississippi failed to carry out the Court's Order by not filing or reporting verbally to the Court the report received from Dr. William Walker, Jr., that no mental testing was done. This failure to report verbally to the Court or file with the Court the medical record from Dr. William Walker, Jr., may be viewed by some as a type of pious fraud (see Black's law dictionary, 4th Edition, page 789;) and 2) James Rodgers was not evaluated by the trial Court because the lower Court did not have all of the information available. The withholding of critical medical information resulted in the trial Court's failure to pursue a competency hearing as required under MRCCC 9.06.

James Rodgers was tried for murder at a time when the trial Court had been misled by the retained counsel and the State of Mississippi. The trial Court states that it did not have full information at the time of the trial in its preliminary statement before the hearing on December 12, 2006. (See page 2 and 4 of the hearing transcript, dated December 12, 2006.) This withholding of critical medical information from the trial Court caused James Rodgers to “fall through the cracks.” (See the testimony of Honorable Omar Craig, pages 50 and 51 of the trial transcript dated December 12, 2006.)

Our criminal justice system has long recognized that a person, such as James Rodgers, who lacks the capacity to formulate a rational defense may not be subjected to a trial. *Drope v. Missouri* 420 U.S. 162, 171 (1975.) The conviction of James Rodgers was at a time when he lacked the mental capacities to formulate a rational defense thereby violating due process. *Pate v. Robinson*, 383 U.S. 375, 378 (1966.)

One would have to speculate that the trial Court, if it had the knowledge of James Rodgers’ mental conditions, including post traumatic stress disorder, bipolar, manic depression and severe depression would have ignored this information and proceed to trial, in violation of MRCCC 9.06. It is the contention of James Rodgers that the trial judge, as a detached and neutral person, would have ordered a competency hearing before the murder trial, otherwise one would have to assume that a Court acting, detached and neutral person, would have ignored the medical facts and history of this case and forced James Rodgers to trial while in the state of severe depression without proper medication.

This Court said in *Conor v. State*, 632 So.2d 1239 (Miss. 1993), that the ultimate question is whether reasonable grounds exist to believe that the accused was insane. MRCCC Rule 9.06 mandates a competency hearing and a determination of what is

reasonable rests largely with the discretion of the trial judge. For the purposes of reviewing a decision to forego a competency hearing this Court has used the following test, did the trial judge receive information which, objectively considered, should reasonably have raised a doubt about defendant's competence and alerted him to the **possibility** that the defendant could neither understand the proceedings, appreciate their significance, nor **rationality aid** his attorney in his defense?

Therefore, the "Bedrock" issue is whether or not reasonable grounds existed to mandate a competency hearing. James Rodgers submits that it did, but the reasonable grounds that existed were never presented to the trial judge. Knowledge of the trial judge is the defining characteristic of MRCC 9.06.

The only fair thing to do now was suggested by James Rodgers' witness, long time attorney, Omar Craig. Mr. Craig opined that James Rodgers "fell through the cracks." He opined that the only fair thing to do now is to set aside James Rodgers' conviction and hold a meaningful competency hearing if possible. (See hearing transcript of testimony of witness attorney Omar Craig's.)

Conventional wisdom as well as case law indicates that a person who has had severe mental problems, officially raised by Affidavit, cannot waive his right to a competency hearing because it is folly to believe that an incompetent person is competent to waive a hearing. The determination of unfitness to stand trial and able to assist in one's defense requires a simultaneous consideration of the individuals' mental capacities with reference to the demands of the specific trial. Pate v. Robinson, 383 U.S. 375, 378 (1966).

Issue 2:

It is further the contention of James Rodgers' that the lower Court should have made a determination as to the probabilities of a meaningful assessment of James Rodgers' mental capacities. A meaningful determination is not likely where the circumstances of the case include a complete lack of medical records for seventeen months prior to the trial of James Rodgers.

Due to the long passage of time and the lack of contemporaneous medical evidence, including medical records, it is submitted that the unopposed affidavit of Dr. Joe E. Morris, filed as an addendum to James Rodgers' Motion to Determine the Accuracy of a Retrospective Competency Hearing, is correct in stating that the lack of medical information causes any assessment of James Rodgers at this time to be pure speculation. Dr. Joe E. Morris' affidavit stands alone as the only affidavit concerning the distinction between speculation and an accurate assessment of the defendant's mental capacities before and at trial.

The medical evidence in this case is so scant that it is now impossible to cure any error by holding a *nunc pro tunc* determination of competency. It is the argument of James Rodgers that a meaningful determination of his mental capacities at or before trial, more than seven years ago, and without medical evidence, his mental competence cannot now be made.

A meaningful retrospective competency hearing depends on the facts of each case. In *Wheat v. Thigpen*, 793 F.2d 621, 630 (5th Cir. 1986) there was insufficient data available to guarantee reliability. The real question is whether or not the available evidence is adequate to arrive at an accurate assessment of the defendant's mental

capacities that can be labeled as more than mere speculation. Any determination made in this case must, as a matter of necessity, result in mere speculation due to the lack of mental status testing at or near the time of the trial.

