No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2020

ALBERTO JULIO GARCIA,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent

THIS IS A CAPITAL [DEATH PENALTY] CASE

PETITION FOR WRIT OF CERTIORARI
to the Mississippi Supreme Court

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QUESTION PRESENTED

Does Mississippi's "presumption of competency" violate the Fourteenth Amendment, and/or the Eighth Amendment, when that presumption is expanded to allow trial courts to conduct dispositive pretrial proceedings determining matters later relied upon to sentence that defendant to death when the only expert testimony established that the defendant was *Dusky* incompetent with respect to participating in any of those pretrial proceedings, and was undergoing as yet incomplete court ordered restorative treatment during some of them?

LIST OF PARTIES AND RELATED CASES

1. The names of all parties appear in the caption of the case on the cover page.

2. Cases in other courts that are related to the case in this Court (proceedings directly on review in the present Petition are in **boldface):**

***State of Mississippi v. Alberto Julio Garcia*, No. B2401-2015-500, Circuit Court of Harrison County, Mississippi, First Judicial District, Sentencing Judgment entered January 25, 2017, Order denying post-trial Motions entered April 11, 2017.**

***Alberto Julio Garcia v. State of Mississippi,* No. 2017-DP-504-SCT, Mississippi Supreme Court, Decision (affirmance) entered May 14, 2020; Rehearing denied September 10, 2020**

Alberto Julio Garcia v. State of Mississippi, 2017-DR-00420-SCT, Mississippi Supreme Court (PCR proceeding on conviction) no final judgment entered as of the date of this list of related cases.

Alberto Julio Garcia v. State of Mississippi, No. A2401-2018-00015, Circuit Court of Harrison County, Mississippi, First Judicial District (PCR proceeding on conviction) no final judgment entered as of the date of this list of related cases.

Alberto Julio Garcia v. State of Mississippi, No. 2018-M-01353-SCT, Mississippi Supreme Court, Order denying Petition for Interlocutory Appeal from No. A2401-2018-00015 (PCR proceeding on conviction) entered 11/18/2018.

Alberto Garcia v. State of Mississippi, No. 2020-M-01158-SCT, Mississippi Supreme Court, Order granting in part and denying in part Petition for Interlocutory Appeal from No. A2401-2018-00015 (PCR proceeding on conviction) and other relief entered 10/22/2020.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Constitutions, & Rules

Other Authorities

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

The Petitioner, Alberto Julio Garcia, prays for a writ of certiorari to review the judgment of the Supreme Court of Mississippi affirming, on direct appeal, the sentence of death imposed upon his conviction for Capital Murder.

OPINION BELOW

The opinion of the Mississippi Supreme Court (Pet. App. A) is reported at *Garcia v. State*, 300 So.3d 945 (Miss. 2020). That Court's order denying rehearing on September 10, 2020 (Pet. App. B) is unpublished, as is the mandate issued September 17, 2020. (Pet. App. C).[1]

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on May 14, 2020, and rehearing was denied on September 10, 2020. This Petition is filed within 150 days of the latter event pursuant to this Court's COVID-19 related Order of March 19, 2020. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257 on the ground that a right or privilege of the defendant which is claimed under the Constitution of the United States has been denied by the State of Mississippi.

[1] The opinion below is attached as Appendix A to this Petition. All citations to that opinion will be to "Pet. App. A" by paragraph. Other appendices to this Petition will be cited as "Pet. App. [letter]" by page. Citations to the Record on Appeal below that are not reproduced in full in an appendix, are to the Clerk's Papers and Trial Transcript as "C.P." and "T." respectively, by page number, and to Exhibits by Exhibit number.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States, which provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part that:

> No state shall … deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

A. Relevant proceedings below

On the evening of July 16, 2014 five-year-old Janaya Thompson (hereafter J.T.) went missing from her home in a Gulfport apartment complex. The next day, after police had been brought in, J.T. was found dead in an abandoned trailer near the apartments, hanging by her neck and bearing signs of sexual penetration. A few hours later, Petitioner Alberto Julio Garcia (hereafter "Garcia"), a neighbor of J.T. and her family, was interviewed by police investigating another suspect in that crime. Garcia was arrested at the conclusion of that interview, and never left custody again. T. 8, 13, 17-18. A little over a year later a Harrison County grand jury returned a single count indictment under Miss. Code Ann. § 97-3-19 (2)(e) charging Garcia with the felony capital murder of J.T. "while in the commission of the crime and felony of Sexual Battery, as defined by Section 97-3-95, Miss. Code of 1972 (as amended)," C.P. 13. The State immediately announced its intent to seek a

death sentence in the event of conviction. C.P. 13, T. 40.[2]

After pleading guilty to that indictment[3], and waiving a sentencing jury, C.P. 447-48, 450-53. T. 517-37, 538-77,[4] Garcia was subjected to a three day long sentencing bench trial. T. 578-896. The denial of Garcia's change of venue motion that undoubtedly contributed to the decision to have a bench sentencing trial, as well as the admissibility of some of the most damaging evidence relied upon by the tribunal in sentencing had already been determined during dispositive pretrial hearings held between March and August of 2016. T. 46-249, though undisputed evidence later established the Garcia had been *Dusky* incompetent to participate in his defense at least during the open-court aspects of those hearings. Pet. App. D (Competency Hearing Exhibit D-1, November 17, 2016 Report of court appointed

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[2] *See* Miss. Code Ann. § 97-3-21 (3) (making capital murder as defined by § 97-3-19 (2) punishable by death). The formal announcement at Garcia's arraignment that the death penalty would be sought was simply confirmation of a prosecuting attorney's press statement nearly a year earlier at the time of Garcia's preliminary hearing that Garcia "is just pure evil" and that "I think the only proper penalty in a case like this would be the death sentence." C.P. 190.

[3] The guilty plea and judgment of conviction pursuant to which that trial proceeded are not at issue in the present Petition. They are under challenge in the separate ongoing, but as yet unresolved, post-conviction review proceedings identified in the List of Parties and Related Cases, *supra*, at ii.

[4] The waiver of jury sentencing was made in the context of having been denied a change of venue notwithstanding the extreme and virulent public outrage at the crime and very personal hostility towards Garcia that had manifested itself from the moment of his arrest and had persisted thereafter. C.P. 132-241 (Motion for Change of Venue and attached exhibits). That outrage had not only been fanned by public officials' statements, *see, e.g.,* n. 2, *supra*, C.P. 158, 167,190, but actually grew more so as time passed, culminating in a petition signed by over 100 people filed with the Circuit Clerk on the first day of his sentencing trial (a date that had previously been publicized) demanding that the court enter a death sentence for Garcia. T. 669-71, Sealed Exhibit Vol. 2 of 9.

forensic psychologist Robert Storer, Ph.D.) (hereafter "Storer Report"); Pet. App. E (Transcript of Competency hearing of November 22, 2016, T. 371-411) (hereafter "Competency Hearing Transcript.")

The evidence admitted as a result of the pretrial hearings, and relied upon by the trial judge in sentencing Garcia to death, included the results of an electronic search of a video game device owned by Garcia but to which the alternate suspect also had access, on which someone had made internet searches for pedophiliac pornography, T. 717-28, Trial Exhibits S-45, S-46, S-47, as well as incriminating – but purportedly inconsistent with the other evidence and/or Garcia's plea colloquy – statements made by Garcia under police interrogation, T. 660-65, Trial Exhibits S-39, S-40 (Statement to police officer transporting him to interrogation), 671-78, Trial Exhibits S-40 and S-41 (statement to Detective who conducted the interrogation). After a less than two hour deliberation conducted over her lunch hour, T. 883, and in explicit reliance on the electronic evidence and on negative inferences regarding Garcia's character, credibility and acceptance of responsibility drawn from the inconsistent statements, the Judge sentenced Garcia to death. T. 883-894, C.P. 463-67.

On Garcia's timely appeal of that sentence, the Mississippi Supreme Court affirmed, and explicitly adopted the view of the "presumption of competency" that is challenged in this Petition. Pet. App. A at ¶¶ 55-66. On September 10, 2020 it denied Garcia's timely motion for rehearing on that decision. Pet. App. B. The instant Petition for Writ of Certiorari to the Mississippi Supreme Court on the

question decided below is timely filed in the manner prescribed by the applicable Rules of this Court as modified by this Court's orders entered "[i]n light of the ongoing public health concerns relating to COVID-19" [5]

B. Other relevant facts

From the beginning, Garcia's competency to proceed was an issue. At his arraignment in late 2015, the trial judge recognized that Garcia had a significant history of mental illness and appointed clinical and forensic psychologist Dr. Robert Storer to evaluate Garcia for competency based on that history. T. 29-45. Dr. Storer conducted a months-long evaluation of Garcia that included multiple interviews with Garcia and collateral sources, and review of Garcia's childhood medical and psychiatric records. *See* Storer Report at pp. 1-2, Competency Hearing Transcript at T. 377-78. On the basis of this evaluation, Dr. Storer submitted his report diagnosing Garcia with a then-untreated severe anxiety disorder, due to which, Garcia "has significant deficits in his ability to attend to court proceedings and participate in his own defense" and concluding that under the criteria of *Dusky* as adopted by the Mississippi courts Garcia was, as a result of these in-courtroom deficits alone, "not competent to stand trial at this time." Storer Report, at p. 1 *(*employing the *Dusky* rule adopted in *Crawford v. State*, 787 So. 2d 1236, 1241

[5] This Court's March 19, 2020 Order modified Supreme Court Rule 13.1 by extending the deadline to file any petition for writ of certiorari "to 150 days from the date of the…order denying a timely petition for rehearing" in the lower court. On April 15, 2020 this Court entered an additional order, modifying of some of the formatting and service requirements of Supreme Court Rules 33.2, 33.1, and 29.3) for "every document filed in a case prior to a ruling on a petition for writ of certiorari."

(Miss. 2001) (citing *Dusky v. United States*, 362 U.S. 402, 402 (1960))). Dr. Storer also reported that the anxiety disorder that was rendering Garcia incompetent was likely susceptible to treatment and recommended that "Mr. Garcia be treated at the jail for his anxiety symptoms and be re-evaluated for competence after his symptoms have been effectively treated." *Id.* at p. 3. [6]

Within five days, the trial court convened a hearing on Garcia's competency. Dr. Storer was the sole witness and was accepted by the trial court as an expert in forensic psychology. Competency Hearing Transcript at T. 376. His report was admitted into evidence in support of that testimony. *Id.* at T. 373-74, 410. Dr. Storer reiterated the findings from his report, his expert psychological opinion that Garcia was then suffering, and had since childhood suffered, from the serious mental illness anxiety disorder, and that Garcia's anxiety disorder had gone untreated from and after his arrest in July 2014. *Id.* at T. 373, 381-82, 386-89, 393. As a result, at all times since his arrest,

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[6] Dr. Storer was separately concerned that the anxiety disorder "*also may* be impairing his ability to make rational decisions in his legal situation" outside of the courtroom setting, Storer Report at p. 3. But, as he made clear during his testimony, his expert opinion that Garcia was actually so impaired by the anxiety disorder that he was incompetent with respect to in-court proceedings did not rest on, and was not contradicted by, that more speculative concern. Rather, as he explained to the court, his opinion that Garcia's capacity to participate *inside the courtroom* setting was substantially impaired by Garcia's untreated anxiety disorder even if he did not have other limitations. Competency Hearing Transcript at T. 393. To the extent that the Mississippi Supreme Court found this second unrelated aspect of Garcia's competency to be evidence contradicting the first one, it is clearly erroneous, and insufficient, absent the presumption of competency, to support the Mississippi Supreme Court's ruling under question here. Pet. App. A at ¶¶ 63-66. This Court does not hesitate to set aside unconstitutional actions below where they are based on clearly erroneous findings in either the trial or appellate courts, or to defer to the trial court in making such findings. *See, e.g., Flowers v. Mississippi,* --- U.S. ---, ---, 139 S. Ct. 2228, 2244 (2019)

> Mr. Garcia's ability to participate in legal proceeding, to attend to what's going on, and to actually consult and work with defense counsel over the course of a trial is significantly impaired by his anxiety.

Id. at T. 373.

The severe mental illness that caused these problems, Dr. Storer testified, was not the product of current circumstances, but had existed in Garcia since childhood, and had affected him throughout his life, including during previous pretrial hearings in the instant matter, *Id.* at T. 378-79, 385-86. Dr. Storer specifically cited an attack during a July pretrial hearing regarding change of venue as an open manifestation of this mental illness. *Id.* at T. 380-81, 386-91, 393-94. Dr. Storer testified that his opinions were further based upon review of Garcia's psychiatric records going back to childhood and interviews with people who had known him since childhood and since his incarceration, *Id.* at T. 377-78, 385-86, Garcia's behavioral and medical records while incarcerated, *Id.* at T. 381, 387-88, and twelve hours of face to face interviews with the defendant held between July 12 and Nov. 22, 2016. *Id.* at T. 377.

It was therefore Dr. Storer's opinion that Garcia was then, and had since his arrest been, mentally incompetent to participate in legal proceedings due an untreated severe anxiety disorder. *Id.* at T. 371, 378-81, 386, 390-92. It was also Dr. Storer's opinion that the incompetency would persist unless and until adequate treatment was undertaken. *Id.* at T. 380-82, 385-87, 390-91. Dr. Storer estimated that it would take at least 30 days of closely controlled and monitored treatment with anti-anxiety medications to determine if Garcia could in fact be successfully be

restored to competency to participate in court proceedings. *Id.* at T. 383-84, 387, 404-05. The State offered no evidence to rebut any of this testimony or any cross-examination that challenged any of Dr. Storer's expert opinions with respect to either Garcia's diagnosis or the competency-impairing effect it had at present, and had had since his arrest, on his abilities to participate in in-court proceedings. *Id.* at T. 384-87.

And, although he was subjected to a hostile and challenging examination by the trial judge, *Id.* at T. 387-94, Dr. Storer never retreated from his testimony that, to a reasonable degree of psychological certainty, Mr. Garcia's severe and untreated anxiety disorder was a mental illness that had at all times since his arrest rendered Mr. Garcia incapable of competently participating in open court proceedings, even though he was less certain that the condition would affect his capacities in other settings. *Id.* at T. 392-93 ("I do know for certain that his ability to attend and participate is being impaired").

The expert testified this was because, during proceedings in open court, his anxiety disorder "shuts him down to where he's not paying attention and listening and processing information, and he's not able to ask questions of his attorneys as appropriate or point things out." *Id.* at T. 390. When pressed by the trial judge to explain why an anxiety disorder would have this effect, Dr. Storer explained, again without refutation from any source, that people with severe anxiety disorder who are in stressful circumstances like in-court proceedings

> focus all of their attentional resources either inwardly on themselves to try and sort out what's going on or in a hypervigilant way looking for

> threats. Anything that's not a threat is dismissed. And so you end up with someone sitting there who is paying attention to what's going on inside and hypervigilant for threats, but not paying attention to what's being said, not thinking conceptually, not thinking about evidence that's been presented.

Id. at T. 391. The trial judge followed her interrogation of Dr. Storer with one of Garcia, who confirmed that he had long suffered from all of these things, that they had affected him in the courtroom during the pretrial hearings, and that he had been able to follow what had gone on in the present hearing because he had received a large dose of medication immediately before the hearing, and there were very few people present, unlike at other proceedings. *Id.* at T. 395-404.

On the basis of the testimony of the expert and the colloquy with Garcia, the trial judge ruled that Garcia was competent "but for" the issue of his capacities to attend and participate during in-trial proceedings, which she agreed caused her to question "if we were to go to trial, how he would handle that in the courtroom," noting that it had manifested itself in earlier proceedings, *Id.* at T. 404. On that basis, the judge expressly reserved ruling on Garcia's competency to participate in in-court proceedings until the recommended restorative treatment was effectively completed and directed that it be undertaken. *Id.* at T. 405. It was not until January 12, 2017, after a second competency hearing at which the expert testified that the restorative treatment had worked that the trial court adjudicated that Garcia was competent. T. 512-13, C.P. 438, 441.

Nonetheless, the trial court did not upset any of the results of hearings held while Garcia was in the state of incompetency testified to by the expert. This

included the July 26, 2016 evidentiary hearing at which Garcia's statements to police – used at the sentencing to find Garcia dishonest and unrepentant in his plea colloquy, and his mitigation evidence to be of little weight as a consequence, T. 883-894, C.P. 463-67 – were found to be admissible, T. 195-240.[7] The validity of the search warrant that recovered the Xbox with the damaging evidence concerning searches for pedophiliac pornography was also established at that hearing, T. 242-61. Equally significant to the sentencing trial, and most particularly to the decision to waive a jury at sentencing, were the hearings on Garcia's motion to change venue. The hearing on that motion commenced on July 26 as well, T. 262-301, and was finally denied after further evidentiary hearing on August 16, 2016, T. 303-47, C.P. 342-48.

Nor, even after the it had ordered restorative treatment, did the trial court wait for that treatment to have the hoped-for restorative effect before holding further in-court proceedings. Instead, on December 8, 2016 it held a dispositive evidentiary hearing on multiple objections to the damaging electronic evidence of searches for pedophiliac pornography made on an Xbox device belonging to Garcia and denied them all. T. 412-66. This electronic evidence was also heavily relied upon by the judge in sentencing Garcia to death. T. 883-894, C.P. 463-67. It did this despite the fact that Garcia and his counsel both announced at the start of these proceedings that the medication treatment had not yet resulted in a reduction of the

[7] This also supported the constitutionally required scienter finding that Garcia "actually killed." T. 886, C.P. 463, Miss. Code Ann. § 99-19-101 (7)(a), *Enmund v. Florida*, 458 U.S. 782, 798 (1982), and both state statutory aggravators found. C.P. 463-65.

symptoms that had been the basis for the judge's reservation of determination on his competency. T. 413. On December 20, again before the expiration of the 30-day period during which restoration treatment was being attempted, the trial court conducted the Omnibus Hearing that established the substantive and procedural parameters that would govern the upcoming trial. T. 468-98.

