

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
2007-CA-00672-COA**

MARK S. ALLEN

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT OF ADAMS COUNTY

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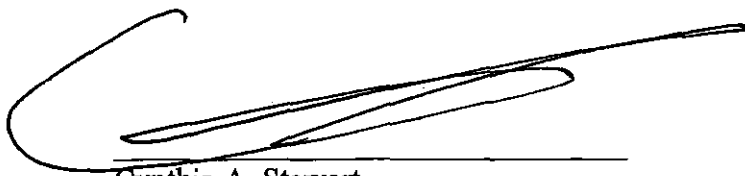
STATE OF MISSISSIPPI

APPELLEE

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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. State of MississippiAppellee
2. David W. Hall, Esq.....Attorney for Appellee
3. Honorable Forrest A. Johnson, Jr.....Circuit Court Judge
4. Mark S. Allen.....Appellant
5. Cynthia A. Stewart, Esq.Attorney for Appellant



Cynthia A. Stewart
Attorney of record for Appellee

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STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument.

STATEMENT OF ISSUES

- I. JURISDICTION AND THE STATUTE OF LIMITATIONS IS INAPPLICABLE DUE TO THE LACK OF MENTAL COMPETENCE ON THE PART OF MARK ALLEN**
- II. MARK ALLEN WAS NOT COMPETENT TO ENTER A PLEA OF GUILTY OR STAND TRIAL; CONSEQUENTLY ENTRY OF HIS PLEA VIOLATED DUE PROCESS GUARANTEED UNDER THE MISSISSIPPI AND UNITED STATES CONSTITUTIONS.**
- III. TRIAL COUNSEL WAS INEFFECTIVE IN PURSUING ALLEN'S LACK OF COMPETENCE.**

STATEMENT OF THE CASE

History of the Case

On or about November 23, 1999, Mark S. Allen was indicted for the willful, unlawful, felonious and with malice of for thought killing and murder of one James P. Allen, Sr. A copy of the indictment is attached as A.R.E. 2. On or about February 9, 2001, Mark S. Allen (hereinafter referred to as "Allen") pled guilty to manslaughter at the sentencing hearing held in the Circuit Court of Adams County, Mississippi of the murder of his father, James P. Allen, Sr. At the time of the crime, Allen was 45 years old and suffered from a lengthy history of mental illness. Allen entered a guilty plea to manslaughter and was sentenced to serve twenty (20) years in prison. A copy of the sentencing order is attached hereto as A.R.E. 4.

This motion represents Allen's first request for post-conviction relief. It was filed in the Court below on or about January 9, 2007 and denied on or about April 10, 2007 (A.R.E. 6). Allen timely appealed. (A.R.E. 7).

Facts of the Case

On or about September 16, 1999, Allen was reported missing by his father, James P. Allen, Sr. who indicated to law enforcement authorities that Allen had not been taking his medication. On September 20, 1999, James P. Allen Sr. and his wife were dining out at South China Sea Restaurant. An acquaintance of the Allen's, David Blackburn, drove by their home on his way to the same restaurant. After seeing the Allen's at the restaurant, Mr. Blackburn made a comment that he had noticed that they were having some work done to their home because he had witnessed an individual in their front yard. Mr. Allen indicated to Mr. Blackburn that there was no work being doing and left the restaurant to go check on his house. Mrs. Allen remained at the restaurant. After Mr. Allen did not return, someone gave Mrs. Allen a ride to their home where she noticed her son's truck as well as her husband's vehicle. Once she arrived at the

home, Mrs. Allen telephoned 911. Law enforcement responded to the home and entered the home through the back door, which was not locked, but had a table pushed up against it. Upon entry into the home, the authorities looked around and noticed blood going down the stairs into the basement. Additional law enforcement authorities were called. Mrs. Allen told the authorities that it might be her son that was in the home. After attempting to get Allen out of the home with a megaphone and calls to the residence failed after an eight (8) hour stand off, tear gas was shot into the home at which time Allen emerged and was arrested for the homicide of his father. Although no autopsy was performed, it was determined by the coroner as well as Dr. Hancock, the pathologist, that the cause of death was a gunshot wound to the head. Upon information and belief, no gunshot residue was found on Mark Allen's hands.

At the guilty plea proceedings, Allen's mother, Irene Myers Allen asked to speak to the Court. A copy of the transcript at the guilty plea and sentencing proceedings is attached hereto as A.R.E. 8. Mrs. Allen stated to the Court that it was her belief at that time and would remain her belief until her death, that Mark did not know what he was doing. She stated that Mark was under the care of a psychiatrist that did not keep his appointments with Mark. In addition, she stated that she was aware that Mark had been on medication and that she was not certain if Mark was taking his medication or not, but it was her belief that Mark never would have committed the crime if he knew what he was doing. Mrs. Allen also made reference to a letter that she signed on October 20, 1999, which was presented and directed by the Court to be made exhibits. Mrs. Allen stated that she was coerced into signing the letter by a cousin who harassed her at the funeral of her husband. She regretted that she signed the letter, stated that she did not read the letter entirely and that she would never sign it again. Mrs. Allen confirmed her belief that Mark, had he been in his right mind, would never have killed his father.

In addition to Mrs. Allen's testimony, counsel for the defendant had spoken personally with many, many people that knew Mark for many years and were willing to testify the Mark they know would never have done this crime. That he was attentive to his parents. He was attentive to his grandmother and grandfather.

Mark S. Allen had a lengthy history of mental illness. His medical records have been reviewed by Dr. Stanley Russell and Dr. William Owen. Their affidavits are attached hereto as A.R.E. 9 and A.R.E. 10 along with the medical records, which are attached hereto AS A.R.E. 11. Dr. Russell's affidavit states as follows:

My name is Stanley C. Russell, M.D.

I live in Jackson, Mississippi.

I was asked to review the medical records of Mark Allen that had been provided me and my report done on October 12, 2002 is as follows.

Mark Allen is currently service a 20 year sentence for manslaughter in the Mississippi Department of Corrections. He is being housed at the East Mississippi Correctional Facility near Meridian, Mississippi. This is on of the private prisons within the Department of Corrections that has contracts to house inmates that have been sentenced to the Department of Corrections and suffer from a psychiatric disorder.

I have specifically reviewed the following records: Mississippi State Hospital records from his three admissions to that facility. He was first committed there in 1989. He was later committed to the Mississippi State Hospital in 1994 and finally he had a court ordered evaluation concerning his competency to stand trial and to address the issue of his legal responsibility for the crime that he was alleged to have committed. This admission was from February 14, 2000 until April 21, 2000.

Other records included an admission to the Veteran's Administration Hospital in Jackson, Mississippi in 1994. In addition, there were records from the VA Hospital in San Diego, California and this was also from 1994.