Issue 3:

A review of the trial Court's Order, dated January 30, 2007, denies James Rodgers any relief, indicating the Court's conclusion was the trial Court's review of the transcript of the criminal trial and the observation of the defendant during the trial. Said criminal case is styled CR-99-177 in the lower Court and was reviewed by the Mississippi Supreme Court in case number 2000-KA-01206-SCT. By the Court's own statement the passage of seven years affects memory and therefore would make the Court's observation of the defendant during trial very difficult, adversely affecting accuracy.

Another reason given by the Court is the reading of the trial transcript from February 16, 2000, and relying upon what was said in that transcript. Obviously the Court did not consider what was missing from the transcript. Missing from the transcript is any type of evidence, lay or expert, which would corroborate James Rodgers' position that his thumb slipped off the hammer without his finger being on the trigger causing the pistol to be fired. This evidence logically would be difficult to believe unless you produced sound proof that the weapon could be fired in such a fashion. The failure of James Rodgers to attempt to show the jury by a visual demonstration of how the gun discharged indicates a lack of good judgment and a rational understanding of what it takes to formulate a meaningful defense, which would be in the best interest of James Rodgers and directly affects the rationality of his defense. James Rodgers was clearly

limited in his ability to understand the consequences of his failure to demonstrate how the weapon in question could be fired without his finger being on the trigger. **Query:** Who, in their right mind would allow themselves to stand trial for murder without corroborating evidence which could have easily been presented to the jury? In other words, James Rodgers could have had another witness, be he expert or lay, demonstrate to the jury how the weapon in question could be fired without his finger being on the trigger. James Rodgers himself could have made such a demonstration. James Rodgers allowed himself to be tried without having another witness corroborate his version of the events of this case. In summary, James Rodgers did not have sense enough to put on a rational defense, which he could have easily done. James Rodgers failed to demonstrate, either through himself, or through another witness, or both to corroborate the most important point in a trial of this case. (See transcript of testimony of James Rodgers' in criminal Case No. CR99-177 and marked as Exhibit 10.)

With regard to the lower Court's reliance upon James' Rodgers retained counsel, James Rodgers would point out that he had made affidavit in this matter that he did not waive his rights to a competency hearing. (See affidavit of James Rodgers, Exhibit 9.) .

Once the possibility in competency is raised, as shown by the retained counsel's first affidavit and contradicted by his second affidavit, a criminal defendant cannot waive his procedural rights to a competency hearing. (See *Pate v. Robison*, 383 U.S. 375 (1966).)

Both the trial Court and retained counsel, Weddle, chose to ignore over thirty years of psychiatric care by the VA Hospital in Memphis, Tennessee, when they substitute their lay opinions to arrive at their decision. Also, both the Court and retained

counsel, Weddle, choose to ignore the total lack of medical evidence from a psychiatrist or psychologist and a total lack of medical records during the seventeen months prior to trial. This total disregard of the lack of contemporaneous medical proof indicates an unreasonable analysis of the facts in this case.

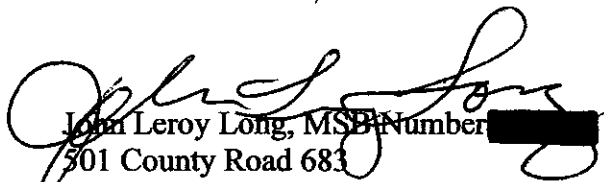
The trial Court also ignored the proof by James Rodgers that a person who is suffering from severe depression may not exhibit irrational behavior. Therefore, any observations made by the Court in this regard should be considered very weak.

The defense attorney would have this Court believe that after thirty years of psychiatric problems and treatment that James Rodgers was suddenly cured of his psychiatric ailments and was able to make a rational decision to waive a competency hearing. The defense attorney would have this Court believe that he is qualified, in some form or fashion, to give his lay opinion and make this judgment without any record or additional proof independent of his specious conclusion.

CONCLUSION

The facts of this case, when viewed as consistent with, or based on reason and logic, stand out as a breakdown in the fairness of the trial of James Rodgers. James Rodgers submits that the prosecution and the defense attorney in his case should have alerted the trial judge and given him the information contained in the one-page medical report of Dr. William Walker, Jr. James Rodgers submits that no meaningful retrospective competency hearing can be held under the facts and circumstances of this case. James Rodgers submits that he should be granted a new trial after a meaningful determination of his mental capacities.

Submitted this 12 of August, 2007


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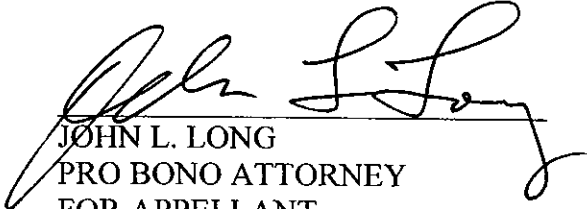
CERTIFICATE OF SERVICE

I, John L. Long, Pro-Bono attorney for James Rodgers, Appellant/Defendant in the above styled and numbered cause, do hereby certify that I have this date mailed a true and correct of the above and foregoing Appellant's Brief to the following listed persons by United States Mail, postage prepaid:

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