The Mississippi Supreme Court rejected Garcia's claim, holding these hearings to have been validly held and allowing the orders previously resulting from earlier pretrial hearings. It concluded that, despite the trial judge having ordered restorative treatment based on the expert's unrefuted testimony, the presumption of competency had not been overcome simply because the trial judge had not affirmatively found Garcia to be incompetent, but had merely reserved ruling on the issue. It based this ruling on the revived and reinvigorated presumption of competency that it had decided as part of an about face on what was sufficient to rebut that presumption. *See Pitchford v. State*, 240 So. 3d 1061 (Miss. 2017) (*overruling Coleman v. State*, 127 So.3d 161 (Miss. 2013), *Smith v. State*, 149 So.3d 1027 (Miss. 2014), and *Hollie v. State*, 174 So.3d 824 (Miss. 2015); and *Evans v. State,* 226 So. 3d 1, 17-18 (Miss. 2017) *cert. denied on other grounds sub nom. Jordan v. Mississippi*, 138 S. Ct. 2567 (2018) (retreating from its position in the cases subsequently overruled in *Pitchford* requiring reversal in the absence of a contemporaneous hearing and adjudication by trial court, as well as from the then-effective Rule's black letter prohibition against waiver of hearing by defense). Pet. App. A. at ¶ 66 (citing to *Evans*).

Mississippi's use of the presumption of competency in this fashion, Garcia respectfully submits, represents an extreme and alarming departure from the established Fourteenth Amendment jurisprudence of this Court governing competency and its determination. *Drope v. Missouri,* 420 U.S. 162, 180 (1975), *Pate v. Robinson,* 383 U.S. 375 (1966), *Dusky v. United States*, 362 U.S. 402, 402 (1960). The present case clearly presents that important constitutional question for determination. And the fact that a man who was established by every means approved by this Court for determining competency to be *Dusky* incompetent to participate in pretrial proceedings will forfeit his life based on the outcome of those proceedings, transgresses the Eighth Amendment, as well.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ sought in order to preserve its longstanding protections of the Fourteenth Amendment's "prohibition fundamental to an adversary system of justice" against proceeding in any fashion against incompetent defendants, and of the Eighth Amendment's protection against cruel and unusual punishments.

A. Mississippi's use of its presumption of competency to allow proceedings against an actually incompetent defendant represents a substantial, and unconstitutional, departure from the minimum requirements of this Court protecting such persons.

Under the Constitution, as this Court has repeatedly said, a defendant simply may not under any circumstances be put to trial for his liberty, much less as Garcia was here for his life, unless he meets the minimum criteria for competency to meaningfully participate in the proceedings seeking to deprive him of either. *Drope v. Missouri,* 420 U.S. 162, 180 (1975), *Pate v. Robinson,* 383 U.S. 375 (1966), *Dusky v. United States*, 362 U.S. 402, 402 (1960)). Violation of this prohibition as to

any particular accused fundamentally impinges upon that individual's right to a fair trial. *Pate*, 383 U.S. at 385. But perhaps even more importantly, strictly adhering to that prohibition is according to this Court "fundamental to an adversary system of justice," *Drope*, 420 U.S. at 172.

Because of this, scrupulous adherence to this right must be accorded, without exception, to all persons who the state wishes to deprive of life or liberty "regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." *Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971). Thus, Mississippi's failure to abide by this Court's jurisprudence, was not "simply an error in the trial process itself" but "affect[ed] the framework within which the trial proceeds." *Weaver v. Massachusetts*, --- U.S. ---, ---, 137 S. Ct. 1899, 1907–08, (2017) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). It was, in other words, structural constitutional error that cannot be subject to waiver or harmless error analysis simply because Garcia pleaded guilty to heinous crime. *Id.*

The Mississippi Supreme Court made this fundamental structural error on this important federal question when, in transgression of the foundational Due Process guarantees of the Fourteenth Amendment and the prohibitions against cruel and unusual punishment of the Eighth Amendment it presumed Garcia competent at times when the only constitutionally acceptable evidence before the trial court established conclusively that he was not.

Chronic mental illness – and the competency issues that arise out of it – are both too common in the criminal justice system and too important for this Court to

ignore Mississippi's default. The prevalence of mental illness in incarcerated people is three times what it is in the general population.[8] Getting this question right is therefore significant not merely to Garcia, or even only to any criminal defendants with mental health issues who may come after him. It is essential to maintaining the integrity of the criminal justice system as a whole, and ultimately public safety. *See, e.g.,* Council of State Governments Justice Center, "Adults with Behavioral Health Needs under Correctional Supervision: A Shared Framework for Reducing Recidivism and Promoting Recovery," *supra*, n. 2, at 12 (recognizing that dealing effectively with mental illness suffered by those within the criminal justice system is relevant not only to that system, but also to "mak[ing] communities safer for everyone.").

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[8] United States Department of Justice survey studies in 2006 and 2015 establish this frequency. These studies also find that on average 24% of all local jail inmates (those who are, in large part, pretrial detainees whose competency to stand trial might become an issue) self-report having symptoms of mental illness that meet the criteria for a psychotic disorder, Doris J. James and Lauren E. Glaze, U.S. Dep't. of Justice, "Mental Health Problems of Prison and Jail Inmates," NCJ 213600 (2006) *available at* https://www.bjs.gov/content/pub/pdf/mhppji.pdf, and that over 1% of the national jail population was so severely affected by mental illness that they were deemed by the authorities holding them or the Department of Justice surveyors to be too mentally incompetent even to be surveyed. Allen J. Beck, U.S. Dep't of Justice, "Use of Restrictive Housing in U.S. Prisons and Jails, 2011-12," NCJ 249209 (2015) *available at* https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf The Council of State Governments Justice Center reported in a 2009 study that 16.9 % of local jail inmates actually suffered from serious mental illness. Council of State Governments Justice Center, "Addressing Mental Illness in the Criminal Justice System" (2009), *available at* https://www.justice.gov/archives/opa/blog/addressing-mental-illness-criminal-justice-system. A multi-disciplinary 2012 paper from the same entity on how to deal with this high rate of mental illness in the context of recidivism reduction relied on published research to confirm this statistic, as well. *See* Fred Osher, M.D., David A. D'Amora, MS, Martha Plotkin, J.D., Nicole Jarrett, Ph.D., Alexa Eggleston, J.D., The Council of State Governments Justice Center, "Adults with Behavioral Health Needs under Correctional Supervision: A Shared Framework for Reducing Recidivism and Promoting Recovery" (2012), 4, *available at* https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/CSG_Behavioral_Framework.pdf (relying on Steadman, Henry J., Fred C. Osher, Pamela Clark Robbins, Brian Case, and Steven Samuels, "Prevalence of Serious Mental Illness Among Jail Inmates," Psychiatric Services 60, no. 6 (June 2009): 761–765)

Mississippi has been particularly egregious in passing the problems of mental illness onto a corrections system which has substantial (and self-acknowledged) shortcomings in its ability to provide for basic human needs, much less in its capacity to actually deliver effective treatment of chronic mental health conditions. *See, e.g.,* Pettus, Emily Wagster, The Associated Press, *"Doctor calls Parchman conditions 'deplorable',"* June 21, 2020, https://apnews.com/eff3da4a355d62fcf71a292aac2329df (doctor and former lead physician for the Washington State Department of Corrections characterizing living conditions at the Mississippi State Penitentiary as "sub-human" and "the worst conditions I have observed in any U.S. jail, prison or immigration detention facility in my 20 years working in this field," and quoting new MDOC Commissioner Burl Cain as admitting the need to "fix" that circumstance). There have also been tragic and deadly dangers to Mississippi communities where the criminal justice apparatus becomes involved with mental illness rather than having it treated properly in the community in the first place. *See, e.g.,* Fowler, Sarah, "*Suspect in deadly shooting of Simpson County deputy apprehended,"* The Clarion-Ledger, June 12, 2020, *available at* https://www.clarionledger.com/ story/news/2020/06/12/simpson-co-deputy-killed-suspect-considered-armed-and-dangerous/3179221001/. These are the stakes if this Court permits Mississippi to *carte blanche* ignore the Constitution and permit its trial courts to go forward with proceedings against people who the only expert testimony finds to be incompetent to participate fully in those proceedings.

And in any event, ameliorating the failure of the justice system to get mental illness right at the threshold by removing people so impaired by it from prosecution

unless and until they can be treated and made healthy enough to participate in it, does not solve the constitutional problem of subjecting such persons to prosecution when they are not.

This Court has prescribed a constitutional definition of competency that measures specifically the defendant's capacity for such meaningful participation in the proceedings, not a presumption grown so large that even uncontradicted evidence of significant impairment of some or all of that capacity is insufficient to rebut it. *Dusky,* 362 U.S. at 402. *See also Cooper v. Oklahoma,* 517 U.S. 348, 354 (1996). While this Court has held that a statutory presumption of competency does not necessarily violate procedural due process, even in a death penalty case, it has put substantial limits on how far states may expand that presumption. *See Cooper v. Oklahoma,* 517 U.S. 348, 354 (1996), *Medina v. California*, 505 U.S. 437 (1992) (prohibiting states from expanding the presumption so far as to requiring a higher level of proof than a preponderance of the evidence to overcome it). Though Mississippi does not purport to increase the burden of proof from a preponderance of the evidence, Pet. App. A at ¶ 69, it did the same thing in the present case by the back door by allowing its presumption of competency to accept a judge's lay, stereotyped and inaccurate assumptions about both the factual reality of Garcia's condition and the scientific premises of psychology – assumptions that the expert has expressly refuted without any contradiction, Pet. App. E, Competency Hearing Transcript, at T. 387-93 – over the actual evidence of record.

This Court should also grant the Petition in this case to prevent Mississippi's

extreme approach to the presumption of competency from becoming an example for other jurisdictions to likewise erode this fundamental protection. The ease with which Mississippi has, over the course of the past three years, retreated from its previously constitutionally acceptable rules and jurisprudence, reflects a dangerous anti-constitutional trend. *See* Miss. Unif. Cir. & Cty. Ct. Rule 9.06 (superceded effective July 1, 2017 by Miss. R. Cr. P. 12) and *Sanders v. State*, 9 So. 3d 1132, 1135-36 (Miss. 2009). These rules and this jurisprudence were applied for the better part of a decade and ensured that only the constitutionally competent, as defined by this Court's jurisprudence, were tried, convicted and sentenced for crimes. *See, e.g., Hollie v. State*, 174 So. 3d 824, 830 (Miss. 2015), *Smith v. State*, 149 So. 3d 1027, 1029 (Miss. 2014), *Beasley v. State*, 136 So.3d 393, 398 (Miss. 2014), *Coleman v. State*, 127 So.3d 161 (Miss. 2013), *Jay v. State*, 25 So.3d 257, 261-62 (Miss. 2009). Mississippi has now placed itself outside the scope of the freedom this Court has given the states to create procedures for ascertaining competency by replacing a constitutionally acceptable approach with one that ignores this Court's jurisprudence entirely. As the alarmed minority of the Mississippi Supreme Court in this process has recognized, Mississippi has done this largely by reinvigorating the presumption of competency that had taken a back seat under its earlier procedural rules, *compare* Miss. Unif. Cir & Cty. Ct. Rule 9.06 *with* Miss. R. Crim. P. 12 and by overruling the cases that had embodied the constitutionally proper standards. *See Pitchford v. State*, 240 So. 3d 1061, 1070 (Miss. 2017) (expressly overruling *Coleman*, *Smith*, and *Hollie*, and, as is noted in the concurrence,

implicitly *Sanders*, *Beasley* and *Jay*, as well.) *Id.* at 1080 (Kitchens, P.J., concurring)). *See similarly*, *Evans v. State,* 226 So. 3d 1, 14 (Miss. 2017). *Id.* at 49-50 (Kitchens, P.J., dissenting).

But even in *Pitchford* and *Evans*, the presumption of competency had, in the end, been borne out by expert opinion. *Pitchford*, 240 So. 3d at 1066, *Evans*, 226 So. 3d at 14-15. In the present case, however, the only expert opinion and evidence affirmatively rebutted it. Pet. App. D, Storer Report; Pet App. E., Competency Hearing Transcript at T. 372-403. The Mississippi Supreme Court in the present matter has swept away any requirement that, at least once there is a hearing and evidence concerning it is adduced, the presumption must bow to the evidence. Contrary to the Mississippi Supreme Court's assertions, Pet. App. A at ¶¶ 63-66, Dr. Storer never contradicted himself or otherwise in any way retreated from his expert opinion that Garcia was, in fact, substantially impaired in his capacity to rationally understand and meaningfully participate *in the courtroom setting* due to the effects of severe mental illness of anxiety disorder. T. 386-394. The Mississippi Supreme Court's bewildering contrary conclusion – and its cavalier finding that the presumption of competence was sufficient to uphold the trial court's actions – is based on a mistaken conflation of not only Dr. Storer's testimony about, but also the trial judge's conclusions regarding, two distinct competency related issues.

Dr. Storer consistently, and despite a great deal of challenging examination by the trial judge, maintained throughout his testimony that Mr. Garcia's severe and untreated anxiety disorder was a mental illness that *did* render Mr. Garcia

incapable of competently participating in open court proceedings, "I do know for certain that his ability to attend and participate is being impaired." Competency Hearing Transcript at T. 393. This was Dr. Storer's firm opinion, independently of and notwithstanding the fact that Dr. Storer could not and did not conclusively opine on the separate and distinct issue of whether Mr. Garcia's rational understanding in general or capacities for *other than in open court proceedings* were similarly impaired. *Id.* at T. 392-93.

Nor is the trial court's ruling at the time this testimony was given inconsistent with the distinction between the two separate competency issues affecting Garcia. On out-of-court competency, in light of Dr. Storer's lack of certainty on that issue, it found Garcia unimpaired. *Id.* at T. 404-05. But on the in-court participation incompetency, it reserved its ruling, *Id.* at T. 405. It instead followed Dr. Storer's recommendations and ordered ameliorative treatment for the condition, Id. at T. 405-06, C.P. 416. It made no final finding that Garcia's in-court impairments did not render him incompetent, as Dr. Storer had unequivocally and consistently testified at the November hearing, until six weeks later. T. 512-13, C.P. 438, 441. And did so then only after Dr. Storer had testified anew that he was satisfied that the six weeks of ameliorative treatment had controlled the anxiety disorder sufficiently to eliminate the impairments to competency in the courtroom that had previously rendered Garcia incompetent for such proceedings. T. 501-05.

By affirming Garcia's sentence despite this undisputed record, Mississippi has expanded the presumption of competency to near irrebuttability and has gone so

far beyond any constitutional boundaries attending such a presumption that Garcia was unconstitutionally sentenced to die. *Dusky v. United States*, 362 U.S. 402, 402 (1960). *See also Pitchford,* 240 So. 3d at 1076 (Kitchens, P.J., concurring), *Evans,* 226 So. 3d at 49-50 (Kitchens, P.J., dissenting). The Writ should be granted to prevent further erosion of this right.

B. Where the proceedings are in aid of imposition of a death sentence, Mississippi violates the Eighth Amendment by using a presumption of competency that ignores and rejects the well-established objective psychological and psychiatric methods that have long been relied upon to establish whether a criminal accused is competent to be proceeded against and instead permits reliance upon subjective and inaccurate non-scientific stereotypes of what is and is not a mental illness.

This Court should also grant the Writ sought because Mississippi's expansion of its presumption of competency in this case also transgresses the Eighth Amendment insofar as it "ensure[s]that death sentences are not imposed capriciously or in a freakish manner." *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

While this Court gives the states considerable leeway to experiment with the means for implementing the protections of the Eighth Amendment, that experimentation is not without its limits. Where those experiments threaten to deny criminal accuseds "the basic dignity the Constitution protects" this Court does not hesitate to correct the states that exceed those limits. *Hall v. Florida*, 572 U.S. 701, 724 (2014). Because the prohibition against proceeding against incompetent persons in any criminal case, and certainly in proceeding against them to deprive them of their very lives, is "fundamental to an adversary system of justice," *Drope v. Missouri,* 420 U.S. 162, 172 (1975), it is clearly one of those basic dignities that this

Court must ensure remains protected.

In the context of determining the exemption from the death penalty for intellectual disability created by *Atkins v. Virginia,* 536 U.S. 304 (2002) this Court has recognized that where scientific evidence and testimony are the accepted means for establishing Eighth Amendment-significant facts, states may not create standards for determining those facts that ignore or are contrary to the scientific standards themselves. *Hall,* 572 U.S. 701; *Moore v. Texas*, --- U.S. ---, ---, 137 S. Ct. 1039, 1052 (2017). *See also Brumfield v. Cain*, 576 U.S. 305, 315-320 (2015) (concluding, for purposes of federal habeas review, that state court fact-findings that rested on interpreting IQ scores in a manner rejected by the scientific community, and that rejected out of hand even disputed expert testimony concerning the existence of adaptive deficits, were "unreasonable" in light of *Hall*.)

As with intellectual disability, this Court has placed evaluation by the appropriate mental health resource at the core of what is required to protect the constitutional right at issue. *See, e.g., Drope*, 420 U.S. at 176 (noting that failure to obtain contemporaneous psychiatric evaluation specifically for competency when reasonable grounds to question competency arose during trial rendered the state court's protection of the right to competency constitutionally inadequate). But this Court has not yet considered the consequence of allowing the courts to flout the scientific standards that apply to such evaluations, as Mississippi's expansive presumption of competency does. This important question is clearly presented by the instant matter, and Garcia respectfully submits that the principles requiring

adherence to the scientific standards by which intellectual disability is assessed are equally applicable to competency determinations.