Finally, I reviewed some information provided by Ms. Robin Thomas. This included some material that had been supplied to

her from the East Mississippi Correctional Facility, as well as, a summary of treatment provided by Dr. Maude Wright, who had been Mr. Allen's treating psychiatrist from 1994 until 1999.

Mr. Allen was apparently born on March 11, 1955 in Natchez, Mississippi. He completed high school in 1972. Shortly thereafter, he joined the Navy and remained in the Navy from 1972 until 1975. After being discharged from the Navy, Mr. Allen returned to California where he was later married and became the father of a daughter.

The records show that Mr. Allen was experiencing some mental problems as early as 1981 and that following his divorce from his first wife he became clinically depressed and was apparently treated at Minrith-Mier Clinic in Texas. This was a Christian based program. He apparently was started on some psychotropic medications which he soon discontinued as he did not think that he needed the medication. There is also some reference to his having seen a psychiatrist at some time in Michigan, but there is no clear history of the difficulty that he was experiencing at that time or exactly when this occurred.

In June 1989, Mr. Allen was committed to the Mississippi State Hospital on commitment from Claiborne County, Mississippi. It was reported that even though he was a native Mississippian, he was actually living in Hawaii at this time. He apparently lived there with his second wife. The circumstances surrounding his commitment were unclear. He was reported to have had a knife and it is also reported that there were people that were afraid of him. He apparently had stated that he was going to kill someone. He is alleged to have wandered in the woods for a couple of days. He was observed engaging in some sort of strange behavior involving a clump of dirt. He was reported to be violent and had tried to get out of the window of a moving car. He was discharged from that period of hospitalization with a diagnosis of schizophreniform disorder. It was recommended that he continue treatment following his discharge. There is no record of his having received that treatment.

In April 1994, Mr. Allen was committed to the Jackson, Mississippi VA Hospital with a history of making threats to his family, walking in the street wearing only a towel, and disturbing the peace. He remained in the Jackson VA Hospital from April 21, 1994 until May 26, 1994. A diagnosis of bipolar disorder was made and he was subsequently discharged from the Jackson VA Hospital to continue his treatment at the Mississippi State Hospital at Whitfield, Mississippi.

His second admission to the Mississippi State Hospital was on May 26, 1994. He came there from the Jackson VA where he had

been committed on April 21, 1994 and then discharged to the Mississippi State Hospital on May 26, 1994. During this stay at the Mississippi State Hospital, they discussed his diagnosis as being either bipolar disorder or schizoaffective disorder bipolar type. He was discharged with a diagnosis of bipolar II disorder with recommendations that he continue to receive treatment through his local mental health center.

Subsequently, Mr. Allen returned to California and presented himself to the VA Hospital in San Diego. This was in September 1994. At that time, he was seeking admission to the hospital to determine if he truly had a major mental illness such as bipolar disorder. He was admitted there on September 19, 1994, and he was discharged on November 10, 1994. The following quote is found in his discharge summary from that hospital, "overwhelming evidence suggested that the patient does indeed have bipolar affective disorder type I with history of manic episodes and psychotic breaks." The patient unfortunately, has little or no recollection of these episodes, which has made it very difficult for him to accept the "bipolar diagnosis." It was also stated that it was essential for him to maintain regular psychiatric follow-up and long-term medication compliance. There was a noted dated February 27, 1995, which stated that Mr. Allen had called the hospital and reported that he was leaving to return to Mississippi.

In the San Diego VA records there is a reference to a 1991 admission to the VA Hospital in Houston, Texas. Apparently, the San Diego VA had obtained a copy of that record as they said that he had been diagnosed as having an atypical psychosis and was discharged on Navane. Mr. Allen stated the he stopped taking that medication almost immediately as he felt he did not need it.

There was a treatment summary dated November 10, 1999, from Dr. Maude Wright. She stated that Mr. Allen had been treated by her at Southwest Mental Health Center in Natchez and that she had seen him at the mental health center from 1994 until 1997. I do not know when in 1994 she saw him unless it was between the time of his discharge from the Mississippi State Hospital in July and his admission to the San Diego VA Hospital on September 19, 1994. After 1997, she stated that he started driving to her office in Jackson, Mississippi to see her. She alleges that she saw him on at least three occasions in 1997 and 1998 and the last time that she saw him was in August 1999. She reported that she spend three hours with him at the last visit. She went on to say that he talked about having a disagreement with his father and that he planned to stay with his grandparents for a period o time. After that meeting, she reports that Mr. Allen's brother called her to report that Mr. Allen was having problems. She said that she was unable to contact Mr. Allen by phone. A few days later, she received a call

informing her that he had allegedly murdered his father and was in the Adams County Jail.

Following his arrest in September 1999, Mr. Allen's attorney requested a forensic evaluation be ordered to address the question of Mr. Allen's competency to stand trial and whether or not he could be held legally responsible for his action at the time of the alleged crime. This requested evaluation was scheduled at the Mississippi State Hospital in February 14, 2000.

The records from Mississippi State Hospital included and were labeled as an admission note. This was dated February 14, 2000. After a rather long note, a decision was made to admit Mr. Allen to the hospital, "to clarify our opinions concerning his competency to stand trial and his mental status at the time of the alleged crime." Mr. Allen remained in the hospital from February 2000, until he was discharged on April 21, 2000. Other parts of his records include a discharge summary dictated on April 20, 2000. It is noted in this summary that on February 21, 2000, Mr. Allen was placed in ambulatory security wrists and ankle restraints. This was done after he was observed to be jumping up and down on a metal picnic table. The next day, February 22, 2000, Mr. Allen was placed in five point restraints after he had thrown water on a staff member. He apparently physically resisted being put in restraints. After that, Mr. Allen continued to complain of back and left rib pain. On April 19, 2000, a chest x-ray was ordered and apparently Mr. Allen was found to show rib fractures of the seventh and eighth ribs on the left. It was stated that these appeared acute and that they were not old fractures. At the time of his discharge, Dr. McMichael provided a prescription for Ultram for the pain associated with these injured ribs.

There is a staffing summary dated April 20, 2000. This was the day before that he was actually discharged back to the jail in Adams County. In this summary, they expressed the unanimous opinion that Mr. Allen was competent to stand trial and that he knew the nature and quality of his alleged acts at the time of the alleged events. He would have known that these alleged acts were wrong.