In *Hall*, this Court recognized that because the constitutionality of the death sentence required consideration of the defendant's psychiatric or psychological diagnosis, and its determination was otherwise "informed by the work of medical experts," those experts, and the standards they promulgate to govern their work, could not be ignored or supplanted by courts called upon to make the relevant determinations:

> Those professionals use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities. Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue.

Hall, 572 U.S. at 710. Where a court makes a determination that rejects out of hand this expertise in favor of judicially created standards or stereotypes about the mental condition that are not supported by the governing scientific principles, this Court has been quick to condemn that displacement, noting that relying on such stereotypes rather than on "medical or clinical appraisals, should spark skepticism" about whether the Constitution has been complied with. *Moore v. Texas*, 137 S. Ct. 1039, 1052 (2017).

As with determining intellectual disability, determining competency to stand trial necessarily requires, at the threshold, proper diagnosis of the accused's mental condition. With respect to competency, this Court requires that the accused show that his "*mental condition is such that he lacks the capacity* to . . . to assist in

preparing his defense." *Drope*, 420 U.S. at 171 (1975) (emphasis supplied). Ascertaining this threshold fact necessary to ascertaining incompetency necessarily requires, just as *Atkins* does for ascertaining intellectual disability, the use of "medical and professional expertise to define and explain how to diagnose the mental condition at issue." *Hall*, 572 U.S. at 710.

Indeed, following this Court's guidance on how to safeguard accuseds' fundamental protection from being proceeded against while incompetent, *see, e.g., Drope*, 420 U.S. at 172-73, *Pate*, 383 U.S. at 385*,* Mississippi *requires* that such medical and professional expertise be obtained if the trial court determines, as it did in Garcia's case, that there were reasonable grounds calling the accused's competency into question. *See* Miss. R. Cr. P. 12.2 (a) ("If . . .the court . . . has reasonable grounds to believe that the defendant is mentally incompetent, the court *shall* order the defendant to submit to a mental examination."); 12.3(a) (If the Court determines that reasonable grounds for a mental examination exist, it *shall* order a *competent psychiatrist and/or psychologist* to examine the defendant and, if necessary, to testify regarding the defendant's mental condition.") (emphasis supplied).

In Garcia's case, the trial court constitutionally properly ascertained that there were reasonable grounds to question Garcia's competency, and, also consistently with the Constitution's requirements, ordered that Dr. Storer, a clinical forensic psychologist competent to perform a mental examination regarding competency, examine Garcia specifically with respect to his competency. T. 29-45;

Pet. App. D., Storer Report, at 1. Further comporting with the requirements of due process, the trial court held a hearing on Garcia's competency at which the expert, without contradiction from any other competent psychiatrist or psychologist, diagnosed Garcia with a mental illness – severe anxiety disorder – and testified that this illness significantly impaired "Garcia's ability to participate in legal proceeding, to attend to what's going on, and to actually consult and work with defense counsel over the course of a trial." Pet. App. E. Competency Hearing Transcript at T. 373. And, again without contradiction from any other competent psychiatrist or psychologist, Dr. Storer further opined to a reasonable degree of psychological certainty that Garcia was then and had been since his arrest, as a result of his mental illness, "not competent to stand trial." *Id*. at T. 379-80.

Despite complying with the Constitution up to this point, however, what happened next transgressed Garcia's Eighth and Fourteenth Amendment protections. The trial court apparently credited the diagnosis and opinion of the expert insofar as the expert also opined that Garcia might be restored to competency if he was properly medicated, and was on a proper medication regime for at least 30 days, and continued on one thereafter, *id*. at T. 383-84, 387. It in fact ordered such treatment, *id.* at 404-05. But it did not make any competency determination at that time. It deferred that determination (though nothing else) and elected, contrary to the uncontradicted and scientifically established incompetency testified to by the expert on the basis of using established psychological techniques and expertise, to continue as if Garcia were competent. It

justified this by relying on the judge's personal, though unsupported, view that *it* could conduct a trial despite the fact that the defendant had the impairments testified to by the psychologist, and that those impairments merely took "patience" from counsel to overcome. *Id.* at T. 404-06.

The Mississippi Supreme Court affirmed this course of conduct using the "presumption of competency" as the basis for doing so. Pet. App. A at ¶ 66. For the same reasons that this Court rejected the efforts by states to end run the constitutional protections embodied in *Atkins* and its progeny in *Hall*, *Brumfield*, and *Moore,* this Court should grant the Writ and determine that the constitutional protections embodied in *Dusky* and *Drope* and their progeny cannot be evaded by ignoring the science and expertise that are at the core of determining competency.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Mississippi Supreme Court on the Question Presented.

Respectfully submitted,

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INDEX TO APPENDICES

APPENDIX A
to
Petition for Writ of Certiorari

Supreme Court of Mississippi Opinion, May 14, 2020
reported at
Garcia v. State, 300 So.3d 945 (Miss. 2020).

300 So.3d 945
Supreme Court of Mississippi.

Alberto JULIO GARCIA a/k/a
Alberto J. Garcia a/k/a Alberto Garcia
v.
STATE of Mississippi

NO. 2017-DP-00504-SCT
|
05/14/2020
|
Rehearing Denied September 10, 2020

Synopsis

Background: Following denials of pretrial motions to suppress and for change of venue, defendant was convicted on guilty plea in the Circuit Court, Harrison County, Lisa P. Dodson, J., of capital murder, and sentenced to death. Defendant appealed.

Holdings: The Supreme Court, Maxwell, J., held that:

finding that defendant was competent to stand trial was not abuse of discretion;

defendant was mentally competent to waive right to jury in sentencing phase of trial;

denial of pretrial motion for change of venue did not render waiver of jury trial for sentencing phase invalid;

denial of motion for change of venue was not abuse of discretion;

evidence that Internet searches of sexually explicit and violent nature involving young girls were made on defendant's electronic game console made prima facie showing of authenticity;

probative value of evidence that, in week prior to crime, Internet searches were made on defendant's electronic gaming console that involved young girls and were of sexually explicit and violent nature was not substantially outweighed by danger of unfair prejudice;

defendant was not "in custody," as would trigger *Miranda* protections, when he made voluntary, inculpatory statements to patrol officer while on way to police station;

state pathologist's expert testimony did not violate defendant's right of confrontation;

defendant's claim that trial court judge should have sua sponte recused herself from sentencing hearing was procedurally barred; and

Mississippi's death penalty scheme did not violate Eighth Amendment prohibition against cruel and unusual punishment as applied.

Affirmed.

King, P.J., filed opinion concurring in part and in result, in which Kitchens, P.J., joined.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection; Pre-Trial Hearing Motion.

***951** HARRISON COUNTY CIRCUIT COURT, HON. LISA P. DODSON, JUDGE

Attorneys and Law Firms

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ATTORNEYS FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL BY: CAMERON LEIGH BENTON, Jackson

EN BANC.

Opinion

MAXWELL, JUSTICE, FOR THE COURT:

***952** ¶1. After a twelve-hour search, police found the dead body of a missing five-year-old girl. Her body was located in a filthy, abandoned trailer fifty yards from her apartment complex. She had been sexually assaulted, vaginally and anally, and then hanged by the neck with a pair of socks tied to a window crank. Twenty-nine-year-old Alberto Garcia, a resident of the same apartment complex, confessed to killing the child in the course of raping her. Forensic evidence

confirmed Garcia's DNA had been found in the child's vagina and anus.

¶2. On the eve of his capital-murder trial, Garcia pled guilty. He also waived his right to a jury at sentencing. Following a three-day hearing, the trial judge, the Honorable Lisa Dodson, found two aggravating circumstances—the young victim was killed during the course of a sexual battery and the nature of the capital offense was especially heinous, atrocious, and cruel—outweighed the mitigating factors of Garcia's lack of significant criminal history, relatively young age, and difficult childhood. Based on these findings, she sentenced Garcia to death.

¶3. Garcia appeals his sentence only. [1] Applying the heightened scrutiny that a death-penalty appeal demands, we find no merit to Garcia's claims the trial judge erred in her sentencing decision. Because the death penalty is constitutional and because Garcia's death sentence is proportionate to other sentences imposed for the capital murder of a young sexual-assault victim, we affirm his sentence of death.

1 Because he pled guilty, Garcia has no right to appeal his underlying capital-murder conviction. *See* Miss. Code Ann. § 99-35-101 (Rev. 2015).

Facts & Procedural History

I. JT goes missing and is later found hanged.

¶4. On the evening of July 16, 2014, five-year-old JT [2] was running in and out of the patio door of her apartment, playing with a neighbor outside. Around 5:30 p.m., her mother called to her, but JT did not answer. After two hours of searching, JT's mother called 911. Police, neighbors, and volunteers systematically searched the area through the night.

2 This opinion refers to the child victim by her initials only.

¶5. At 7:45 a.m. the next morning, police found JT's half-naked body in the bathroom of an abandoned trailer approximately fifty yards from JT's apartment. She had been hanged with a pair of socks tied around her neck and fastened to the shower window. There were signs of sexual penetration of her vagina and anus. There were also scratch marks around her neck showing she had tried to free herself from the makeshift noose before she died from ligature strangulation.

II. Garcia approaches the police.

¶6. Based on a tip, investigators developed a person of interest—one of JT's neighbors in the apartment complex, Julian Casper Gray. As police searched Gray's apartment the evening ***953** of July 17, Garcia, Gray's friend and neighbor, engaged the police commander in conversation. Because Garcia appeared to be volunteering information relevant to the investigation, a detective went to Garcia's apartment. He asked Garcia if he would be willing to speak with investigators at the police station.

¶7. Garcia agreed. On the ride to the police station, Garcia mentioned that his fingerprints would likely be found in the trailer because he had been in the trailer the weekend before. At the station, another detective formally interviewed Garcia after reading Garcia his ***Miranda*** rights and obtaining a waiver. *See* ***Miranda v. Arizona***, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (requiring that, before a custodial interrogation, the person interrogated be warned he has a right to remain silent, that any statement he makes may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed). Garcia told the detective he had stolen some items from the trailer a few days earlier. So his fingerprints and possibly DNA would be in the trailer. He also mentioned his semen may be in the trailer because he had masturbated there while visiting the trailer's prior occupants. Garcia claimed he had possibly blacked out around the time of JT's disappearance and that he woke up with feces on his penis and inner thighs. Garcia said the feces was not his. [3] And he immediately took a shower and washed his clothes. The interview ended when Garcia asked for a lawyer. [4]

3 During his guilty plea, Garcia admitted JT defecated on him when he penetrated her anus with his penis.

4 A few days later, Garcia requested a second interview with the same detectives. This time, he insisted he had not blacked out during the time JT went missing. He also backtracked from his earlier admission that he had showered because his penis and thighs were covered in someone else's feces. Instead, Garcia told the detectives that Gray had come to his apartment asking for help. Garcia said he followed Gray to the abandoned trailer where he found JT tied to a chair in the

bedroom. Garcia admitted that he helped move JT's body to the bathroom, where he tried to rinse feces and semen off JT. Garcia also admitted using the socks tied around JT to hang her by the crank on the window. During this interview, Garcia insisted he had not sexually assaulted JT. He explained, however, that his semen was possibly on JT's body because when Gray came to his apartment, Garcia had just finished masturbating and had not washed his hands before going to the trailer.

¶8. Based on this information, police obtained a search warrant for Garcia's apartment. In his bedroom, police found an Xbox 360 game console, which was connected to the internet. A digital forensic examiner recovered the internet searches made on the console in the days leading up to JT's rape and murder. These search phrases included "toddler hentai," [5] "poor little thing," "kidnapped and raped," and "virginravisher."

5 According to the forensic examiner, a "hentai" is a sexually explicit anime or cartoon.

¶9. Garcia was arrested and held without bond. On October 5, 2015, a grand jury indicted Garcia for capital murder in the commission of felony sexual battery.

III. Garcia moves to suppress his statements.

¶10. On July 15, 2016, Garcia moved to suppress the Xbox search and his statements to the police. He claimed his apartment was illegally searched because he had never been read his ***Miranda*** rights before being recorded in the police car. He suggested his statement on the way to the police station and all his following statements and evidence were "fruit of the poisonous tree." ***954** ***Marshall v. State***, 584 So. 2d 437, 438 (Miss. 1991) (explaining the "fruit of the poisonous tree" doctrine—also known as the exclusionary rule—deems inadmissible any evidence obtained incident to an unlawful search or seizure (citing ***Murray v. United States***, 487 U.S. 533, 536, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988))).

¶11. On July 26, 2016, the trial court held a suppression hearing. Police Commander Ken Brown testified that, on July 17, 2014, during the search of Gray's apartment, he was in the hallway when Garcia approached him and asked about the investigation. At this point, Garcia was not a person of interest or a suspect. This conversation was relayed to Detective Clay Fulks. Detective Fulks, a patrol officer in July 2014, followed up by going to Garcia's apartment. Garcia volunteered to go to the police station to provide information. While Garcia chose to ride in the back of the police car, he was not restrained. Detective Fulks activated the vehicle's recording system. During the fifteen-minute drive, the two engaged in a casual conversation. But at some point Garcia mentioned that his fingerprints may be found in the trailer where JT was discovered. Garcia explained that he knew the trailer's former occupants. Detective Fulks testified that, at this point, Garcia was not a suspect. When they arrived at the station, Detective Fulks parked in the front parking lot and not at the sally port where suspects are delivered. Detective Fulks testified Garcia was one of three witnesses he transported to the police station during the investigation.

¶12. During Detective Fulks's testimony, the State played the recording of the fifteen-minute ride to the police station. The trial court ruled the video could come in as evidence against Garcia. Garcia was not in custody at the time. And it was clear from the video that Garcia was the one who started the conversation. He volunteered, without being asked, that his fingerprints would be found in the trailer because he had been there just days before, rummaging through the prior occupants' belongings.

¶13. The trial court also ruled that the search warrant for Garcia's apartment had been supported by probable cause —namely, the statement Garcia gave to investigators at the police station after he voluntarily waived his ***Miranda*** rights. [6]

6 In his recorded interview at the police station, Garcia told the detectives they would find items that Garcia took from the trailer in his apartment. Garcia was separately charged with burglary.

IV. Garcia moves to change venue.

¶14. At the same July 26, 2016 hearing, the trial court took up Garcia's motion to change venue, which he had filed July 14, 2016. In his motion, Garcia argued there was a reasonable likelihood that an impartial jury could not be impaneled in the First Judicial District of Harrison County. He asserted the disappearance and death of JT was "sensational, front-page news throughout the Gulf Coast region." To support his motion, he attached copies of various media reports, along with affidavits by three community members. *See* Miss. Code § 99-15-35 (Rev. 2015) (requiring a motion to change venue be "supported by the affidavits of two or more credible persons").

¶15. At the hearing, Garcia, the State, and the trial court agreed to the following procedure: Garcia would present his evidence supporting the motion, and the State would present its evidence opposing the motion. Then, the question of pretrial publicity would be put to fourteen people who had been summoned but not selected for ***955** jury duty for an unrelated trial being held that day. But after Garcia and the State presented their arguments and evidence, the court learned the case scheduled for trial had ended in a guilty plea, so there were no jurors to question. After further discussions, Garcia, the State, and the court agreed to defer the rest of the hearing until another mock jury was available.

¶16. Three weeks later, on August 16, 2016, the change-of-venue hearing resumed. As agreed, the court brought in thirty prospective jurors who were not seated in an unrelated trial taking place that day. They were questioned by the trial judge about their knowledge of the pretrial publicity surrounding JT's murder and Garcia's arrest. After general questions were asked, fourteen jurors were seated and asked additional detailed questions by Garcia's counsel and the State. [7] From their responses, the trial court concluded that "a fair and impartial jury can be seated, given proper and thorough voir dire."

7 Once seated in the jury box, these fourteen people were told they would not serve as the actual jury in Garcia's case. Instead, they would be asked questions about pretrial publicity so the court could determine if the accused would receive a fair trial.

¶17. The trial court also weighed other factors—the fact the case was capital, the lack of evidence of threats of violence against Garcia, and the media coverage, which the court determined was not "an inordinate amount." *See* ***White v. State***, 495 So. 2d 1346, 1349 (Miss. 1986) (enumerating factors that when present indicate the presumption that a fair trial cannot be had in the jurisdiction where the crime occurred is irrebuttable). The court denied Garcia's motion to change venue.

V. The trial court considers Garcia's competency.

¶18. On November 22, 2016, the trial court heard testimony from forensic psychologist Dr. Robert Storer on a "possible competency issue."

¶19. After evaluating Garcia, Dr. Storer testified that, in his expert opinion, Garcia was not competent to stand trial. While Garcia had no intellectual deficits, there was a "constant theme of anxiety" in his life. Dr. Storer noted that Garcia had suffered at least one panic attack while at court. And if Garcia became anxious, Dr. Storer opined, he would be unable to participate in trial and interact with his attorneys. Dr. Storer also expressed doubt about Garcia's ability to make rational decisions concerning his legal situation. When asked, Garcia said he would prefer death over a life sentence due to the solitary confinement of death row. Dr. Storer recommended Garcia get long-term treatment for his anxiety, which could be administered in jail. Dr. Storer opined that thirty days of treatment would be enough for Garcia to experience a "different outcome." Dr. Storer said he would wait until after this treatment period was over before completing his full forensic report.

¶20. The trial judge then questioned Dr. Storer more carefully. She first asked if Dr. Storer was aware that the day of Garcia's alleged panic attack, Garcia had not been administered his regular medication. She also asked if Dr. Storer was aware that Garcia had no problem during the court proceedings. Rather, as court recessed for lunch, Garcia told his attorneys that he felt uncomfortable. The trial judge then asked Dr. Storer about his earlier comment that Garcia had responded appropriately to the questions asked by the court and that Garcia fully understood what was going on. Dr. Storer reiterated that Garcia's intellectual functioning was fine. He also explained that his anxiety ***956** disorder "is not a severe and persistent mental illness of the type that would alter someone's perception of reality." But Dr. Storer cautioned that Garcia's anxiety "shuts him down to where he's not paying attention and listening and processing information, and he's not able to ask questions of his attorneys as appropriate or point things out."

¶21. Finally, the trial judge asked what was illogical or irrational about Garcia's preferring his own jail cell. Before Dr. Storer answered, the judge interjected,

> [L]et me tell you that for many years I have expressed the opinion that if I were in this position, I would rather have the death penalty than a life without [parole] for several reasons. One of which is that I would have my own cell where no one else would be and my own things that no one else would bother. I don't find that

> at all irrational. I find it very much like those who perhaps have a life-threatening disease make a choice either for treatment or no treatment. So tell me why it's irrational in this case.

Dr. Storer responded that his concern was that Garcia's decision-making ability may be impacted by his anxiety disorder. But he could not say to a reasonable degree of psychological certainty that this was so.

¶22. After speaking with Garcia, who said he was "feeling fine" that day, the trial judge made her ruling:

> [B]ased on the testimony, and of course my observances of Mr. Garcia, it does not appear to me that he is in any manner incompetent in terms of intellectual functioning or his ability to understand and appreciate what is going on or in fact in his ability to consult with his attorneys.
>
> I do have some question, based on Dr. Storer's testimony, with regard to if we were to go to trial, how he would handle that in the courtroom because I do recall that at some point it was reported to me that he was beginning to experience some anxiety on one of our hearings previously.
>
> It was also reported to me he had not received his medication that morning, and the nurse I believe actually traveled here to the courthouse to provide him with that. And he did much better and was much more relaxed, insofar as my observations, for the portion after the lunch break.
>
> It appears to me that clearly he could participate during trial. And I think that based on that, we probably need to follow Dr. Storer's recommendation in that regard and have Mr. Garcia seen by whomever at the jail can make the determination as to the appropriate medication and determine if, in fact, they believe a long-acting medication would be better than what he is taking or a different dose of what he's taking would be better and to allow him that 30 days to get that, as I understand it, therapeutic level is what Dr. Storer is talking about, and then have Dr. Storer again speak with him in that regard.
>
> So at this point I find him competent but for that potential issue, and I'll reserve that issue to see if in fact the medication which Mr. Garcia states he's more than willing to take because it seems to make him feel better and function better, and we'll see what sort of result that has because I think at this point he probably could make it through a trial, and he probably would do all right going through a trial.
>
> But I think it would take a great deal of patience on his part and his attorney's part. It might take more frequent breaks, et cetera. And once we're into the trial, it would be very difficult at that point. If in fact he did have one of these as attacks and was unable to participate, ***957** we would be unable to move forward. so I think the better course is to try to treat this first and see where we stand in about 30 days.

¶23. The trial judge concluded the hearing by addressing Garcia directly about his stated preference for the death penalty:

> Judge: Now, Dr. Storer says you have a preference in this case that you've expressed to him about sentencing. I've told him an opinion I've held for some time about sentencing. I don't want you to be swayed by my opinion one way or the other.
>
> Garcia: No, ma'am. I won't.
>
> Judge: Because I'm not in your situation.
>
> Garcia: I understand, ma'am.
>
> Judge: It's an academic exercise for me in terms of my years of practice, et cetera. So I don't want you to be swayed by that. I asked him that because I wanted to know really truly what he was thinking on that.
>
> Garcia: Yes, ma'am. I understood about that.

VI. Garcia moves to exclude Xbox searches.

¶24. The following month, on December 8, 2016, the trial court took up Garcia's motion in limine to exclude the explicit searches on the Xbox 360 based on lack of authentication and unfair prejudice. *See* M.R.E. 901; M.R.E. 403. Garcia argued there was no proof he was the one who made those internet searches and that the probative value of the evidence was outweighed by unfair prejudice.

¶25. Detective Sam Jewell testified for the State. He explained that while Garcia lived in a two-bedroom apartment with another family, [8] that family was out of town the week of JT's disappearance and death. Detective Jewell testified he seized the Xbox from Garcia's bedroom, which Garcia did not

share with anyone. On cross-examination, Detective Jewell admitted it was possible that another person could have used the Xbox the week of July 10-18, 2014, including Julian Gray, who at the time of the suppression hearing was under indictment for possession of child pornography. The State also called the digital forensic examiner with the FBI. This examiner was responsible for validating the sexually explicit search queries the week of JT's disappearance and death. On cross-examination, the examiner acknowledged that the user name for the Xbox account was "dummy" with no password protection.

8 The family consisted of a coworker of Garcia's, the coworker's wife, and their two small children.

¶26. The trial judge denied Garcia's motion in limine. On the question of authenticity, the judge found,

> There is also no proof that anyone else actually accessed the Xbox during the relevant time period. There's nothing to indicate that anyone else was in the room, had access to the Xbox, and certainly there's a possibility it was used by other people, it was moved other places, et cetera. Anything is possible. It could have floated at some point. But that's not likely either.

¶27. Based on the State's witnesses' testimony, the trial judge ruled the State sufficiently authenticated that the searches actually came from Garcia's Xbox. It would be up to a jury to decide how much weight to give this information and if Garcia, Gray, or someone else made the searches. At this point, the judge found no basis to ***958** exclude the Xbox searches on authenticity grounds.

¶28. The trial judge also rejected Garcia's unfair-prejudice argument.

VII. The trial court holds pretrial omnibus hearing.

¶29. On December 20, 2016, the trial court held a pretrial omnibus hearing. Of note for this appeal, when the judge reached the issue of competency, she asked Garcia's counsel, "[A]t this point, ... there's no claim of incompetency to stand trial but for this anxiety issue we've already addressed, and that's not really a competency issue so much as a being able to pay attention and participate, right?" To which Garcia's counsel responded, "That's correct, Your Honor."

VIII. The trial court revisits Garcia's anxiety issue.

¶30. On January 12, 2017, the week before the scheduled trial, the trial court held a hearing "to follow up on Dr. Storer's earlier testimony concerning the anxiety issue."

¶31. Dr. Storer testified that, after Garcia received medical treatment for his anxiety, Dr. Storer reevaluated Garcia in front of Garcia's entire legal team, plus a dozen officers, to create as close as possible the courtroom setting. While Garcia still had anxiety disorder, in Dr. Storer's opinion the medical intervention had been effective to the point that there was no significant interference with Garcia's competency-related abilities. Dr. Storer found Garcia competent either to stand trial or to enter a guilty plea and waive his constitutional rights.

¶32. The trial judge then entered her ruling:

> All right. Then at this point, clearly the court previously found that Mr. Garcia was competent with regard to his mental functioning, his intellectual abilities, et cetera.
>
> But there was some concern with not purely competence, but his ability to be in the courtroom and to fully participate in his defense, to communicate with his counsel, if he choose[s] to do so, to be able to testify.
>
> And that was all tied to this anxiety disorder and his feeling a heightened level of anxiety in the courtroom. ... Based though, on Dr. Storer's testimony as well as the court's observations of Mr. Garcia, it appears that that matter has been fully addressed with regard to this new medication and perhaps these new interventions that Dr. Storer testified to.
>
> And so it appears to me that Mr. Garcia is fully competent and fully able to go forward in his matter, to make all necessary decisions with regard to assertion of his rights, waiver of his rights if he chooses to waive any, testifying if [he] chooses to testify, going to trial if that is his choice or entering a guilty plea if that is his choice.

IX. Garcia moves to waive a jury for sentencing.

¶33. On January 17, 2017, the day before his scheduled trial, Garcia filed a motion for sentencing by the judge without

a jury present. *See* Miss. Code Ann. § 99-19-101(1) (Rev. 2015) (conferring the statutory right to jury sentencing upon conviction or adjudication of guilty of capital murder). The judge held a hearing on the motion the same day.

¶34. The hearing mainly consisted of the trial judge's advising Garcia of the rights he would be giving up and ensuring Garcia understood the difference between having a jury of twelve of his peers versus one judge sentence him. In particular, the judge highlighted her unique experiences ***959** that jurors would not have—namely, prosecuting, defending, and presiding over other capital-murder cases. She also pointed out to Garcia that, as the judge presiding over his case, she had participated in conversations with Garcia and his counsel and had read attorney status reports that a jury would not be privy to. Instead of ruling on the motion that day, she advised Garcia to think about his decision overnight and to consult with his attorney.

X. Garcia pleads guilty and waives a jury for sentencing.

¶35. The next day, on January 18, 2017, Garcia pled guilty to the capital murder of JT. Garcia gave the factual basis for his plea. He claimed he went to the trailer that night with Gray, who had asked for his help. Inside, he found five-year-old JT already bound by socks to a chair, face down. Garcia proceeded to anally rape JT. After he ejaculated, he realized JT had "defecated everywhere." Garcia stated that he thought JT was dead at that point. Only later did he realize she was not dead, only unconscious. Because Garcia had not used a condom, he tried to clean her off. Both men carried her to the bathroom, and Garcia used the cap from a spray bottle to dip water from the toilet tank to rinse her. With Gray's help, Garcia hung JT from the neck using the socks that had bound her to the chair. Gray held JT while Garcia tied her to the shower window. Garcia then rinsed the backside of her body and flipped her around to wash her front. He left JT's body hanging in the trailer and went straight to the apartment's laundry room because his clothes were covered in fecal matter. Afterwards, he showered.

¶36. The State then presented the proof it would offer at trial. Based on Garcia's admissions and the State's factual basis, the trial court accepted Garcia's guilty plea.

¶37. Having waived his right to trial, Garcia proceeded to waive his right to a jury for sentencing. Garcia explained his decision:

> Garcia: Ma'am, I feel more comfortable having one individual, not 12, presiding over my sentencing. And I believe since you know me already and you can make that decision properly without any, you know, problems, ma'am.
>
> Court: Let me ask you this, Mr. Garcia. Do you think that if the proof is there that I would have any hesitation at all in imposing the death penalty?
>
> Garcia: No, ma'am.
>
> Court: Do you think if the proof is not there that I would have any hesitation at all in imposing life without parole?
>
> Garcia: Yes, ma'am, I understand.
>
> Court: So you think I would have some hesitation?
>
> Garcia: Oh, no, no, ma'am.
>
> Court: So you think—you don't, you're not hedging your bets here thinking I would lean one way or the other?
>
> Garcia: No, ma'am.
>
> Court: Okay. And you understand I will make that decision just like a jury would make it. It's just that the state, as I explained to you, would only have to convince me.
>
> Garcia: Yes, ma'am.
>
> Court: Not 12 people. All right?
>
> Garcia: Yes, ma'am, I understand.
>
> Court: All right. And so you believe that you've had sufficient time and sufficient advice to make this decision of your own free will?
>
> Garcia: Yes, ma'am.

¶38. The judge then questioned Garcia's counsel to ensure Garcia had been given adequate time to consider his decision and had based his decision on the proper factors. ***960** Both of Garcia's lawyers answered that they and Dr. Storer had spoken at length with Garcia about what his decision would mean and that Garcia was sure that he wanted to waive a jury. After offering Garcia another opportunity to take more time to make his decision, which he declined, the trial court granted Garcia's motion to waive jury sentencing.

XI. The trial judge sentences Garcia to death.

¶39. The next week, the trial court held a three-day sentencing hearing.

¶40. The State's presentation began with testimony from the 911 dispatcher who received the call from JT's mother that JT was missing. A recording of the 911 call was played for the judge. Next, the apartment manager testified. She testified Garcia had reported to her on the night JT disappeared that a little girl was missing. He was soaking wet, like he had just gotten out of the shower. He also appeared very calm. The next morning, after police found JT's body, Garcia returned to the manager's apartment. Garcia told her that he had been in that trailer and that police would likely find his prints and accuse him of the crime.

¶41. Next, the State called Lieutenant Heather Dailey, who responded to the crime scene after JT's body had been found. She described the trailer as messy and dark, with items strewn everywhere. She explained that JT had a shirt on but was naked from the waist down. Crime Scene Technician Jessica Kendzioreck arrived at the trailer an hour later. Before moving JT's body, Kendzioreck took pictures of the trailer and JT's body as it was found. These pictures were admitted into evidence. FBI Agent Ty Breedlove searched the trailer that day. He testified that, in his eight or nine years of experience, the trailer "was one of the most disgusting crime scenes that we've been to, full of cockroaches and rat feces and rotted food and the smell stuck with us for a good two or three weeks.

¶42. Police Officer Grant Koon attended the autopsy of JT's body, performed by the coroner the afternoon JT was found. Officer Koon testified he photographed the body. He also secured the samples taken from the body and submitted them to the FBI for testing. Shane Hoffman, the FBI forensic examiner who tested the samples also testified. He confirmed the DNA from the vaginal and anal swabs matched Garcia's DNA but excluded Gray's. The DNA on the socks tied to JT's neck also excluded Gray's DNA but was a possible, albeit inconclusive, match with Garcia's.

¶43. In addition to the DNA evidence, the State presented the recording of Garcia's conversation on the way to the police station. The State also played the recording of his interview once he arrived. [9]

9 At Garcia's request, the judge also admitted the recording of his second interview with the police, in which Garcia admitted helping Gray hang JT's body but denied sexually assaulting her.

¶44. The FBI digital forensic examiner also testified about the internet searches made through the seized Xbox. Search terms included "toddler hentai," [10] "very young," "petit, tiny, tween, crying, rape, anal, forced," and "poor little thing, kidnapped and raped, virginravisher."

10 *See supra* n.5.

¶45. Finally, the State called Dr. Mark LeVaughn, State Pathologist. Dr. LeVaughn was admitted as an expert witness without objection from the defense. He testified the appearance of JT's vagina and ***961** anus indicated injurious sexual penetration that would have caused JT pain and trauma. Dr. LeVaughn gave his expert opinion that, based on the crime-scene photos, autopsy photos, and autopsy report, JT died from ligature strangulation or hanging. He also testified that, based on his experience, the abrasions found on JT's neck below her left ear were scratch marks—marks typically left when someone tries to free herself from being hanged.

¶46. Garcia called Dr. Storer to testify on Garcia's behalf. Dr. Storer relayed that Garcia came from a broken home with too many children, a history of domestic violence, and some odd religious beliefs. In particular, Garcia had been admitted to a child psychiatric hospital when he was eight years old. From his records, it appears Garcia had been an "extremely disturbed child." Upon his release, Garcia was supposed to be placed in a residential facility for treatment, but his mother did not follow through. Garcia left school at sixteen and was, at one point, homeless. [11] Dr. Storer also relayed Garcia's history with sexually compulsive behavior, including obsessive masturbation beginning at a prepubescent age. He also experimented with bondage and sadomasochism beginning at the age of eighteen. During one period, Garcia would go to pornographic theaters and allow random men to tie him up and have sex with him.

11 Garcia later obtained his GED.

¶47. Garcia also called Heather Hobby, Gray's ex-girlfriend and the source of the tip that led to the search of Gray's apartment. [12] Hobby testified about Gray's relationship with Garcia—how Gray mistreated Garcia, how Garcia would do anything Gray wanted, and how Gray took advantage of that.

12 Hobby testified she called the police when she learned a little girl in Gray's apartment complex was missing because Hobby knew Gray "had a past with child pornography" and had been sexually abusive toward her.

¶48. In closing, Garcia's counsel condemned the death penalty generally and asked the judge for mercy.

¶49. After deliberation, the trial judge sentenced Garcia to death. The judge noted that, in her opinion, Garcia "had not been totally truthful" and had "never shown remorse." The judge found, regardless of whether Gray was or was not involved, Garcia admitted he sexually assaulted and caused the death of JT, and he is responsible for those actions.

¶50. The judge found two statutory aggravating circumstances beyond a reasonable doubt. First, beyond a reasonable doubt, the killing of JT occurred while Garcia was engaged in the commission of a sexual battery. Miss. Code Ann. § 99-19-101(5)(d) (Rev. 2015). Second, beyond a reasonable doubt, the capital murder of JT was especially heinous, atrocious, and cruel. Miss. Code Ann. § 99-19-101(5)(i) (Rev. 2015). The judge based her decision

> on evidence including the child's age, size, injuries, pain and suffering. [JT] was five (5) years of age, was four (4) feet two (2) inches tall, and weighed fifty (50) pounds. Garcia was a heavyset twenty-nine (29) year old man at the time of the crime. [JT] had no means by which she could have resisted Garcia or defended herself from his actions based on her size and age. Further, she was face down, tied to a chair with her head stuffed into the seat and turned to the side. This occurred prior to the sexual assault even further restricting any ability to protect herself, avoid Garcia or avoid what was about to befall her. Clearly she would have recognized and been aware of this occurring, that there ***962** was danger, and that something terrible was about to occur. Moreover, the assault and killing occurred in what is undisputedly a filthy trailer, with roaches running rampant everywhere and a terrible stench. [JT] was certainly able to see and know of these conditions before being bound to the chair.
>
> She was then penetrated both vaginally and anally while still alive and tied to the chair. Garcia admits only to the anal penetration, which caused her to defecate. The undisputed evidence, however, is that his DNA was found to be a match to the DNA located on the vaginal swabs, with the person Garcia claims committed the vaginal penetration being excluded on DNA testing of those swabs. Garcia's DNA was also found to be a match to the DNA on the anal swabs, the rectum swabs, the inner thigh and vulva swabs, and the inside of the socks used to hang [JT]. The other person was also excluded from each DNA comparison.
>
> There is every reason to believe that [JT] was conscious for at least some of the sexual assault. The length of time she was tied to the chair is not specified in this record, but was obviously long enough for both the vaginal assault and the anal assault. Garcia admits the anal penetration which, even accepting only his own testimony, had to follow the vaginal penetration. Dr. LeVaughn testified to the serious injuries inflicted to the vaginal and anal areas. Those injuries involved the entire circumference of each area as well as injuries to the internal portions of those areas. Dr. LeVaughn also testified that the sexual assaults would have caused [JT] pain and terror.
>
> Finally, it is clear that death was not instantaneous upon the hanging. There is evidence that [JT] was conscious at some point during the hanging as there are scratches to her left face/jaw area which Dr. LeVaughn testified are consistent with someone attempting to free herself from a ligature around her neck. [JT] suffered significant physical and mental pain and suffering before her death. The sexual battery and killing of [JT] was brutal, cold and torturous.