DISCUSSION: A review of these records reveals that Mr. Allen is an individual who has been suffering with a mental disorder from as early as 1981. He reported problems with depression at that time. He was later hospitalized at a private hospital in Texas in 1985 for inpatient treatment of his condition. His condition continued to deteriorate and in 1989 he was committed to the Mississippi State Hospital in a psychotic state. At that time, he was diagnosed as having a schizophreniform disorder and advised to continue on treatment. He did not follow that advice. He was later (1991 or 1992) admitted to the VA Hospital in Houston,

Texas, where he was diagnosed as having a atypical psychosis and discharged on Navane and antipsychotic medication. Mr. Allen stated that he promptly discontinued that medication because he did not feel that he needed it. There followed a series of hospitalization in 1994. He was committed to the Jackson VA Hospital and then transferred to the Mississippi State Hospital at Whitfield. Again, he was described as being very psychotic and was diagnosed as having a bipolar disorder. When he was discharged from the Mississippi State Hospital in July, 1994, he was again told to continue treatment through his local mental health center. He was told how important it was for him to take his prescribed medication. In September of 1994, he was admitted to the San Diego VA Hospital at his request to try to get a second opinion concerning his diagnosis of bipolar disorder. The record for that hospitalization is very important as they point out that Mr. Allen had a history of several very florid manic episodes and psychotic breaks for which he had little or no recollection. This statement is very important because in my professional opinion, the records clearly show that Mr. Allen received less than ideal treatment from the time of his discharge from the San Diego VA Hospital until the time in September 1999, when he was arrested and charged with the murder of his father. Furthermore, there is a very strong likelihood that he was not compliant with his prescribed medication and that he had once again become very manic and psychotic. The fact that he was evaluated at the Mississippi State Hospital between February 14, 2000 and April 21, 2000, after he had been incarcerated for several months and had been receiving his prescribed medications does not, in my professional opinion, reflect his mental state on the night of September 20, 1999, when he is alleged to have murdered his father. Following the forensic evaluation at Mississippi State Hospital for which he as given the maximum sentence of 20 years. While acknowledging that Mr. Allen had a serious mental disorder, the judge in his order directed the Mississippi Department of Corrections to provide Mr. Allen with appropriate treatment of his mental condition. It is interesting to note, that once he arrived at Central Mississippi Correctional Facility to undergo classification, someone there decided that Mr. Allen did not have a mental illness and did not need the prescribed medications. His medications were stopped and he was sent to the Correctional Facility in Greene County, Mississippi. This facility has no psychiatrist on staff and no known psychiatric patients should have been sent to that facility. Mr. Allen subsequently decompensated and had to be hospitalized at the Hospital at Parchman, Mississippi. There, he was restarted on psychotropic medications. Subsequently, Mr. Allen was placed at the East Mississippi Correctional Facility near Meridian, Mississippi. This is a private prison that is under contract with the Mississippi Department of Corrections to provide

treatment for inmates with psychiatric disorders. A summary of his treatment at this facility indicates that he has continued to experience difficulty with the management of his mental disorder. This review clearly shows that Mr. Allen has been very poorly served by the mental health system here in Mississippi. Very little supervision was provided to ensure that he is seen on frequent and regular basis and that appropriate blood levels be done to ensure that he was taking his Lithium and that it was in the therapeutic range. This failure contributed to his becoming, in my opinion, noncompliant with his medications and developed a florid manic episode that contributed to the disaster that occurred on September 20, 1999.

At this time, it is not clear as to what remedy would be best. If Mr. Allen were allowed to withdraw his guilty plea, he could still face trial for murder and no one could predict the outcome of that preceding. If he remains incarcerated as he has been, there is little assurance, based on past performance, that he will receive the most appropriate psychiatric care. If he should receive some type of clemency from the governor, he would certainly need to be required to continue his psychiatric treatment with close monitoring of his clinical condition and of the blood levels of his prescribed medications.

Updated Report

Some time ago, I reviewed the medical records concerning Mark Steven Allen. Mr. Allen is currently at the Mississippi State Penitentiary at Parchman, Mississippi, where he is serving a 20 year sentence on a manslaughter charge. For details of that original review, I refer to the report that I did October 12, 2002. As a consequence of reviewing those records, it became clear that Mr. Allen was a person who had been experiencing psychiatric problems for many years. In the early 1980's, he had received treatment for what had been diagnosed as depression. Then in 1989, he was committed to the Mississippi State Hospital at Whitfield, Mississippi. He was committed there from Claiborne County, Mississippi. This circumstances that led to this commitment show that Mr. Allen was quite psychotic and that he had been observed to be engaging in rather bizarre behavior. It is interesting to note at that time, he had no memory for many of the things that he had been observed to be doing prior to that commitment. Following that commitment, he was discharged on antipsychotic medicines with a recommendation that he continue to receive treatment following his discharge. There is no record to show that he followed that recommendation. In 1994, he was gain committed for treatment. On this occasion, he was committed to the Veteran's Administration Hospital in Jackson, Mississippi.

Once again, he was found to be suffering from a psychotic illness and to have been engaging in rather bizarre behavior. During that admission, it was thought he was suffering from either bipolar disorder or schizoaffective disorder. The Veteran's Administration felt he needed continued treatment through his local mental health center. He was discharged on Depakote, Haldol, and Cogentin. He had his intake at the mental health center on July 11, 1994. He subsequently saw Dr. Maude Wright there on July 28, 1994. At that time, Dr. Wright decreased his Haldol. He returned to the mental health center on August 3, 1994. At that visit, Dr. Wright discontinued his Haldol and Cogentin leaving him on Depakote alone. Mr. Allen indicated at that time that he planned to go to the San Diego VA to seek confirmation of his diagnosis of bipolar disorder. He was admitted there on September 19, 1994. He remained there until he was discharged on November 10, 1994. In the discharge summary, a statement was made that the patient had little or no recollection of his prior manic episodes and psychotic breaks. I think this is an important observation in view of what happens to him later on. Mr. Allen remained in San Diego and was treated as an outpatient for a period of time, but then he left San Diego to return to Mississippi. While there, his Depakote had been discontinued and he was discharged from San Diego VA Hospital on Lithium 600 mg. twice a day and Prozac 60 mg. per day.

After leaving San Diego, he returned to Mississippi and the next visit to his local mental health center in Mississippi is dated April 18, 1995. It reports that he was prescribed Lithium Carbonate to take 1200 mg. a day and Prozac 60 mg. a day. He was seen again one week later on April 25, 1995, and his Prozac was decreased. At that time, he was found to have a Lithium level of 0.8. This is in the therapeutic range and it had been reached while he was taking 1200 mg. of Lithium per day. He had several visits at the mental health center with Dr. Chawla. He did not keep his scheduled appointment at the mental health center in November, 1995. He was not seen again until May 17, 1996, by Dr. Khurana. In the report, he makes the statement that non-compliance could be a potential problem. At that time, he was changed from Lithium Carbonate to Eskalith CR 450 mg. twice a day. He was seen again on July 12, 1996. At that visit, his Eskalith was decreased to once a day. I could not find a Lithium level that was obtained at that time to understand why his Lithium was decreased. I am very puzzled by that decrease in his prescribed dosage of Lithium as it would be almost impossible to keep the Lithium level in the therapeutic range taking that small a dose. It was about this time that Mr. Allen began to see Dr. Wright in her office in Jackson. In spite of all attempts that have been made, we have not been able to get copies of Dr. Wright's office records concerning her care of

Mr. Allen. What we do have is a treatment summary dated November 10, 1999. This was apparently sent to the jail in Natchez, Mississippi. In the report, she stated that she had last seen Mr. Allen in August of 1999. She indicated that she had spent three hours with Mr. Allen at that time. She said in that report that he had not been taking his Lithium as his blood level was less than 0.3. I am not sure how she knew this at that time as a lithium level was done at the Natchez Community Hospital on August 4, 1999, and was reported on August 5, 1999. It is also of interest that a Lithium level reported January 9, 1998, was also recorded as less than 0.3. That would suggest that his Lithium had not been in the therapeutic range for over eighteen months. During that time, he was apparently only being prescribed Escalith CR 450 mg. once a day. Without Dr. Wright's office notes, it is impossible to know why adjustments were not being made in his Lithium dosage. On September 8, 2003, Dr. Wright sent a fax in which she stated that his original records are no longer available. This would appear to be in violation of the Mississippi State Medical Licensure Board's rules which state that all records should be retained for at least five years. If she last saw him in August, 1999, as she said, it has not yet been five years since that visit; therefore the records should be available.

As I indicated in my first report, it is my professional opinion based on my review of the available medical records that Mr. Allen suffers from a major mental disorder. He has had numerous hospitalizations and has received treatment, both on an inpatient and outpatient basis. As an outpatient, he had been treated at his local mental health center and he had also been treated at the office of Dr. Maude Wright. I feel that he has been poorly served by the mental health profession.

I disagree with the forensic evaluation that was done at the Mississippi State Hospital where he was found to be competent to stand trial and to be legally responsible for his behavior that is alleged to have occurred in September, 1999. This assessment was not done until February, 2000. He had been on his medication after he was placed in jail in September of 1999. He had clearly not been receiving his medication in adequate dosages prior to that, as he had two Lithium levels reported as less than 0.3. It is clear to me that Mr. Allen suffered an acute psychotic episode and just as he had done in the past, he had no memory for what had occurred. Following the findings of the forensic evaluation, Mr. Allen entered a plea to the charge of manslaughter. The Judge gave him the maximum sentence for that charge and indicated that he realized that Mr. Allen had a major psychiatric illness. He ordered that Mr. Allen should receive treatment by the Mississippi Department of Corrections. Once again, Mr. Allen has been the

victim of the failure of the Department of Corrections to provide appropriate treatment of his diagnosed bipolar disorder. In view of my assessment, I support Mr. Allen's request for clemency. If he should be granted relief, I would agree to provide treatment for Mr. Allen on a regular basis and would monitor his medication compliance if he so desired.

Allen's first record of mental problems occurred as early as 1981 resulting in his treatment at Minrith-MRER Clinic in Texas. He was released from that clinic on psychotic medications, which he discontinued shortly after his release.

In June, 1989, Allen entered the Mississippi State Hospital at Whitfield, Mississippi pursuant to a commitment from Claiborne County, Mississippi. He was committed as a result of a psychotic break in which he was wandering in the woods and engaging in bizarre behavior. He was discharged from the hospital with a diagnosis of schizophrenia disorder.

The next record of hospitalization followed, again, a psychotic break, this time involving walking around in public in the nude. In April 1984, following this behavior, he was committed to the Veteran's Administration Hospital in Jackson, Mississippi. Mr. Allen left the Veteran's Administration Hospital to continue treatment at the Mississippi State Hospital at Whitfield, Mississippi. He was discharged with a diagnosis of bipolar disorder with the conditions that he continue treatment.

There are indications in some of the records that Mr. Allen was admitted to the Veteran's Administration Hospital in Houston, Texas in 1991 with an atypical psychosis.

The next record of hospitalization occurred in September, 1994, when Mr. Allen was admitted to the Veteran's Administration Hospital in San Diego, California. He was found by "overwhelming evidence" to have bipolar effective disorder type one "with history of manic episodes and psychotic breaks." The records from the Veteran's Administration Hospital in San Diego reference the lifelong memory lapses suffered by Mr. Allen.

During the years preceding the criminal charge, Mr. Allen resided with his parents in Natchez, Mississippi. He was treated at Southwest Mental Health Center by Dr. Maude Wright. At the time of the offense, Mr. Allen was not taking adequate doses of Lithium. As Dr. Russell sets out in his affidavit, "Mr. Allen has been very poorly served by the mental health system here in Mississippi. Very little supervision was provided to ensure that he is seen on frequent and regular basis and that appropriate blood levels be done to ensure that he was taking his Lithium and that it was in the therapeutic range." Dr. Russell also noted that a Lithium level reported January 9, 1998 was [also] recorded as less than 0.3. In a treatment summary from Allen's treating psychiatrist, Dr. Maude Wright, Dr. Wright found that in August, 1999, Mark Allen had not been taking Lithium because his blood level was less than 0.3. As Dr. Russell finds, this had not been in the therapeutic range for over eighteen (18) months. The result of this would be a psychotic break. See affidavit of Dr. Russell.

Defense Counsel advised the prosecution under Rule 9.07 of the Uniform Circuit Court Rules that it was Mr. Allen's intent to offer a defense of insanity to said charge. A copy of correspondence from defense counsel, Donald G. Ogden, is attached hereto as A.R.E. 12.

Following Mr. Allen's indictment, his counselor filed several motions dealing with his mental condition. Counsel for Mr. Allen informed the Court that they intended to pursue a defense of insanity. A copy of the order documenting this is attached hereto as A.R.E. 13 as states as follows:

The Court being advised that the Defendant intends to avail himself of the Defense of Insanity, in addition to the plea of Not Guilty. The Court believes that the Motion of the Defendant to have made available all records of the latest evaluation and treatment at Whitfield is well taken, and should be made available to both the State and the Defendant.

Accordingly, it is ordered and adjudged that the Mississippi State Hospital at Whitfield prepare a copy of all interviews and reports of any nature, summaries of opinion, opinions, tests, medical

records and other documents relative to the evaluation and treatment of the defendant, Mark Steven Allen, during the year 2000. It is the intent to include all documents, papers, notes, tape recordings of any nature or substance relative to said Mark Steven Allen, for his treatment and evaluation which began Tuesday, February 14, 2000, ending on or about Thursday, April 20, 2000.