¶51. The judge also found "some mitigating factors have been shown." Garcia had no significant criminal history. And he was twenty-nine years old at the time of the crime, "still being a considered young person." While Garcia claimed he committed the crime under extreme emotional disturbance, the judge found absolutely no evidence to support this alleged mitigating circumstance. Finally, Garcia presented evidence of his troubled childhood and extensive information about the psychological evaluation performed by Dr. Storer. The judge noted that it appeared to be somewhat mitigating that his formative years "were far from good." Further, while Garcia no doubt had an anxiety disorder, this disorder had nothing to do with the crime committed. And while Garcia had ongoing mental-health issues as a child for which he did not receive treatment, at age twenty-nine, Garcia had long been old enough to seek help on his own.

¶52. In the end, the judge found the mitigating circumstances insufficient to outweigh the aggravating circumstances. She thereby sentenced Garcia to death. Following the denial of his motion to vacate the sentence and conduct a new sentencing trial, Garcia appealed his sentence only, having no right to

appeal his underlying capital-murder conviction based on his guilty plea. *See* Miss. Code Ann. § 99-35-101 (Rev. 2015) ("[W]here the defendant enters a plea of guilty and is sentenced, then no appeal from the circuit court to the Supreme Court shall be allowed."). *But* ***963** *see* Miss. Code Ann. § 99-19-105(1) (Rev. 2015) ("Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court.").

Issues on Appeal

¶53. On appeal, Garcia raises eight sentence-related issues:

1. Must Garcia's death sentence be set aside because the trial court unconstitutionally heard and decided material pretrial motions at a time when Garcia was incompetent to participate in the proceedings?

2. Was Garcia's waiver of a jury at his sentencing proceeding invalid because the trial court improperly denied his pretrial motion for change of venue?

3. Must Garcia's death sentence be set aside because the trial court relied on unconstitutionally admitted evidence to arrive at its sentencing decision?

4. Did the trial court reversibly err by finding Garcia competent to waive a jury trial at sentencing?

5. Was Garcia deprived of a fair sentencing tribunal because the sentencing judge should have disqualified herself based on her pre-sentencing exposure to confidential information that would ordinarily not be known to a sentencing factfinder, her admitted predisposition in this case, and her intent to consider extra-record matters?

6. Was Garcia's death sentence imposed in violation of the United States Constitution?

7. Must Garcia's death sentence be set aside as disproportionate?

8. Does the cumulative effect of the trial court's errors in this case mandate reversal of Garcia's death sentence?

Additionally, Mississippi Code Section 99-19-105(3) mandates this Court review Garcia's death sentence and make the following determinations:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 99-19-101;

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; and

(d) Should one or more of the aggravating circumstances be found invalid on appeal, the Mississippi Supreme Court shall determine whether the remaining aggravating circumstances are outweighed by the mitigating circumstances or whether the inclusion of any invalid circumstance was harmless error, or both.

Miss. Code Ann. § 99-19-105(3) (Rev. 2015).

Standard of Review

¶54. "We apply heightened scrutiny to an appeal from a sentence of death." ***Evans v. State***, 226 So. 3d 1, 13 (Miss. 2017) (citing ***Corrothers v. State***, 148 So. 3d 278, 293 (Miss. 2014)). "This higher level of scrutiny requires that all doubts be resolved in favor of the accused because 'what may be harmless error in a case with less at stake becomes reversible error when the penalty is death.' " ***Bennett v. State***, 933 So. 2d 930, 939 (Miss. 2006) (quoting ***Balfour v. State***, 598 So. 2d 731, 739 (Miss. 1992)).

***964 Discussion**

I. COMPETENCY

Issue 1: Did the trial judge hear and rule on pretrial motions during a time when Garcia was incompetent?

¶55. Garcia first argues his sentence must be vacated because the trial court "unconstitutionally heard and decided pretrial motions material to the sentencing proceedings under review at a time when Garcia was incompetent to participate in the proceedings." Garcia claims the record "establishes without dispute" that, due to his untreated anxiety disorder, Garcia was incompetent to participate in open-court proceedings

from the time of his arraignment in October 2015 until, following treatment, he was found to be competent on January 12, 2017. Garcia argues that during this time, despite his incompetency, the trial court ruled on motions significant to his sentencing, such as his motion to change venue and his motions to suppress. Citing ***Drope v. Missouri***, 420 U.S. 162, 181, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975), Garcia argues that, because the proceedings against him were not suspended during the time of his incompetency, his sentence must be set aside.

¶56. Garcia's argument principally rests on his presumption that the trial court "adjudicated that Garcia was not competent" at the November 22, 2016 hearing and only found Garcia to be competent on January 12, 2017, after Garcia received "restorative treatment." Consequently, Garcia insists, the trial court held important pretrial hearings and made rulings during a time Garcia had been found incompetent. But the record does not support this premise. Instead, the record shows the opposite—the trial court found Garcia to be competent during the entire trial-court proceedings.

¶57. "The standard for competency to stand trial is whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding,' and 'has a rational as well as a factual understanding of the proceedings against him.' " ***Pitchford v. State***, 240 So. 3d 1061, 1067 (Miss. 2017) (quoting ***Gammage v. State***, 510 So. 2d 802, 803 (Miss. 1987)); *see also* ***Dusky v. United States***, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960) (per curiam). And at the November 2016 hearing, following Dr. Storer's testimony, the trial judge found Garcia met this standard. She ruled, "based on the testimony, and of course [her] observances of Mr. Garcia, it [did] not appear to [her] that he is in any manner incompetent in terms of intellectual functioning or his ability to understand and appreciate what is going on or in fact in his ability to consult with his attorneys."

¶58. The judge did, however, "have some question" about how Garcia would handle the courtroom setting *if the case went to trial*. Noting how Garcia appeared more relaxed when properly medicated, she determined, "the better course [was] to try to treat [his anxiety] first and see where [things stood] in about thirty days." At that point, the judge found Garcia "competent but for that *potential* issue ...." (Emphasis added.) On appeal, Garcia interprets the judge's ruling as finding him *incompetent* to participate in open-court proceedings and actually communicate with his lawyers during them. But this interpretation is contrary to what the judge actually found. As part of her ruling, the judge noted, "It appear[ed] to [her] that clearly [Garcia] could participate during trial." At the time of the November 2016 hearing, the judge determined Garcia "probably could make it through a trial, and ... probably would do all right going through a trial." But because "it would take a great deal of patience on his part ***965** and his attorney's part," and to prevent Garcia's anxiety from *potentially* escalating to a point that he could not participate at future trial, the judge ordered treatment and a reevaluation in thirty days.

¶59. Garcia's interpretation is further contradicted by the judge's comments on her prior ruling at the December 20, 2016 omnibus hearing. Notably, defense counsel never objected to this hearing based on Garcia's incompetency. And when discussing the issue of competency, the judge asked Garcia's counsel, "[A]t this point, ... there's no claim of incompetency to stand trial but for this anxiety issue we've already addressed, and *that's not really a competency issue so much as a being able to pay attention and participate*, right?" (Emphasis added.) And counsel acknowledged, "That's correct[.]"

¶60. At the January 12, 2017 hearing, in which the trial court "follow[ed] up on Dr. Storer's earlier testimony concerning the anxiety issue," the judge emphasized that she never found Garcia to be incompetent. Instead, "clearly the court previously found that Mr. Garcia was competent with regard to his mental functioning, his intellectual abilities, et cetera." But the judge did note "there was some concern with not purely competence, but his ability to be in the courtroom and to fully participate in his defense, to communicate with his counsel, if he choose[s] to do so, to be able to testify." Garcia seizes on this comment, asserting that competency includes the ability "to rationally communicate with his attorney about the case" and "to testify in his own defense if appropriate." ***Hearn v. State***, 3 So. 3d 722, 728 (Miss. 2008) (quoting ***Martin v. State***, 871 So. 2d 693, 697 (Miss. 2004)). But the judge never found Garcia had met his burden to overcome the presumption that he possessed these abilities. *See* ***Evans***, 226 So. 3d at 14 ("The burden of proof rests on the defendant to prove that he is mentally incompetent to stand trial." (citing ***Richardson v. State***, 767 So. 2d 195, 203 (Miss. 2000))). Rather, the record shows the judge was concerned about—and addressed—the possibility that Garcia might lose these abilities during a future jury trial if he was not properly medicated.

¶61. Specifically, the trial court never found what Garcia now asserts on appeal—that, from the time of his arraignment in October 2015 until Dr. Storer testified a second time in January 2017, Garcia had been incompetent to participate in the proceedings that took place during that time period.

¶62. As to the trial court's actual finding—that Garcia was competent during the entire trial-court proceedings—we find no abuse of discretion. *See* ***Martin***, 871 So. 2d at 698 (applying abuse-of-discretion standard of review to a competency determination). "We will reverse a trial court's competency determination only if it is 'manifestly against the overwhelming weight of the evidence.' " ***Dickerson v. State***, 175 So. 3d 8, 15 (Miss. 2015) (quoting ***Hearn***, 3 So. 3d at 728). And here, contrary to Garcia's claim, the trial court's finding Garcia to be competent was not manifestly against the overwhelming weight of the evidence.

¶63. At the November 2016 hearing, Dr. Storer did testify that his preliminary opinion was that Garcia was incompetent. But this testimony did not go "unrebutted" as Garcia suggests. Instead, the trial judge questioned Dr. Storer carefully about the bases of his opinion, one being the reported panic attack Garcia suffered during the July 26, 2016 suppression and change-of-venue hearing. The judge asked Dr. Storer if he was aware that Garcia exhibited no symptoms during the court proceeding that morning. Instead, he reported to his attorneys as they were breaking for lunch ***966** that he did not feel well. It came to light that Garcia had not been given his medication that morning, so the jail nurse was called to see Garcia during the break. After being seen and treated, Garcia told the court he felt better.

¶64. Dr. Storer had also based his opinion on Garcia's initial stated preference for the death penalty over life without parole. Dr. Storer had testified he was concerned Garcia's preference was evidence his anxiety disorder had impaired his decision-making ability. But when questioned by the trial judge, Dr. Storer admitted this was only a concern. He could not say that Garcia's anxiety impaired his rational decision-making ability to a reasonable degree of psychological certainty.

¶65. The judge also asked Dr. Storer about his comment that Garcia had responded appropriately to the questions posed by the court and that Garcia fully understood what was going on. Dr. Storer reiterated that Garcia's intellectual functioning was fine and that his anxiety disorder "is not a severe and persistent mental illness of the type that would alter someone's perception of reality." Instead, Dr. Storer testified that Garcia's anxiety "shuts him down to where he's not paying attention and listening and processing information, and he's not able to ask questions of his attorneys as appropriate or point things out." But balanced against Dr. Storer's opinion was the trial judge's own observations of Garcia in court and her own careful questioning of Garcia at each hearing to ensure he understood what was going and had a meaningful opportunity to communicate with his counsel. We have carefully reviewed these proceedings and find no evidence Garcia had been unable to understand what was going on or consult with his counsel.

¶66. In other words, the transcript belies Garcia's assertion that "without dispute" he was actually incompetent during his change-of-venue and evidence-suppression hearings. Criminal defendants—including those charge with capital offenses—are presumed competent, with "[t]he burden of proof rest[ing] on the defendant to prove that he is mentally incompetent to stand trial." ***Evans***, 226 So. 3d at 14 (citing ***Richardson***, 767 So. 2d at 203). Here, contrary to Garcia's assertion, the trial court never found Garcia had met that burden. And the record does not show her finding Garcia competent was manifest error. Therefore, the trial court did not reversibly err by failing *sua sponte* to suspend the proceedings against Garcia from his arraignment until Dr. Storer submitted on January 12, 2016, his final report finding Garcia competent.

Issue 4: Did the trial judge err by finding Garcia competent to waive a jury for sentencing?

¶67. Garcia raises a second competency argument related specifically to his competency to waive his right to a jury trial at sentencing. Despite his own mental-health expert's testifying on January 12, 2016, that Garcia was competent, Garcia now argues the trial court erred by finding him competent to waive his right to jury sentencing.

¶68. Garcia seemingly dismisses Dr. Storer's finding of competency because it was conditioned on Garcia's receiving proper medical treatment. But at no point does he argue that he had been incompetent on January 18, 2017—the day he waived his right to a jury for sentencing—because he had not received proper medication. Garcia also contends the trial court erred by largely rejecting Dr. Storer's testimony at the November 16, 2016 hearing that Garcia's anxiety disorder impaired his ability to make rational decisions, as evidenced

by his stated preference to live on ***967** death row instead of with the general prison population. While acknowledging his preference changed following treatment, [13] Garcia attributed this change to continued availability of treatment. But Garcia does not claim lack of proper treatment contributed to his decision to waive jury sentencing.

13 Garcia fails to acknowledge, however, that Dr. Storer could not testify to a reasonable degree of psychological certainty that Garcia's anxiety disorder impaired his rational decision-making ability. Rather, Dr. Storer was merely concerned, which was largely the reason he suggested treatment.

¶69. Instead, citing the Mississippi Court of Appeals' decision in ***Magee v. State***, 752 So. 2d 1100, 1102 (Miss. Ct. App. 1999), Garcia argues—in his own words—that the "capacity for rational decision making" is "another aspect of competency." [14] He contends his decision to waive a jury for sentencing was irrational because his "sole concern" was avoiding the jury-selection process. As support, he zeroes in on one question he asked during the hearing:

> Garcia: Just one question, ma'am. If I waiver [sic] my sentencing Jury, would a Jury still be selected?
>
> Judge: No.
>
> Garcia: Okay. That's why I was asking.

Garcia claims on appeal that this question "is that of a person who is so controlled by his fear of having an anxiety attack if his medications fail him in a courtroom full of people during the jury selection process that he is driven by his mental illness to do anything to avoid the possibility that could happen." But even under heightened scrutiny, and giving Garcia the benefit of any doubt, the record does not support his contention that the trial court erred by finding him competent. Garcia bore the burden to show incompetency by a preponderance of the evidence. ***Ross v. State***, 954 So. 2d 968, 1007 (Miss. 2007) ("Where there is a serious question about the sanity or competency of a defendant to stand trial, 'it naturally devolves upon the defendant to go forward with the evidence to show his probable incapacity to make a rational defense.' " (quoting ***Emanuel v. State***, 412 So. 2d 1187, 1189 (Miss. 1982))). And, here, Garcia's isolated procedural question does not tip the scale against the trial judge's ruling.

14 Here is what the Court of Appeals actually held in ***Magee***:

> The standard of competency to enter a guilty plea is the same as that for determining competency to stand trial. ***Godinez v. Moran***, 509 U.S. 389, 399, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993); ***Caylor v. State***, 437 So. 2d 444, 447 (Miss. 1983). All that the State must demonstrate as to competency to stand trial is that the defendant has a rational understanding of the charges against him and the ability to assist his lawyer in preparing his defense. ***Godinez***, 509 U.S. at 396, 113 S.Ct. 2680 ...; ***Caylor***, 437 So. 2d at 447.
>
> ***Magee***, 752 So. 2d at 1102. In other words, the standard for competency to waive the right to a jury trial is the same standard of competency to stand trial. It is the ***Dusky*** standard—the "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, 80 S.Ct. 788.

¶70. Instead, the trial judge's finding that Garcia was competent is supported not only by her own observations of Garcia's ability to communicate with counsel and participate in the proceedings against him over the course of more than a year but also by Garcia's own expert. Indeed, Dr. Storer found Garcia competent after interviewing him in a courtroom in front of his entire defense team and a dozen officers convened to simulate as closely as possible a jury-trial environment. Dr. Storer created this environment to ensure Garcia's ***968** social-anxiety issues did not factor in his decision to waive his right to a jury sentencing.

¶71. After review, we find the judge's competency finding well supported. There is no reversible error on either competency-related claim.

II. CHANGE OF VENUE

Issue 2: Did the trial court abuse its discretion by denying Garcia's motion to change venue?

¶72. As his second issue, Garcia argues that his waiver of a jury at sentencing was invalid because the trial court improperly denied his pretrial motion for a change of venue. Garcia argues he waived his right to a sentencing jury out of necessity because the trial judge ruled his jury would come

from Harrison County, "a place where there was personal hatred against him."

¶73. The record, however, does not support that his waiver of a sentencing jury was forced or even connected to the denial of his motion to change venue months earlier. In the December 2016 pretrial conference, the trial judge indicated her motion-to-change-venue decision was not set in stone. Garcia was free to raise the venue issue again based on changing circumstances. Garcia did not renew his motion —despite now arguing on appeal that post-venue-hearing circumstances supported the need to change venue. Instead, Garcia chose to waive his right to a jury at sentencing.

¶74. Further, before accepting Garcia's waiver of a jury at sentencing, the trial judge specifically advised Garcia that he would be waiving his right to challenge her jury-related pretrial rulings, including the denial of his motion to change venue. She warned, "You're giving up the right, all these motions we've heard about the venire and possible media coverage, all of that stuff, basically all those motions would go by the wayside as to any kind of fair and impartial jury. You understand that?" Garcia responded that he understood.

¶75. On appeal, Garcia argues the trial judge's advice contained legal error. Citing cases from other jurisdictions, he argues that his waiver of a jury at sentencing did not operate as a waiver of the right to challenge on appeal the denial of his motion to change venue. ***State v. Kahey***, 436 So. 2d 475, 481 (La. 1983) (holding that the waiver of trial by jury did not moot the change-of-venue issue); ***State v. Johnson***, 318 N.W.2d 417, 421 (Iowa 1982) (same); ***Commonwealth v. Dobrolenski***, 460 Pa. 630, 334 A.2d 268, 271 (1975) (same).

¶76. In their briefs, both Garcia and the State claim ***Byrom v. State***, 863 So. 2d 836, 851 (Miss. 2003), speaks to the waiver issue. But in ***Byrom***, also a death-penalty case, the defendant did not plead guilty, as Garcia did, but instead was tried by a jury. Only after a jury found her guilty did the defendant waive her right to a jury at sentencing. ***Id.*** at 845. On appeal of both the jury's verdict and the trial court's sentence, Byrom argued the trial court erred by denying her motion to change venue. ***Id.*** at 851. But it came to light that Byrom's counsel erroneously believed a motion to change venue had been denied, though in reality the motion, while discussed in open court, had never been filed. ***Id.*** Because no motion was ever filed or brought to a hearing, this Court found the issue of venue procedurally barred. ***Id.*** We also found her claim lacked merit. ***Id.***

¶77. ***Byrom*** was based on a waiver principle not at issue here —the failure to obtain a ruling on a motion. ***Id.*** Here, Garcia obtained a ruling. His motion to change venue was denied. But he then proceeded to waive his right to a jury both at trial and at sentencing. So ***Byrom*** is silent on ***969** what impact Garcia's waiver of a jury had on his ability to appeal the denial of his motion to change venue.

¶78. We do note the Mississippi Court of Appeals has addressed this issue in a non-death-penalty case. In ***Grissom v. State***, 66 So. 3d 1280, 1282 (Miss. Ct. App. 2011), the court held that the defendant was procedurally barred from raising in a motion for postconviction relief the claim that the trial court erred by denying his motion to change venue. The bar applied because the defendant "chose to plead guilty and, thus, did not have a trial." ***Id.*** We find the Court of Appeals' reasoning sound. Because Garcia chose to plead guilty, waiving his right to a jury trial, and because Garcia additionally waived his right to a jury at sentencing instead of renewing his motion to change venue, we find this issue is procedurally barred.

¶79. That said, in ***Byrom***, we proceeded to address the merits of the capital defendant's venue claim despite the clear procedural bar. ***Byrom***, 863 So. 2d at 851. We do the same here, additionally finding the trial judge did not abuse her discretion by denying Garcia's motion to change venue.

¶80. "A motion for a change of venue is not automatically granted in a capital case." ***Id.*** Even in a capital case, "[t]he decision to grant a change of venue rests soundly in the discretion of the trial judge." ***King v. State***, 960 So. 2d 413, 429 (Miss. 2007) (citing ***Howell v. State***, 860 So. 2d 704, 718 (Miss. 2003)). "This Court will not disturb the ruling of the trial court where the sound discretion of the trial judge in denying a change of venue was not abused." ***Id.*** (citing ***Howell***, 860 So. 2d at 718).

¶81. As required by Mississippi Code Section 99-15-35, Garcia's motion to change venue contained three sworn affidavits by Harrison County citizens that Garcia could not receive a fair and impartial trial. He also attached copies of media reports. At the change-of-venue hearing, the State acknowledged Garcia's motion complied with Section 99-15-35, creating "a presumption ... that an impartial jury is unattainable." ***Barfield v. State***, 22 So. 3d 1175, 1183 (Miss. 2009) (citing ***Welde v. State***, 3 So. 3d 113, 118 (Miss. 2009); Miss. Code § 99-15-35 (Rev. 2007)); *see*

also ***Holland v. State***, 705 So. 2d 307, 336 (Miss. 1997) ("In addition [to affidavits], adverse and prejudicial pretrial publicity may demonstrate the inability to obtain a fair jury in that venue." (citing ***Johnson v. State***, 476 So. 2d 1195, 1211 (Miss. 1985))).

¶82. But this presumption is rebuttable. ***Johnson***, 476 So. 2d at 1211. To that end, the trial court proposed and Garcia and the State agreed to putting the pretrial-publicity question to a jury venire that had been summoned but not chosen for another trial. *See* ***id.*** (acknowledging that the State may rebut the presumption by demonstrating through voir dire that an impartial jury is attainable); *see also* ***Welde***, 3 So. 3d at 118 ("The State may rebut the presumption that an impartial jury cannot be obtained 'by proving from voir dire that the trial court impaneled an impartial jury.' " (quoting ***Holland***, 705 So. 2d at 336)). So on August 16, 2016, the trial judge, the State, and Garcia questioned a pool of thirty potential jurors summoned for an unrelated trial but not selected to serve on the jury. Of the thirty, nineteen acknowledged having known, heard, or read something about Garcia's case. After general questions were asked, fourteen mock jurors were asked to stay for additional detailed questions.

¶83. In making her ruling, the trial court found the "questioning of the jurors in this matter to be the most helpful to the determination of this Motion [to change venue]." Specifically,

> ***970** There were over one-third of the total jurors who indicated that they had never heard or seen anything concerning this case. Of those fourteen (14) questioned more fully, half had no knowledge of the case. Only three (3) of the fourteen (14) questioned in detail indicated having formed any opinion and only two (2) of those three (3) indicated that they would not be able to set that opinion aside. In fact, one (1) of those two (2) would not have been a proper juror for any case. After being told about the burden of proof being on the State and upon being asked in general if the State proved in any case that a crime had been committed but failed to prove that a defendant had committed it whether the jurors would find that defendant not guilty, this particular juror indicated that he would not as he believed that if someone was present or knew about the crime or such, then that person was also guilty.

The trial judge concluded that "the questioning of the jurors indicates to the Court that the publicity has not been so pervasive that everyone has either become exposed to it or recalls it. It also indicates that a fair and impartial jury can be seated, given proper and thorough voir dire." We find no abuse of discretion in this finding. As in ***Welde***, only one person answered he could not apply the presumption of innocence. *See* ***Welde***, 3 So. 3d at 119 (affirming the trial court's denial of a motion to change venue partly because "[o]nly one prospective juror stated that he had formed a fixed opinion").

¶84. Garcia argues the trial judge should have never conducted a voir dire because his motion demonstrated that the presumption he could not receive a fair trial in Harrison County due to the media coverage was irrebuttable. "While the presumption may be rebutted during voir dire," this Court has found that " 'in some circumstances pretrial publicity can be so damaging and the presumption so great, that no voir dire can rebut it.' " ***White***, 495 So. 2d at 1349 (quoting ***Johnson***, 476 So. 2d at 1211). This Court "ha[s] set forth certain elements which, when present would serve as an indicator to the trial court as to when the presumption is irrebuttable." ***Id.*** These elements are

(1) Capital cases based on considerations of a heightened standard of review;

(2) Crowds threatening violence toward the accused;

(3) An inordinate amount of media coverage, particularly in cases of

(a) serious crimes against influential families;

(b) serious crimes against public officials;

(c) serial crimes;

(d) crimes committed by a black defendant upon a white victim;

(e) where there is an inexperienced trial counsel.

Id. In her order denying Garcia's motion to change venue, the trial judge considered each these factors. She acknowledged the fact Garcia's case was capital. But she found a lack of evidence of threats of violence on Garcia. Further, she determined there had not been "an inordinate amount" of media coverage.

¶85. In particular regarding media coverage, the trial judge acknowledged that "[t]here was a great deal of coverage at the time of the subject crime, arrest of [Garcia,] and preliminary hearing." But then the coverage severely dropped off. "There were then a few articles the following year and only one (1) this year prior to the hearing on this Motion." Moreover, while "[t]he subject crime is certainly serious, ... there is no allegation that it was committed against a member of an influential family or a public official. Nor is there any indication that it is a serial crime. The victim was black and the Defendant is ***971** Hispanic." Finally, the trial judge noted that Garcia's "[t]rial counsel is experienced." For these reasons, the trial judge concluded the media coverage had not been "an inordinate amount." Specifically, she found the coverage had not reached the saturation level found to create an irrebuttable presumption of partiality in ***Fisher v. State***, 481 So. 2d 203, 217-23 (Miss. 1985). [15]

15 The trial judge here found,

> This is particularly true when one considers that there were approximately thirteen (13) homicides in Harrison County in 2014, seven (7) of those being in Gulfport (including the subject crime). Each of those homicides also received a great deal of media coverage at the time of the occurrence, the arrest and the preliminary hearing. That is, this case was neither the only homicide in 2014, nor the only homicide receiving media coverage. To be sure, the fact that the victim in this case is a child separated it somewhat from other homicides and did draw attention from those outside of this geographic area. However, there has certainly not been the media saturation which occurred in ***Fisher***. Nor has there been any indication of any prior convictions of Defendant or any indication that he has ever been involved in any similar crime as also occurred in ***Fisher***.

¶86. On appeal, Garcia is dismissive of the trial judge's findings both that there was a lack of evidence of threats of violence made toward Garcia and that there had not been "an inordinate amount" of media coverage. He asserts that "throughout the process[,] threats of violence toward the accused from the community, and indeed toward his counsel, have been present and ubiquitous." [16] He cites various articles as demonstrating a community demand for his death. [17] But as evidenced by the record, the trial judge carefully considered each article Garcia submitted. [18] And from these articles she detected no present and ubiquitous threats of violence. Only one article reported the jail warden's saying Garcia had not been housed with the ***972** general population due to the high probability of threats against inmates accused of sex crimes against children and internal and external threats. And this one article, standing alone, is insufficient to show the trial judge abused her discretion.

16 We note that counsel's comment about receiving threats was made at sentencing, not at the motion to change venue. And Garcia never renewed his motion to change venue based on any new evidence, despite being advised that he could.

17 At oral argument, Garcia's counsel also repeatedly referenced a petition calling for Garcia to be sentenced to death. But Garcia's counsel admitted this undated petition had been filed *after* Garcia pled guilty. And even so, Garcia did not renew his motion to change venue. Instead, he proceeded to waive a jury at sentencing.

18 In her order, the trial judge observed,

> [Garcia] also submitted a large number of media reports. The Court has reviewed each of those. Only one (1) article for 2016 was submitted and that article followed an earlier motion hearing in this case. Eight (8) articles from 2015 were submitted. Three (3) of those focused on the one (1) year anniversary of the date of the subject crime; one (1) related to the victim's seventh birthday; two (2) reported on [Garcia's] arraignment; one (1) reported on the setting of the trial date in this cause; one (1) reported on the victim's cousin beginning a group to help victim's families; and one (1) related to a second arrest of a person of interest in this cause who has not been charged with the crime in this cause.
>
> The majority of the articles are from July and August of 2014, just after the subject crime occurred. The initial articles concern the victim's disappearance and make no mention of

> [Garcia] who had not yet even been identified as a person of interest. Later articles report on [Garcia's] arrest, the cause of death, and [Garcia's] preliminary hearing. The later articles in 2014 contain a number of details as to cause of death, [Garcia's] purported statements, and DNA testing.
>
> Many of the articles are the same, simply having been published by different media sources. A number of articles also report on the fact that [Garcia] was first arrested and charged with burglary of the trailer in which the victim was found and his purported statement admitting to that burglary. Many of the details in the articles appear to have come from the testimony adduced at the preliminary hearing in this case.

¶87. This Court has also carefully reviewed the media reports submitted to the trial court. And despite Garcia's characterizations, the remaining articles do not demonstrate the threat of community violence was such that no voir dire could rebut the presumption of impartiality. Nor do they, as Garcia also argues on appeal, demonstrate a saturation of media coverage such that the denial of his motion to change venue was reversible error. Even under the heightened scrutiny of a capital case, the trial judge did not abuse her discretion when she evaluated the ***White*** factors and concluded the media coverage was not such that the presumption a Harrison County jury could not be impartial was irrebuttable.

¶88. Because the State rebutted the presumption of unfairness through the agreed-upon mock voir dire—demonstrating an impartial jury could be drawn from Harrison County [19] —the trial judge did not abuse her discretion by denying Garcia's motion to change venue. *See* ***Welde***, 3 So. 3d at 119.

19 At oral argument, Garcia's counsel insinuated that, because the jurors who had been questioned knew they would not in fact have to serve on a death-penalty case, their answers may not have been truthful. But this newly raised speculation ignores that Garcia's lawyers agreed to this approach. And it cuts both ways because the opposite could be just as easily argued—that these fourteen people's answers were more truthful because none had incentive to lie to escape jury service for a lengthy capital-murder trial for which they may have been sequestered.

III. EVIDENCE

Issue 3: Did the trial court rely on "unconstitutionally admitted evidence" when making its sentencing decision?

¶89. As his third claimed error, Garcia argues the trial judge relied on "unconstitutionally admitted evidence" when making her sentencing decision. Specifically, he challenges the admission of the Xbox internet searches and his statements to the police, which he tried to suppress pretrial. He also challenges the admission of the State pathologist's expert testimony, to which he never objected. "The admission of evidence ... is left to the sound discretion of the trial judge." ***Havard v. State***, 928 So. 2d 771, 797 (Miss. 2006) (quoting ***Minor v. State***, 831 So. 2d 1116, 1120 (Miss. 2002)). After review, we find the trial judge did not abuse her discretion by admitting these three categories of evidence.

A. Internet Searches on Garcia's Xbox 360

¶90. Garcia first argues the trial judge erred by denying his motion in limine to exclude evidence of the internet searches conducted through his Xbox 360. At the motion hearing, an FBI forensic examiner testified these searches—which were of a sexually explicit and violent nature and involved terms describing young females—had originated from the Xbox seized from Garcia's bedroom and had been conducted in the week before JT's murder. Garcia objected to the admission of the searches based on Mississippi Rule of Evidence 901, which requires evidence be authenticated before admission. He also objected, citing Mississippi Rule of Evidence 403. This rule grants trial courts discretion to exclude otherwise admissible evidence if its probative value is outweighed by the danger of unfair prejudice.

973** ¶91. In claiming the searches had not been properly authenticated under Rule 901, Garcia likened this evidence to the social-media messages purportedly sent by the defendant in ***Smith v. State, 136 So. 3d 424 (Miss. 2014). In ***Smith***, this Court ruled the messages were not properly authenticated as being what they purported to be—messages created and sent by the defendant. The primary concern in ***Smith*** was the potential for fabrication—that is, creating a fake social-media account using someone else's name and masquerading as that person. ***Id.*** at 432-33. "Because of the special concerns regarding fabrication," we ruled that " 'the fact that an

electronic communication on its face purports to originate from a certain person's social networking account is generally insufficient standing alone to authenticate that person as the author of the communications.' " ***Id.*** at 433 (quoting ***Campbell v. State***, 382 S.W.3d 545, 550 (Tex. Ct. App. 2012)).

¶92. Here, by contrast, we are not dealing with an electronic communication purporting to originate from Garcia's social-media account. We are dealing with electronic searches indisputably conducted on Garcia's electronic device. And when it comes to the authentication of internet searches, courts have found that evidence that searches were conducted on the defendant's device is sufficient to make a prima facie case of authentication. ***Saunders v. State***, 241 So. 3d 645, 648-49 (Miss. Ct. App. 2018) (holding that the screen shot of a text message found on a phone in the defendant's possession met a prima facie showing of authenticity); *see also* ***Hoey v. State***, 2017 Ark. App. 253, 519 S.W.3d 745, 757-58 (2017) (holding that testimony that internet searches came from two smart phones found in the defendant's possession was sufficient to authenticate them); ***Holzheuser v. State***, 351 Ga.App. 286, 828 S.E.2d 664, 668-69 (2019) (holding that images and notes found on the defendant's personal cell phone were sufficiently authenticated); ***United States v. Lubich***, 72 M.J. 170, 175 (C.A.A.F. 2013) (holding that a prima facie showing of authenticity had been made by evidence that incriminating internet searches were made using defendant's account). Indeed, in ***Smith***, this Court surmised that a social-media message potentially could be authenticated by evidence "that the communication originated from the purported sender's personal computer ...." ***Smith***, 136 So. 3d at 433.

¶93. As the trial judge ruled, the possibility that some of the searches on the Xbox could have been conducted by someone else besides Garcia goes to the *weight* of this evidence, not its authenticity.[20] *See* ***Holzheuser***, 828 S.E.2d at 668 ("To the extent that Holzheuser argues that the information on his phone could have been the product of a different person's use of his phone without his knowledge or permission, this argument goes to weight, not authenticity."); ***McLemore v. State***, No. 02-15-00229-CR, 2016 WL 4395778 (Tex. Ct. App. Aug. 18, 2016) ("The possibilities that someone accessed the data before appellant owned the phone or while he owned it but was not in possession of it are alternative scenarios that the jury was entitled to assess upon the admission of the evidence."); ***Lubich***, 72 M.J. at 175 (noting that, once Rule 901's standard had been met, the defendant had the opportunity to cross-examine the government expert on "the possibility that someone else was sitting at a computer that [the defendant] ***974** previously logged onto and entered the information without her knowledge").

20 At his guilty-plea hearing, Garcia admitted making some of the searches, but he claimed he accidentally typed "tween" instead of "teen." Other searches he suggested were made by Gray, who Garcia claimed had borrowed his Xbox that week.