It is ordered that this information be supplied as soon as possible; however, not later than October 17, 2000. The cost of preparation of all said documents, etc. shall be paid by the State of Mississippi.

Defense counsel also filed a motion raising the issue of Mr. Allen's competency to stand trial. A copy of that motion is attached hereto as A.R.E. 14 and states as follows:

Comes now, Defendant by and through his attorney's and files this his Motion pursuant to Rule 9.06 of the Uniform Circuit and County Court Rules for the State of Mississippi and avers to the Court as follows:

That the Defendant has been evaluated at the Mississippi State Hospital at Whitfield under order of this Circuit Court to determine competency to stand trial.

Rule 9.06 of the Uniform Circuit and County Court Rules provides that after the appropriate mental health facility determines that the Defendant is competent to stand trial and submits its report to the Court regarding said Defendant the Court shall then proceed to conduct a hearing on the competency of the Defendant to stand trial.

Wherefore premises considered, the Defendant respectfully requests this Court to conduct a hearing on the competency to stand trial issue, at its earliest opportunity prior to proceeding with trial.

Pursuant to the request of defense counsel, Mr. Allen was sent to Mississippi State Hospital at Whitfield, Mississippi for a mental evaluation. A copy of this order is attached hereto as A.R.E.

15 as states as follows:

This cause came before the court this date, on the defendant's motion for psychological and/or psychiatric evaluation, alleging that the defendant was incompetent to stand trial. The defendant stands charged with the murder of his father. The court is advised that the defendant has previously been committed to the Mississippi State Hospital at Whitfield.

The court finds, based on the above, that the motion for a psychiatric examination should be granted. It is therefore ordered that the defendant undergo a mental examination and evaluation by the staff of Forensic Services of the Mississippi State Hospital at Whitfield, Mississippi, at the earliest possible date, with a copy of the report thereof to be furnished to the following:

Forrest A. Johnson
Circuit Judge
P. o. Box 1372
Natchez, MS 39121
(601-442-8363)

Ronnie L. Harper
District Attorney
P. O. Box 1148
Natchez, MS 39121
(601-445-4099)

Don Ogden
Attorney for Defendant
P. O. Box 2084
Natchez, MS 39121
(601-446-5475)

It is further ordered that the mental examination and evaluation be for the purpose of evaluating: (a) whether or not the defendant has sufficient present ability to consult with their attorney with a reasonable degree of rational understanding in the preparation of the defense, and has a rational as well as factual understanding of the nature and object of the legal proceedings against them; and (b) to describe the defendant's mental state at the time of the alleged offense with respect to the defendant's ability to know the nature and quality of their alleged acts and to know the difference between right and wrong in relation to their alleged acts at that time.

It is further ordered that the defendant receive any and all medically necessary treatment and procedures, in the statute of limitations discretion and determination of the staff, while at the Mississippi State Hospital pursuant to this order, whether the defendant shall consent to such treatment or not.

It is further ordered that any medical privilege of the defendant is waived by virtue of this court order and any and all medical, psychiatric, and/or psychological records of the defendant pertaining to previous and/or present medical psychiatric or

psychological examination or treatment are hereby ordered and directed to be released and provided to the staff of Forensic Services of Mississippi State Hospital at Whitfield, to aid and assist in said examination and evaluation herein ordered to be conducted.

It is further ordered that the above named attorney for the defendant, the District Attorney's Office, and the Adams County Sheriff's Office and/or the Natchez Police Department, if applicable, with full and complete cooperation with each other, under penalty of sanction, contempt or other appropriate disciplinary action of the Court, shall prepare and promptly furnish to the professional staff at said hospital the following:

- (1) A copy of the motion, if any, and court order for evaluation at said hospital;
- (2) Information concerning the crime, including the name of the charge, date, and detailed accounts of the crime, including investigator's report, arrest report, any statement made by witnesses and victims, and all relevant medical/psychiatric/psychological records;
- (3) Any statement made by the defendant;
- (4) A statement describing the defendant's behavior in jail, if applicable, and any medication defendant may have been taking while incarcerated;
- (5) A copy of the defendant's prior local arrest record and NCIC or FBI identification report;
- (6) Names, addresses and telephone numbers of at least two family members or friends who can be contacted to obtain a more detailed personal and social history of the defendant; and
- (7) Any other statements, documents, reports or information that the District Attorney, the attorney for the defendant, or law enforcement agencies determine may be relevant or helpful to the staff of the Mississippi State Hospital at Whitfield in complying with this court order.

It is further ordered that upon arrangements being made for this examination and evaluation, and the Sheriff's Office of Adams County being so advised, the Adams County Sheriff, or his lawful deputy, shall promptly transport the defendant to the Forensic Services of Mississippi State Hospital at Whitfield, Mississippi.

The Mississippi State Hospital at Whitfield is authorized and directed to keep said defendant, pursuant to law, as long as necessary, in the discretion and judgment of the staff, for the examination and evaluation, and any medical and/or psychiatric or psychological treatment. At the conclusion of the examination, evaluation and any treatment, the Adams County Sheriff, or his lawful deputy, is further ordered to transport the defendant back to Adams County, Mississippi, where the defendant shall remain in custody, until further order of the court.

It is further ordered that the expense of said mental examination and evaluation, and of the transportation of said defendant to and from Forensic Services of Mississippi State Hospital at Whitfield, shall be borne by Adams County, Mississippi.

It is further ordered that no report of this examination and evaluation and no copies of any of the information provided to Mississippi State Hospital for the purpose of the examination and evaluation, or of any of the information generated by the staff of Mississippi State Hospital, including tapes or transcripts of interviews with the defendant, shall be released to any parties except as directed by this order, without further order of this court.

It is further ordered, due to the nature of this order being entered this date, that the defendant be held without bond, until further order of the court.

So ordered, this the 30th day of September, 1999.

As set out in the affidavit of Dr. Stanley Russell attached hereto as A.R.E. 9, the records for Mississippi State Hospital at Whitfield, Mississippi note that a decision was made to admit Mr. Allen to the hospital "to clarify opinions concerning his competency to stand trial and his mental status at the time of the alleged crime." He was hospitalized from January 2000 until April 21, 2000. As a result of his mental condition, the authorities at Whitfield placed him in wrist and ankle restraints following bizarre behavior on his behalf.

After the Mississippi State Hospital at Whitfield found that Mr. Allen was competent to stand trial, his counsel filed a Motion for Additional Funds for Independent Psychiatric Expert Assistance. A copy of this motion is attached hereto as A.R.E. 16. In it is set out what is confirmed by the records of the Mississippi State Hospital that early on in his admission to the

hospital, Mr. Allen was injured receiving broken ribs and that he was in acute pain during the entire time he was at Whitfield. Despite this request, the Court denied the Motion for Additional Funds for Independent Psychiatric Expert Assistance. A copy of this order is attached hereto as A.R.E. 17.

Finally, without any submission of the evidence by the counsel for Mr. Allen, and with no evidence from the prosecution, the Court found Mr. Allen to be competent to stand trial. A copy of this order is attached hereto as A.R.E. 18 and states as follows:

This cause came before the Court on November 20, 2000, for a hearing on the defendant's Motion as to Competency to Stand Trial. The Court had previously granted the defendant's motion for a competency examination. The defendant underwent a thorough mental examination at the Mississippi State Hospital at Whitfield and was found to be competent to stand trial, with an official report submitted to the Court and to each counsel.

The defendant presented no evidence at the hearing. The State presented no evidence. Therefore, based upon the official report from the Mississippi State Hospital, the Court found that the defendant was competent to stand trial.

So ordered, this the 6th day of December, 2000.

The finding of competence is in sharp contrast to the lengthy mental history of Mark Allen. The opinion of both Dr. Russell and Dr. Owen is that Mr. Allen was not and is not competent. The affidavit of John Leckie further documents the psychotic behavior of Mr. Allen predating the criminal charges. A copy of this affidavit is attached hereto as A.R.E. 19.

SUMMARY OF THE ARGUMENT

Jurisdiction and the statute of limitations are inapplicable due to the lack of mental competence on the part of Mr. Allen.

Mr. Allen was not competent to enter a plea of guilty or to stand trial. Consequently, the entry of his plea violated due process that is guaranteed under the Mississippi and United States Constitutions.

In addition, trial counsel was ineffective in pursuing Mr. Allen's lack of competence.

ARGUMENT

I. JURISDICTION AND THE STATUTE OF LIMITATIONS IS INAPPLICABLE DUE TO THE LACK OF MENTAL COMPETENCE ON THE PART OF MARK ALLEN

Under the post-conviction relief act, Miss. Code Ann. § 99-39-1 et seq., the prisoner has three (3) years to file a Motion for Post-Conviction Relief. This motion is filed more than three (3) years after the entry of a guilty plea by Mr. Allen. The Post-Conviction Relief Act provides that Mr. Allen must file his request to proceed with an evidentiary hearing with the court that last exercised jurisdiction in his case. *Evans v. State*, 485 So.2d 286, 283 (Miss. 1986). In this case, that would be in the Circuit Court in Adams County, Mississippi.

The statutory three-year limitation for filing a petition for post-conviction relief is suspended while a petitioner is mentally incompetent, and this rule is supported by statute and by principles of due process. Even in the absence of a statute tolling the statute of limitations, application of the statute of limitations to the facts of such case could violate constitutional due process. Furthermore, strict application of the statute of limitations in post-conviction matters might violate due process if it prohibited a claim based upon grounds for relief that did not exist when the limitations period began to run. In applying the rule in *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992) to specific factual situations involving whether the statute of limitations bars a claim for post-conviction relief, a three-step process should be utilized: (1) When the limitations period would normally have begun to run; (2) whether the grounds for relief actually arose after the limitations period would normally have commenced; and (3) if the grounds are later arising, whether under the facts of the case, a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim.

In *Walcott v. Wolcott*, 184 So.2d 318, the Mississippi Supreme Court considered whether the statute of limitations on an action (election to renounce husband's will) should be tolled due to the widow's incompetence in the absence of such a savings clause. The Court concluded that, equitably, generally, requires an extension of a statutory period where incompetence exists.

On the other hand, both the Mississippi Supreme Court and the Court of Appeals have held that "errors affecting a fundamental constitutional right may survive a time bar." *Dozier v. State*, 952 So.2d 259, 260-61 (Miss.App. 2006) citing *Ivy v. State*, 731 So.2d 601, 603 (Miss.1999) (holding that Ivy's petition alleging that he was serving time under an illegal sentence was not subject to the time bar).

Dozier also cites *Luckett v. State*, 582 So.2d 428, 429-30 (Miss.1991) (finding that trial judge committed plain error and denied defendant due process by issuing a sentence in violation of statute) and *Smith v. State*, 477 So.2d 191 (Miss.1985) (finding that defendant was sentenced under a harsher statute that was not the subject of the indictment).

The argument for such tolling is even stronger here, where there are due process mandates requiring competence at criminal proceedings. See, *McGinnis v. State*, 133 So.2d 399 (Miss. 1961) (specifically noting that due process requires an adequate inquiry into defendant's mental condition).

There is additional authority for the proposition that a claim that defendant was incompetent at trial tolls the statute of limitations for filing for post-conviction relief. For instance, the Ninth Circuit, in *Calderon v. United States District Court*, 163 F.3d 530 (9th Cir.) (en banc), held that a petitioner's incompetence is grounds for equitably tolling the AEDPA's one-year statute of limitations for filing habeas petitions. *Calderon v. U.S. District Court (Kelly V)*, 163 F.3d 530 (9th Cir.1998) (en banc), *overruled in unrelated part by Woodford v. Garceau*, 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003). See also *Rohan ex rel. Gates v.*

Woodford, 334 F.3d 803, 814 (9th Cir. 2003) (“Where, as here, there is a threshold showing of mental incompetency, a sufficient showing has been made for equitably tolling the statute of limitations”).

The state of Arkansas has held similarly with respect to its three year statute of limitations for post conviction pleadings. *Henry v. State*, 708 S.W.2d 88, 90 (Ark. 1986). In *Henry*, the Arkansas Supreme Court held that a claim of incompetency to stand trial was not subject to the three year statute of limitations under Rule 37.2(c) because proof of incompetency would render the conviction abstatute of limitationsutely void. 708 S.W.2d at 89. The court held that “[i]f the convicted defendant did not raise the issue of his competence at trial, he may nevertheless assert his incompetence to stand trial in a petition for post-conviction relief since a person who is incompetent cannot knowingly and intelligently waive his right to have the court determine his capacity to stand trial.” *Id.*

It is a violation of due process to try and convict a defendant who lacks mental competence. *Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996); *Pate v. Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); *Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); *Carter v. Johnson*, 131 F.3d 452, 459 (5th Cir.1997).

For a criminal defendant to be judged competent to stand trial, he must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and . . . a rational as well as factual understanding of the proceedings against him” *Dusky*, 362 U.S. at 402. “[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.” *Drope v. Missouri*, 420 U.S. at 171.

posed: to him or her, that "he can follow the testimony reasonably well," and there be a "capacity to realistically challenge prosecution witnesses." Without that capacity, defendants realistically are unable to exercise the rights to consult with counsel, testify in personal defense, and confront accusers.