¶94. As this Court has said, "A party need only make a prima facie showing of authenticity, not a full argument on admissibility. Once a prima facie case is made, the evidence goes to the jury and it is the jury who will ultimately determine the authenticity of the evidence, not the court." ***Walters v. State***, 206 So. 3d 524, 535 (Miss. 2016) (quoting ***Sewell v. State***, 721 So. 2d 129, 140 (Miss. 1998)). In other words, the State was "not required to rule out all possibilities inconsistent with authenticity." ***Jones v. State***, 466 S.W.3d 252, 262 (Tex. Ct. App. 2015).

¶95. The State made a prima facie showing that the internet searches were what the State claimed them to be—internet searches made on Garcia's Xbox. The State was not required to rule out the possibility that the internet searches could have been conducted by someone other than Garcia. Therefore, the trial judge did not abuse her discretion by finding this evidence had been sufficiently authenticated.

¶96. Turning to Rule 403, the trial judge did not abuse her discretion by finding the probative value of the searches was not outweighed by any unfair prejudice. *See* M.R.E. 403. While Garcia tries to discount the probative value—namely through his denial he was the one who made the searches—the probative value was certainly high. The searches were for child pornography that mimicked the acts Garcia admitted carrying out. And the searches were made just days before Garcia acted. So any claim of unfair prejudice is unfounded under this highly discretionary rule.

¶97. Also unfounded is Garcia's claim, raised for the first time on appeal, that the trial judge should have excluded the searches based on Mississippi Rule of Evidence 404(b)(1), which deems "[e]vidence of a crime, wrong, or other act ... not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." M.R.E. 404(b)(1). Not only may the Xbox evidence be considered intrinsic to the charged sexual-battery-based murder, but what Garcia is now calling

inadmissible character evidence falls well within obviously applicable exceptions to Rule 404(b)(1), found in Rule 404(b)(2). Under 404(b)(2), "[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." M.R.E. 404(b)(2). The internet searches certainly go to the issues of motive, intent, preparation, and plan.

B. Garcia's Voluntary Statement to Police

¶98. Next, Garcia argues the trial judge violated his Fourth, Fifth, Sixth, and Fourteenth Amendment rights when she denied his motion to suppress his statements to the police and their fruits. Garcia argues that the first recorded conversation in the police car with Detective Fulks violated his ***Miranda*** rights. *See* ***Miranda***, 384 U.S. at 444, 86 S.Ct. 1602. He further reasons that information from the car conversation was used to gather more information in the formal police interview, before which he was advised of and waived his ***Miranda*** rights. And it was his admissions during the police interview that formed the probable-cause basis for the search warrant of his apartment. Therefore, he concludes, both statements and the evidence from his apartment should have been suppressed. *See* ***Marshall***, 584 So. 2d at 438 (explaining that the "fruit of the poisonous tree"—or exclusionary rule—"prohibits the introduction of *derivative evidence*" that is the ***975** product of evidence obtained in violation of the Fourth Amendment (quoting ***Murray***, 487 U.S. at 536, 108 S.Ct. 2529)).

¶99. But, as the trial court found, for ***Miranda*** rights to attach, Garcia had to have been "in custody" while on his way to the police station. ***Hopkins v. State***, 799 So. 2d 874, 878 (Miss. 2001) (citing ***Miranda***, 384 U.S. at 444, 86 S.Ct. 1602; ***Oregon v. Mathiason***, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977); ***Moore v. State***, 344 So. 2d 731 (Miss. 1977)). "The test for whether a person is in custody is whether a reasonable person would feel he was in custody and depends upon the totality of the circumstances," and

> [t]he factors to be considered include the place and time of the interrogation, the people present, the amount of force or physical restraint used by the officers, the length and form of the questions, whether the defendant comes to the authorities voluntarily, and what the defendant is told about the situation.

Id. (citing ***Hunt v. State***, 687 So. 2d 1154, 1160 (Miss. 1996); ***Porter v. State***, 616 So. 2d 899, 907 (Miss. 1993)). Commander Brown testified Garcia approached him voluntarily during the search of Gray's apartment. Detective Fulks then testified Garcia voluntarily agreed to accompany Fulks—who at the time was a patrol officer—to the police station to speak with detectives. When Garcia got into the back of the police car, he was not restrained. He was free to leave and could have asked Detective Fulks to pull over or turn around at any point. Garcia was not delivered to the sally port like other suspects, and he was not interrogated. Having watched the video of the car ride, the trial court noted it was Garcia who initiated the conversation and any questions Detective Fulks asked dealt with a general conversation between the two—they were not investigatory. So the evidence supports the trial court's determination that Garcia was not in custody.

¶100. On appeal, Garcia does not contend he was in custody when he voluntarily got into the police car. Rather, he suggests that, as soon as he mentioned he had rummaged through the trailer days before, Detective Fulks should have ***Mirandized*** him. But Detective Fulks testified that, during the car ride, he had no reason to suspect Garcia had committed a separate crime of burglary based on his statement about his fingerprints. At that point, Detective Fulks was simply giving a witness a ride to the police station as part of the ongoing investigation of JT's murder.

¶101. Garcia's claim that the car ride somehow turned into a custodial investigation of his burglary of the trailer has no basis. As the United States Supreme Court explained in ***Miranda***, "Our decision is not intended to hamper the traditional function of police officers in investigating crime. ... General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." ***Miranda***, 384 U.S. at 477, 86 S.Ct. 1602 (citation omitted). Garcia's statement was made while a patrol officer voluntarily transported him to the police station as part of the fact-finding process. He was not in custody. Therefore, the trial court did not err by denying his motion to suppress the video of the car ride and its fruits.

C. The State Pathologist's Expert Testimony

¶102. Finally, Garcia argues for the first time on appeal that Dr. LeVaughn's testimony about JT's cause of death violated his constitutional right to confront his accuser. *See* U.S. Const. amend VI. Relying on ***976** ***Bullcoming v. New Mexico***, 564 U.S. 647, 652, 131 S. Ct. 2705, 2710, 180 L. Ed. 2d 610 (2011), Garcia claims Dr. LeVaughn's testimony was improper "surrogate testimony" for Dr. McGarry, the coroner who performed JT's autopsy.

¶103. Garcia admits he did not object to Dr. LeVaughn's testimony. And "[i]f no contemporaneous objection is made, the error, if any, is waived. This rule is not diminished in a capital case." ***Ronk v. State***, 172 So. 3d 1112, 1134 (Miss. 2015) (quoting ***Cole v. State***, 525 So. 2d 365, 369 (Miss. 1987)).

¶104. Still, Garcia asks this Court to review for plain error. "Under the plain-error doctrine, [this Court] can recognize obvious error which was not properly raised by the defendant and which affects a defendant's fundamental, substantive right." ***Ambrose v. State***, 254 So. 3d 77, 136 (Miss. 2018) (quoting ***Conners v. State***, 92 So. 3d 676, 682 (Miss. 2012)). "For the plain-error doctrine to apply, there must have been an error that resulted in a manifest miscarriage of justice or seriously affects the fairness, integrity or public reputation of judicial proceedings." ***Id.*** Here, there was no error at all—let alone one that resulted in a manifest miscarriage of justice.

¶105. In ***Bullcoming***, the Supreme Court was presented with a specific question:

> whether the Confrontation Clause permits the prosecution *to introduce a forensic laboratory report containing a testimonial certification*—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification.

Bullcoming, 564 U.S. at 652, 131 S.Ct. 2705 (emphasis added). The plurality answered this question by holding "that surrogate testimony of that order does not meet the constitutional requirement." ***Id.***

¶106. But this Court is not presented with the same question. The State did not admit Dr. McGarry's autopsy report through Dr. LeVaughn. So Bullcoming's specific concern of "surrogate testimony" is not at issue. Instead, Dr. LeVaughn was admitted as an expert in pathology. And he gave his *independent* expert opinion that JT had been sexually assaulted before she died and that she died by strangulation. As Garcia points out, Dr. LeVaughn did rely in part on Dr. McGarry's autopsy report and Officer Koon's autopsy photos to form his expert opinion. But this fact does not place his testimony in the ***Bullcoming*** surrogate-testimony category.

¶107. As Justice Sotomayor noted in her special concurrence, ***Bullcoming*** was "not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." ***Id.*** at 673, 131 S. Ct. 2705, 2710 (Sotomayor, J., concurring). "We would face a different question," she observed, "if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence." ***Id.*** (Sotomayor, J., concurring)).

¶108. The Supreme Court faced this different question in ***Williams v. Illinois***, 567 U.S. 50, 67, 132 S. Ct. 2221, 2233, 183 L. Ed. 2d 89 (2012). And a plurality concluded expert testimony of this nature does not violate the Confrontation Clause because the out-of-court statements on which the expert relies are not being offered to prove the truth of the matter asserted. Rather, they explain the assumptions on which the opinion rests. ***Id.*** at 57-58, 132 S. Ct. 2221, 2233 (Justice Alito authored the judgment, joined by Chief Justice Roberts and Justices Kennedy and ***977** Breyer. Justice Thomas concurred in the judgment.). A majority of this Court has similarly agreed that an expert pathologist called to give her independent opinion as to cause of death does not violate ***Bullcoming's*** surrogate-testimony prohibition. ***Christian v. State***, 207 So. 3d 1207, 1225 (Miss. 2016) (Justice Maxwell specially concurred, joined by Chief Justice Waller, Presiding Justice Randolph, and Justices Lamar, Coleman, and Beam.).

¶109. Thus, Garcia's ***Bullcoming*** argument lacks merit. And the trial judge did not plainly err by admitting Dr. LeVaughn's expert testimony.

IV. RECUSAL

Issue 5: Once Garcia waived his right to a jury at sentencing, should the trial judge have recused *sua sponte* based on either her pre-sentencing exposure to information not ordinarily presented to the jury or her personal views on the death penalty and Garcia's mitigation theory?

¶110. Next, Garcia argues he "was deprived of a fair sentencing tribunal because the judge's pretrial exposure to confidential information that would ordinarily not be known to a sentencing factfinder, and her self-admitted predispositions and intention to consider extra-record matters disqualified her from being the trier of fact." Essentially, Garcia characterizes the trial judge's warnings to Garcia about what he would be giving up if he chose bench sentencing over jury sentencing as the judge's "free admi[ssion] ... that she would be following her own predelictions [sic] and pre-existing perception, as well as information outside the record, in arriving at a sentencing decision." Based on this alleged admission, Garcia claims the trial judge should have recused, even though Garcia concedes he never asked her to.

¶111. Because Garcia never sought the trial judge's recusal, this claim is procedurally barred. ***Rice v. State***, 134 So. 3d 292, 299 (Miss. 2014) (holding that a petitioner's claim of a biased trial judge was procedurally barred on appeal due to the failure of the petitioner to file a motion to recuse at trial). Garcia chose to waive his right to a jury for sentencing *after* the trial judge's thorough explanation of the disadvantages and differences of judge sentencing, as opposed to jury sentencing. Specifically, the trial judge brought to Garcia's attention the very circumstance Garcia now claims made his sentencing hearing fundamentally unfair—the fact the judge had been privy to information that a jury would never see. Aware of this reality, Garcia chose to forego his right to jury sentencing. So he cannot now craft those warnings into a claim that the trial judge's acting as sentencer was fundamentally unfair.

¶112. Further, his complaint that the judge should have recused *sua sponte* based on her own admitted impartiality or inability to be fair has no merit. This Court recognizes that "trial judges are confronted daily with evidence that would tend to make defendants appear more culpable than not. We presume that our trial judges are aptly equipped to handle these issues and apply the law without fear of undue prejudice." ***Scott v. State***, 8 So. 3d 855, 860 (Miss. 2008). The transcript of the January 17, 2017 waiver-of-jury-sentencing hearing speaks for itself. Nowhere does the judge insist she would follow her own predispositions or base her decision on information outside the record. Instead, the trial judge carefully explained her background and that she was privy to information and experiences that a jury would not possess. She also gave Garcia multiple opportunities to withdraw his motion to waive jury sentencing after consulting with counsel. So, despite Garcia's attempt ***978** to mischaracterize the judge's words and actions, the judge's January 17, 2017 conversation with Garcia leaves no doubt about the validity of the presumption that Judge Dodson, "sworn to administer impartial justice, [wa]s qualified and unbiased." ***Jones v. State***, 841 So. 2d 115, 135 (Miss. 2003).

¶113. In addition to the January 17, 2017 hearing, Garcia points to the trial judge's comment to Dr. Storer at the November 22, 2016 competency hearing that she "would rather have the death penalty than a life without for several reasons[,] [o]ne of which is that I would have my own cell where no one else would be and my own things that no one else would bother." Garcia claims this is evidence of a predisposition toward the death penalty that might have impacted her sentencing decision.

¶114. But again, Garcia never sought to have the trial judge recuse based on this statement, which was made months before he decided to waive jury sentencing. So again this issue is procedurally barred. ***Rice***, 134 So. 3d at 299. Further, this one comment taken out of context is not evidence that the judge was so biased in favor of the death penalty that she should have recused *sua sponte*. Instead, a fuller reading of the record belies Garcia's accusation that the judge was biased. At the end of the November 22, 2016 hearing, the judge explained to Garcia that her comment—which was made in the context of whether it was irrational to prefer having one's own room on death row—was merely part of an academic exercise and was by no means intended to sway Garcia one way or another. Moreover, during the January 17, 2017 hearing, the judge explained to Garcia that, in her previous roles of prosecutor and defense attorney, she had argued for *and* against the death penalty. Before she accepted Garcia's waiver of jury sentencing, the judge questioned Garcia as to whether he believed, "if the proof is there that [she] would have any hesitation at all in imposing the death penalty" and "if the proof is not there that [she] would have any hesitation at all in imposing life without parole." And she only accepted his waiver of a jury after Garcia assured her he was "not hedging [his] bets here thinking [the judge] would lean one way or the other[.]" Instead, Garcia stated that he

understood that the judge would make a sentencing decision just as a jury would.

¶115. Finally, Garcia asserts the sentencing order revealed the trial judge's "disqualifying views." Specifically, he alleges that the trial judge categorically rejected the mitigation evidence presented by Dr. Storer. But the order shows the judge did consider Dr. Storer's mitigation testimony. The order also shows she properly considered his testimony in the context of mitigation and did not, as Garcia claims on appeal, use this mental-health evidence offered in mitigation as an aggravating factor justifying the death penalty.

¶116. "In determining whether a judge should have recused h[er]self, the reviewing court must consider the trial as a whole and examine every ruling to determine if those rulings were prejudicial to the complaining party." ***Jones***, 841 So. 2d at 135 (citing ***Hunter v. State***, 684 So. 2d 625, 630-31 (Miss. 1996)). Reviewing the record as a whole, there is no evidence to support Garcia's contention that, despite not moving for the trial judge's recusal, the trial judge still should have disqualified herself *sua sponte* based on personal bias or an inability to be impartial.

V. DEATH PENALTY

Issue 6: Was the death penalty imposed on Garcia in violation of the United States Constitution?

¶117. In his sixth issue on appeal, Garcia argues the trial judge erred by ***979** denying his pretrial motion to declare Mississippi's entire death-penalty statutory scheme unconstitutional. The trial judge rejected Garcia's motion, finding this Court's decisions have consistently found "that the current death penalty statutes are constitutional and that in fact the imposition of the death penalty as that process is outlined in our statutes and our case law is constitutional." On appeal, Garcia concedes the law supports the trial judge's ruling. He "acknowledges that majorities of neither this Court nor the United States Supreme Court have yet adopted the positions he takes here[.]" Yet he asserts his "positions are legally meritorious and warrant revisiting and abandoning any precedent inconsistent with them."

¶118. In addition to not being supported by the law, the same arguments Garcia asserts against the death penalty were advanced and rejected in two prior death-penalty appeals before the Court. *See* ***Ambrose***, 254 So. 3d at 149-151 (rejecting the specific arguments that the failure to include *mens rea* factors or aggravating circumstances in the indictment renders the death sentence unconstitutional, that Mississippi's statutory death penalty scheme is unconstitutional for piecemeal reasons, and that Mississippi's capital statutory scheme permitting the imposition of a death sentence violates the Eighth Amendment *in toto*); ***Evans***, 226 So. 3d at 36-40 (rejecting the specific arguments that use of the same crime to capitalize the homicide and as an aggravator violated the Eighth Amendment, that Mississippi's death-penalty scheme is generally unconstitutional, that the failure to include aggravating circumstances in the indictment renders the sentence unconstitutional, and that Mississippi's death-penalty scheme is unconstitutional for additional reasons). The one exception is Garcia's argument that this Court should revisit the constitutionality of the death penalty based on Justice Breyer's dissent from the denial of certiorari in ***Jordan v. Mississippi***, —— U.S. ——, 138 S. Ct. 2567, 2569-70, 201 L. Ed. 2d 1104 (2018) (Breyer, J., dissenting from the denial of certiorari).

¶119. In his dissent, Justice Breyer expressed concern over what he views as the "geographic arbitrariness" of the imposition of the death penalty. ***Id.*** at 2570. Justice Breyer observed how "[d]eath sentences, while declining in number, have become increasingly concentrated in an ever-smaller number of counties"—the Second Circuit Court District of Mississippi being one of those areas of concentration. ***Id.*** at 2569. And Justice Breyer repeated his concern that two other capital defendants may have been sentenced to death, not because their crimes reflect the "worst of the worst" but because they committed those crimes in the Second Circuit Court District, which is where Garcia also committed his capital crime. ***Id.*** at 2570; *see also* ***Reed v. Louisiana***, —— U.S. ——, 137 S. Ct. 787, 197 L. Ed. 2d 258 (2017) (Breyer, J. dissenting from denial of certiorari) (arguing sentences originating from Caddo Parish, Louisiana, are geographically arbitrary); ***Tucker v. Louisiana***, —— U.S. ——, 136 S. Ct. 1801, 195 L. Ed. 2d 774 (2016) (Breyer, J., dissenting from denial of certiorari) (same); ***Glossip v. Gross***, 576 U.S. 863, 135 S. Ct. 2726, 2761, 192 L. Ed. 2d 761 (2015) (Breyer, J., dissenting) (asserting that geographical arbitrariness is national in scope).