4. Defendants should be capable of testifying in personal defense if that should prove appropriate.

5. A final factor is a defendant's abilities to meet the competency criteria in the setting of the particular charges, the extent of the defendant's participation in trial proceedings, and the complexity of the case. Therefore, an evaluator should consider a defendant's mental ability in relation to the severity of the charge and the complexity of the case. Commentary to ABA Criminal Justice Mental Health Standards 7-4.1 at 174-75.

Due process requires a separate hearing to determine competency to stand trial. *Pate v. Robinson, supra*. A judge has a duty to order a competency hearing "where there is substantial evidence of a defendant's incompetence at the time of trial". *Pate v. Smith*, 637 F.2d 1068, 1071 (6th Cir.1981). If before or during trial the court, of its own motion or upon motion of counsel, has reasonable grounds to believe that the defendant is insane, the court shall order the defendant to submit to a mental examination by some competent psychiatrist or psychologist selected by the court. Miss.Code Ann. § 99-13-11 (1972); *Conner v. State*, 632 So.2d 1239, 1247 -1248 (Miss. 1993). This rule is also embodied in. Rule 4.08(1) of the Uniform Criminal Rules of Circuit Court Practice which provides:

Inability to Stand Trial. If before or during trial the court, of its own motion or upon motion of counsel, has reasonable grounds to believe that the defendant is insane, the court shall order the defendant to submit to a mental examination by some competent psychiatrist selected by the court in accordance with Miss.Code Ann. § 99-13-11 (1972).

A trial judge should order a competency hearing when he receives 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 rationally aid his attorney in his defense. *Lokos v. Capps*, 625 F.2d 1258, 1261 (5th Cir.1980). The United States Supreme Court in *Drope v. Missouri*, 420 U.S. 162, 180, 95 S.Ct. 896, 903, 43 L.Ed.2d 103, 118 (1975), indicated that "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required."

Trial courts must, at all times during the trial process, guard against trying an incompetent defendant regardless of when the incompetency materializes or what caused it to occur. *See United States v. Stevens*, 461 F.2d 317, 320 (7th Cir. 1972).

It is well settled that a conviction of an accused person while he is incompetent violates due process. *See Bishop v. United States*, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956); *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). Due process requires a separate hearing to determine competency to stand trial. *Pate v. Robinson, supra*. "Broadly speaking, one cannot properly assist in his own defense unless he can advise his counsel concerning the facts of the case as known to him and unless, if necessary, he can testify on his own behalf in the cause concerning those facts." *United States v. Sermon*, 228 F.Supp. 972, 977 (D.Mo. 1964).

Where counsel fails to insist on a competency hearing in a case in which indications of incompetency are strong and there is a reasonable probability that, but for counsel's deficient performance in this regard, the petitioner would have been found incompetent to stand trial, the defendant has received ineffective assistance. *See, e.g., People v. Harris*, 460 N.W.2d 239 (Mich. App. 1990) (counsel ineffective in arson case for requesting trial despite serious doubts

concerning defendant's competence); *Matthews v. State*, 596 S.E.2d 49 (S.C. 2004) (counsel ineffective in carjacking case for failing to request a competence hearing prior to the defendant's plea. The defendant had learning disabilities and took special education classes in school. Just one year before the crimes, the defendant had been in a near fatal car accident that caused significant frontal lobe, neurological damage); *People v. Shanklin*, 814 N.E.2d 139 (Ill. App. 2004) (counsel ineffective in attempted murder plea for failing to request a hearing on the defendant's competence or fitness or, alternatively, asking the trial court to question the defendant carefully as to the plea he entered and the consequences. Following the defendant's guilty plea, a presentence report disclosed that the defendant had been hospitalized three times for mental-health problems as a teenager. In addition, he was mildly mentally retarded and had significant problems retaining and receiving verbal information. Counsel's conduct was deficient and prejudicial); *Hull v. Kyler*, 190 F.3d 88, 106 (3rd Cir.1999); *Braden v. Bagley*, 2007 WL 1026454, *9 (S.D.Ohio).

II. MARK ALLEN WAS NOT COMPETENT TO ENTER A PLEA OF GUILTY OR STAND TRIAL; CONSEQUENTLY ENTRY OF HIS PLEA VIOLATED DUE PROCESS GUARANTEED UNDER THE MISSISSIPPI AND UNITED STATES CONSTITUTIONS.

The trial court has the obligation to conduct a hearing whenever there is sufficient doubt concerning a defendant's mental competence. *Drope v. Missouri*, 420 U.S. 162, 171, 43 L.Ed. 2d 103, 95 S.Ct. 896 (1975). The criminal prosecution of an incompetent defendant violates the due process clause of the Fourteenth Amendment (and the due process clause of the Mississippi Constitution). *Medina v. California*, 505 U.S. 437, 120 L.Ed. 2d 353, 112 S.Ct. 2572 (1992); *Riggins v. Nevada*, 504 U.S. 127, 138, 118 L.Ed. 2d 479, 112 S.Ct. 1810 (1992); *Drope v. Missouri*, 420 U.S. 162, 171, 43 L.Ed. 2d 103, 95 S.Ct. 896 (1975); *Pate v. Robinson*, 383 U.S. 375, 378, 15 L.Ed. 2d 815, 86 S.Ct. 836 (1966). The standard for competency is "the capacity to

understand the nature and the object of the proceedings against him, to consult with counsel, and to assist and prepare in his defense”, *Drope*, 420 U.S. at 171. See also *Dusky v. U.S.*, 362 U.S. 402, 4 L.Ed. 2d 824, 80 S.Ct. 788 (1960).

The affidavits of Drs. Russell and Owen and accompanying medical records amply demonstrate the lengthy mental incompetence of Mark Allen. His medical records are lettered with references to bizarre behavior, delusions and psychosis.

Counsel for Mr. Allen recognized this in filing motions raising the defense of insanity and Allen’s competence to stand trial. See A.R.E.13 AND A.R.E. 14. After Allen’s unusual examination at Whitfield (See affidavit of Dr. Russell), counsel filed for additional funds for independent psychiatric expert assistance. See A.R.E. 16 In this motion, questions were raised concerning the adequacy of the examination at Whitfield.

While a trial Court has reasonable discretion to grant or deny such a motion, denial can constitute error. In *Hill v. State*, 339 So.2d 1382 (Miss. 1976) the Court considered direct appeal whether a trial Court erred in refusing additional examinations following a pretrial psychiatric examination found him competent, but recommended further evaluation and possibly testing, in particular psychological testing and an electroencephalogram. The Court concluded at 1385 – 1386:

[2] The overruling of the motion to transfer the defendant to Mississippi State Hospital at Whitfield for psychiatric and psychological examination constituted reversible error. Upon the record as it now appears, before the defendant is again tried, he should either be (1) sent to Mississippi State Hospital at Whitfield for a careful and thorough examination, or (2) otherwise afforded appropriate and adequate determination of his sanity, and mental competency to conduct a rational defense pursuant to Mississippi Code Annotated § 99-13-11 (1972). *Stevenson v. State*, 325 So.2d 113, 117 (Miss. 1975); *Robinson v. State*, 223 Miss. 70, 77 So.2d

265 (1955); *McGinnis v. State*, 241 Miss. 883, 133 So.2d 399 (1961). While considerable discretion is to be vested in trial judges applying § 99-13-11, in the present case the examination by the psychiatrist was inadequate as demonstrated by the fact that the examining psychiatrist himself testified that further examination of the defendant was needed.

In *Eastland v. State*, 223 Miss. 195, 78 So.2d 127, 131, the Mississippi Supreme Court held that an accused should not be tried “unless he is physically and mentally able to confer with his counsel as to the merits of the case, and to testify as a witness in his own behalf.” See also *Carter v. State*, 198 Miss. 523, 21 So.2d 404; *Williams v. State*, 205 Miss. 515, 39 So.2d 3; *Shipp v. State*, 215 Miss. 541, 61 So.2d 329.

Furthermore, the Court failed to conduct a hearing on competency. Instead, the Court merely entered an order finding Allen competent in view of the lack of evidence on the issue presented by defense counsel at the prosecution. See A.R.E. 18.

III. TRIAL COUNSEL WAS INEFFECTIVE IN PURSUING ALLEN’S LACK OF COMPETENCE.

The Mississippi Rules of Professional Conduct Rule 1.14 addresses representation of a client under a disability:

- (a) When a client’s ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest.

Mr. Allen did not receive effective assistance of counsel as required by the Mississippi and United States Constitutions. An ineffective assistance of counsel claim is governed by the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 80 R.Ed.2d 674, 104 S.Ct. 2005

(1984) with the requirement that the petitioners show that counsel's performance was sufficient and that petitioner was prejudiced by the deficient performance. The deficiency herein was the failure of counsel to adequately investigate the potential information available concerning Mr. Allen's competence. There is no question that defense counsel's failure to investigate an issue of sanity or competence can amount to ineffective assistance of counsel. See *Williams v. Taylor*, 529 U.S. 362, 146 L.Ed. 2d 389, 120 S.Ct. 1495 (2000); *Lockett v. Anderson*, 230 F.3d 695 (5th Cir. 2000). According to *Strickland*, 466 U.S. at 691, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."

Mr. Allen suffered and suffers from a longstanding history of psychotic breaks and mental disorders well documented by medical records. The problems are further documented by the affidavits of Ray Holland, Irene Allen and Jimmy Allen. Copies of these affidavits are attached hereto as A.R.E. 20, 21, and 22.

Mr. Allen's medical records both past and present further document historic memory loss and bizarre behavior. The affidavit of his mother, Irene Allen, indicates that she would have been willing to pay for any diagnostic test necessary to explore Mr. Allen's mental condition.

In the case of *Lockett v. Anderson*, supra, the United States Court of Appeals for the Fifth Circuit considered a similar set of facts. In that case, counsel was found to have failed to adequately investigate mental problems according to Dr. William Owen, the expert in the case of *Lockett v. Anderson*. After examining Carl Lockett and reviewing his medical records, Dr. Owen reached a conclusion similar to that here that Lockett required an electroencephelogram, a CT brain scan and neuropsychological studies. After those studies were performed, Mr. Lockett was

diagnosed with a condition called temporal lobe epilepsy. In that case, Dr. Owen testified that temporal lobe damage "would explain any senseless acts of violence and interpretation of reality."

Like Carl Lockett, Mr. Allen suffers a history of eccentric behavior, psychotic breaks and substantial memory losses. No physiological tests were ever conducted as part of the mental examination of Mr. Allen. It was the obligation of counsel to request such tests.

Also like Lockett, the State authorities here did admit to some mental problems on the part of Mr. Allen. For example, the admission of Mr. Allen as part of the evaluation process is outside the norm of most competency examinations. In addition, he left the State Hospital at Whitfield with psychiatric medications. Copies of those prescriptions are attached hereto as A.R.E. 23.

The decision not to pursue for lack of competence on the part of Mr. Allen cannot be deemed strategic. *Strickland* "does not require [the Court] to defer to decisions that are uninformed by an adequate investigation into the controlling facts and law." *Baxter v. Thomas*, 45 F.3d 1501, 1514 (Eleventh Cir. 1995). The record overwhelmingly points to the conclusion that Allen's counsel did little work in investigating possible bases for a competency defense for Allen. Allen was substantially prejudiced by entry of a plea of guilty at a time when he was not competent to do so. Even a cursory examination of the medical records demonstrates that Allen belongs in a mental institution and not a prison.

**SPECIFIC FACTS THAT ARE NOT WITHIN
THE PRISONER'S PERSONAL KNOWLEDGE AND
HOW SAID FACTS WILL BE PROVEN**

In support of this Motion for Post-Conviction Relief, Allen submits to the Court that the facts that are not within his personal knowledge will be proven through the record of this case and through pertinent testimony as shown in the affidavits attached as A.R.E. 19, 20, 21, 22 and

24. These affidavits of family and friends note that Mr. Allen's delusions and psychotic behavior existed before the death of his father and continue to the present day. The affidavit of Robin Thomas, A.R.E. 24", amply documents the longstanding nature of Allen's disorder and its effect on his ability to function in daily life.

It may be that *House* is an example of the rule that to overcome the STATUTE OF LIMITATIONS bar, the defendant must present "some basis for the truth of the claim before the limitation period will be waived." *Cochran v. State*, 2007 WL 2107560, *1 (Miss.App.) . "[T]he mere assertion of a constitutional violation is not sufficient to overcome the time bar." *Id.*

CONCLUSION

Allen is entitled to an evidentiary hearing at which to prove his claims. Where defendant has pleaded a claim that meets the requirements of the post-conviction act and where the claim, if true, would entitle petitioner to relief, "the petitioner is entitled to an in court opportunity to prove his claims." *Billiot v. State*, 515 So.2d 1234, 1237 (Miss. 1987); *Neal v. State*, 525 So.2d 1279, 1281 (Miss. 1987). Upon hearing, he is entitled to a new trial.

WHEREFORE, PREMISES CONSIDERED, Mark S. Allen respectfully moves this Court to grant him a full evidentiary hearing and to enter an order setting aside his conviction and sentence and ordering a new trial and for whatever relief may be appropriate and just.

This the 5th day of November, 2007.

Respectfully submitted,



Cynthia A. Stewart [REDACTED]
ATTORNEY FOR MARK S. ALLEN

Of Counsel:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via
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This the 5th day of November, 2007.


Cynthia A. Stewart