¶120. In his brief, Garcia presents statistical data to support Justice Breyer's position. But beyond Justice Breyer's dissent to a denial of certiorari, Garcia presents no law supporting his argument that the geographical concentration of the

imposition of the death penalty renders the death sentences imposed in areas like the Second Circuit Court District of Mississippi arbitrary and thereby unconstitutional. Justice ***980** Breyer pitched his geographical arbitrariness argument in his dissent in ***Glossip*** and was joined by just one other justice. ***Glossip***, 135 S. Ct. at 2761 (Breyer, J., dissenting). The ***Jordan*** denial-of-certiorari dissent was at least the third time since ***Glossip*** that Justice Breyer has advanced his geographical-arbitrariness argument to no avail. ***Jordan***, 138 S. Ct. at 2569-70; ***Reed***, 137 S. Ct. 787; ***Tucker***, 136 S. Ct. 1801. And Garcia cites no other state or federal courts that have ruled the death penalty unconstitutional based on the fact the death penalty has been imposed in higher concentration in certain geographical areas, such as the Second Circuit Court District of Mississippi.

¶121. Because Garcia provides no legal support for this argument that the trial judge erred by denying his pretrial motion to declare the death penalty unconstitutional on its face, we find no reversible error.

Issue 7: Is Garcia's death sentence constitutionally and statutorily disproportionate?

¶122. In his next issue, Garcia turns from a facial to an as-applied challenge of his death sentence. He argues that, because he suffers from anxiety disorder, which he describes as a "severe mental illness,"[21] imposing the death penalty on him is just as categorically disproportionate as imposing the death penalty on a juvenile or someone who is intellectually disabled. *See* ***Roper v. Simmons***, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (holding that execution of individuals who were under eighteen years of age at time of their capital crimes is prohibited by the Eighth Amendment); ***Atkins v. Virginia***, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (holding that execution of intellectually disabled criminals is prohibited by the Eighth Amendment). But the argument that an anxiety disorder exempts individuals from the death penalty was rejected by a majority of this Court in ***Dickerson v. State***, 175 So. 3d 8, 17-18 (Miss. 2015). As does Garcia, the defendant in ***Dickerson*** "liken[ed] the mentally ill to the mentally retarded and to juveniles, who have 'diminished personal culpability,' and who are constitutionally ineligible for the death penalty ...." ***Id.*** at 17 (citing ***Atkins***, 536 U.S. 304, 122 S.Ct. 2242; ***Roper***, 543 U.S. 551, 125 S.Ct. 1183). And he asked this Court to hold that mentally ill defendants are exempt from the death penalty. ***Id.***

21 We note that the record does not support Garcia's argument that he suffers from a *severe* mental illness. His own expert, Dr. Storer, testified that Garcia's anxiety disorder, while a mental illness, was "not a severe and persistent mental illness of the type that would alter someone's perception of reality."

¶123. In response, this Court looked to the Fifth Circuit, which has repeatedly rejected the argument that suffering from a mental illness is the same as being intellectually disabled. ***Id.*** at 18 (citing ***Ripkowski v. Thaler***, 438 Fed. Appx. 296, 303 (5th Cir. 2011); ***In re Neville***, 440 F.3d 220, 221 (5th Cir. 2006); ***In re Woods***, 155 Fed. Appx. 132, 136 (5th Cir. 2005)). More important, "the [United States] Supreme Court has never held that mental illness removes a defendant from the class of persons who are constitutionally eligible for a death sentence." ***Id.*** (quoting ***Ripkowski***, 438 Fed. Appx. at 303). This Court has held that it could not "take the ***Atkins*** opinion—which was so specific to mental retardation that the Court cited and discussed the clinical definition of mental retardation—and apply it to all other mental disorders." ***Id.*** "To do so would be no different than taking ***Roper*** and expanding it to preclude execution of criminals under age twenty-one, rather than ***981** age eighteen as the Supreme Court explicitly held." ***Id.***

¶124. Garcia never argued to the trial court—let alone proved—he is intellectually disabled. In fact, Dr. Storer testified "Garcia has no deficits whatsoever regarding his intellectual functioning." *See* ***id.*** at 24 (defining intellectual disability as including "significantly subaverage intellectual functioning"). And because he was twenty-nine years old when he committed his capital crime, his reliance on ***Atkins*** and ***Roper*** is misplaced.

¶125. For the same reasons articulated in ***Dickerson***, we reject Garcia's argument that, based on his anxiety disorder, his death sentence in constitutionally disproportionate.

VI. CUMULATIVE ERROR

Issue 8: Did the trial judge commit errors, in themselves harmless, that cumulatively require reversal?

¶126. As his final issue, Garcia argues cumulative error. But a prerequisite of cumulative error is error. The cumulative-error doctrine permits this Court, "[u]pon appellate review of cases in which [it] find[s] harmless error or any error that

is not specifically found to be reversible in and of itself," to reverse when "the cumulative effect of all errors committed during the trial deprived the defendant of a fundamentally fair and impartial trial." ***Moffett v. State***, 49 So. 3d 1073, 1116 (Miss. 2010) (quoting ***Byrom v. State***, 863 So. 2d 836, 847 (Miss. 2003)). Garcia has failed to demonstrate *any* errors occurred during his sentencing. Therefore, the cumulative-error doctrine does not apply.

VII. STATUTORY PROPORTIONALITY REVIEW

¶127. As a final matter, this Court must review the proportionality of Garcia's death sentence. Miss. Code Ann. § 99-19-105 (Rev. 2015).

¶128. First, this Court must ask whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor. Miss. Code Ann. § 99-19-105(3)(a). We have already addressed in Section IV of this opinion Garcia's argument that the trial judge should have recused as sentencer based on allegedly admitted improper influences on her sentencing decision. For the same reasons, we find Garcia's sentence was not influenced by passion, prejudice, or any other arbitrary factor.

¶129. Second, this Court must ask if the evidence support the judge's finding of statutory aggravating circumstances. Miss. Code Ann. § 99-19-105(3)(b). The judge found two aggravating circumstances—(1) Garcia killed JT during the commission of a sexual battery and (2) JT's murder was especially heinous, atrocious, and cruel. Miss. Code Ann. § 99-19-101(5)(d); Miss. Code Ann. § 99-19-101(5)(i). The record supports both findings. Garcia admitted under oath that he sexually assaulted five-year-old JT by inserting his penis in her anus. He also told the court that he thought she had died while he was raping her but only later realized she was merely unconscious. While Garcia claimed that JT had already been bound by the socks when he arrived at the trailer, Garcia admitted he was the one who decided to hang JT by her neck from the bathroom window. He did this so he could rinse his semen off her. He then left her half-naked body hanging from that window. In addition to these facts, other evidence demonstrated the especially heinous, atrocious, and cruel nature of Garcia's crime. In the days leading up to the crime, Garcia had conducted internet searches of the pornographic depiction of kidnaping and raping of young girls. If he was not the one who in fact ***982** kidnaped JT, he did admittedly rape her when presented with her small body, bound face down in a chair in a filthy trailer. An FBI agent later described it as the most disgusting crime scene he had ever worked. Dr. LeVaughn testified the sexual assault would have been painful and traumatic for the five-year-old JT. Dr. LeVaughn also opined that, based on the scratch marks on her neck, JT tried to free herself from the sock-based noose around her neck as she was strangled. So the evidence clearly supports the judge's finding of both statutory aggravating circumstances.

¶130. Finally, we must ask if the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Miss. Code Ann. § 99-19-105(3)(c).[22] When faced with the capital murder of a young victim committed during the course of sexual battery, this Court has repeatedly and consistently held that the death penalty is not disproportionate. *E.g.*, ***Loden v. State***, 971 So. 2d 548, 571 (Miss. 2007) (holding the death penalty was not disproportionate for capital murder committed during the commission of kidnaping and sexual battery of a sixteen-year-old); ***Havard v. State***, 928 So. 2d 771, 804 (Miss. 2006) (holding the death penalty was not disproportionate for capital murder committed during the commission of a sexual battery of a six-month-old infant); ***Evans v. State***, 725 So. 2d 613, 708 (Miss. 1997) (holding the death penalty was not disproportionate for capital murder committed during the commission of sexual battery of a ten-year-old); ***Walker v. State***, 671 So. 2d 581, 631 (Miss. 1995) ("find[ing] that a thorough consideration of Walker, his crime [of capital murder during the commission of sexual battery of teenager] and the sentence imposed in this case, as compared to ... all other death penalty cases, indicates the death penalty is proportionate").

22 Because neither aggravating circumstance was found to be invalid, this Court does not have to address "whether the remaining aggravating circumstances are outweighed by the mitigating circumstances or whether the inclusion of any invalid circumstance was harmless error, or both." Miss. Code Ann. § 99-19-105(3)(d).

Conclusion

¶131. Garcia was competent to waive his right to a jury at sentencing. This waiver included waiving his right to appeal his motion to change venue. Still, we additionally find the trial judge's denial of this motion was not an abuse of discretion. At the sentencing hearing, the trial judge did not err in her evidentiary rulings, did not improperly consider non-record evidence, and was not disqualified by any personal bias.

Her decision that the aggravating factors outweighed the mitigating circumstances is supported by the record. And the sentence imposed—death—is proportionate compared to other similar cases. Therefore, we affirm Garcia's sentence.

¶132. **AFFIRMED.**

RANDOLPH, C.J., COLEMAN, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR. KING, P.J., CONCURS IN PART AND IN RESULT WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS, P.J.

KITCHENS, P.J., JOINS THIS OPINION.

KING, PRESIDING JUSTICE, CONCURRING IN PART AND IN RESULT:

¶133. I disagree with the propriety of using a mock jury in this, or any, criminal case to determine whether a change of venue is warranted. However, because ***983** Garcia waived this issue, any error in using a mock jury is not reversible.

¶134. "Upon filing an application for change of venue supported by two affidavits affirming the defendant's inability to receive a fair trial, there arises a presumption that an impartial jury cannot be obtained." ***Welde v. State***, 3 So. 3d 113, 118 (Miss. 2009). The State may then rebut that presumption "by proving from voir dire that the trial court impaneled an impartial jury." ***Id.*** (internal quotation marks omitted) (quoting ***Holland v. State***, 705 So. 2d 307, 336 (Miss. 1997)). The State can use voir dire of the jury venire for the specific trial to rebut the presumption because "[i]t is fundamental and essential to our form of government that all persons charged with a crime have the right to a fair trial by an impartial jury." ***White v. State***, 495 So. 2d 1346, 1348 (Miss. 1986). In sum, the State can rebut the presumption with voir dire of the actual jury venire for the defendant's criminal trial, because the defendant is entitled to have a fair and impartial trial jury. A mock jury does not suffice, as that jury will not be the same jury that tries the defendant. It should never be a substitute for ensuring the impartiality of the impaneled jury for the defendant's trial. Moreover, it should never be an excuse for a trial court to make a less-than-complete venue analysis; in other words, a trial court should not simply rely on its assessment of the mock jury and fail to complete a thorough venue analysis. Additionally, I especially disagree with the use of a mock jury when the defendant objects to its use. The juror sample used in a mock jury may be dissimilar to the jury venire for trial. For example, the mock jury in this case was made up of thirty jurors, and it is unclear from which district they came. For trial, the court planned on creating a special jury venire by sending out six hundred juror summonses. Clearly, the dynamics of the two groups would likely be vastly different.

¶135. However, the trial court in this case did conduct a thorough venue analysis in this case. [23] Furthermore, the trial court gave Garcia the option to renew the motion to change venue once his actual jury venire was present, and Garcia waived this issue. Garcia agreed to the use of the mock jury and failed to meaningfully object to the use of the mock jury on appeal, thus waiving the issue. Even if this Court were to examine this issue under plain error review, considering the heightened standard we apply to death penalty cases, this issue would be without merit. The trial judge repeatedly told Garcia and his defense counsel that Garcia could renew his motion to change venue once the jury venire was present. [24] Thus, Garcia could have renewed his motion to ensure that his trial jury was impartial once his case had progressed to that stage of the proceedings. [25]

23 The majority outlines the trial court's analysis on these issues.

24 At one of the hearings on the motion to change venue, the trial court stated, "And of course ... [denying the motion to change venue] does not prohibit the defense from raising it again should circumstances change or should we stay here, bring in a venire and it turns out that too many folks on the venire do have fixed opinions."
At a separate hearing on various matters, the trial court stated that "the court has already ruled on the motion for change of venue. But as the parties well know if the situation changes, the defense is, of course, free to raise that again."

25 I disagree with the majority that Garcia waived his appellate challenge to the venue issue simply by pleading guilty and waiving his sentencing jury. However, the majority nonetheless analyzes the venue issue on the merits, and I agree with the majority's conclusion that the trial court did not err by denying the motion to change venue. The problematic nature of the venue issue relates to the use of the mock jury, and Garcia waived a specific challenge to the use of the mock jury by agreeing to it, by failing to renew his motion to change venue,

and by failing to meaningfully raise the issue of the mock jury on appeal."

***984** ¶136. I caution courts against using mock juries in motions for change of venue, because doing so is not a substitute for ensuring an impartial trial jury. The impartiality of the trial jury, the impartial nature of such being a right guaranteed to defendants, can only be determined by considering the actual trial jury venire. However, the use of a mock jury in this case did not prevent Garcia from raising the issue again once presented with his trial jury venire, as the trial court specifically expressed that he could raise his motion when faced with his venire. Further, Garcia waived the issue. Thus, I concur in part and in result.

DEATH CASES AFFIRMED BY THIS COURT

APPENDIX

Abdur Rahim Ambrose v. State, 254 So. 3d 77 (Miss. 2018).

Curtis Giovanni Flowers v. State, 240 So. 3d 1082 (Miss. 2017), *rev'd and remanded*, —— U.S. ——, 139 S. Ct. 2228, 204 L. Ed. 2d 638 (2019).

Timothy Nelson Evans v. State, 226 So. 3d 1 (Miss. 2017).

James Cobb Hutto III v. State, 227 So. 3d 963 (Miss. 2017).

David Cox v. State, 183 So. 3d 36 (Miss. 2015).

David Dickerson v. State, 175 So. 3d 8 (Miss. 2015).

Timothy Robert Ronk v. State, 172 So. 3d 1112 (Miss. 2015).

Curtis Giovanni Flowers v. State, 158 So. 3d 1009 (Miss. 2014), *vacated*, —— U.S. ——, 136 S. Ct. 2157, 195 L. Ed. 2d 817 (2016).

Caleb Corrothers v. State, 148 So. 3d 278 (Miss. 2014), *leave to seek PCR granted in part and denied in part*, 255 So. 3d 99 (Miss. 2017).

Jason Lee Keller v. State, 138 So. 3d 817 (Miss. 2014), *leave to seek PCR granted in part and denied in part*, 229 So. 3d 715 (Miss. 2017).

Leslie Galloway III v. State, 122 So. 3d 614 (Miss. 2013).

Bobby Batiste v. State, 121 So. 3d 808 (Miss. 2013), *leave to seek PCR granted*, 184 So. 3d 290 (Miss. 2016).

Roger Lee Gillett v. State, 56 So. 3d 469 (Miss. 2010).

Moffett v. State, 49 So. 3d 1073 (Miss. 2010).

Pitchford v. State, 45 So. 3d 216 (Miss. 2010).

Goff v. State, 14 So. 3d 625 (Miss. 2009).

Wilson v. State, 21 So. 3d 572 (Miss. 2009).

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King v. State, 960 So. 2d 413 (Miss. 2007).

Bennett v. State, 933 So. 2d 930 (Miss. 2006).

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Walker v. State, 913 So. 2d 198 (Miss. 2005).

985** ***Le v. State, 913 So. 2d 913 (Miss. 2005), *leave to seek PCR denied*, 967 So. 2d 627 (Miss. 2007), *leave to seek second PCR granted*, 2013-DR-00327-SCT (Miss. Jan. 26, 2016).

Brown v. State, 890 So. 2d 901 (Miss. 2004).

Powers v. State, 883 So. 2d 20 (Miss. 2004)

Branch v. State, 882 So. 2d 36 (Miss. 2004).

Scott v. State, 878 So. 2d 933 (Miss. 2004).

Lynch v. State, 877 So. 2d 1254 (Miss. 2004).

Dycus v. State, 875 So. 2d 140 (Miss. 2004).

Byrom v. State, 863 So. 2d 836 (Miss. 2003).

Howell v. State, 860 So. 2d 704 (Miss. 2003).

Howard v. State, 853 So. 2d 781 (Miss. 2003).

Walker v. State, 815 So. 2d 1209 (Miss. 2002). *following remand.

Bishop v. State, 812 So. 2d 934 (Miss. 2002).

Stevens v. State, 806 So. 2d 1031 (Miss. 2002).

Grayson v. State, 806 So. 2d 241 (Miss. 2002).

Knox v. State, 805 So. 2d 527 (Miss. 2002).

Simmons v. State, 805 So. 2d 452 (Miss. 2002).

Berry v. State, 802 So. 2d 1033 (Miss. 2001).

Snow v. State, 800 So. 2d 472 (Miss. 2001).

Mitchell v. State, 792 So. 2d 192 (Miss. 2001).

Puckett v. State, 788 So. 2d 752 (Miss. 2001). * following remand.

Goodin v. State, 787 So. 2d 639 (Miss. 2001).

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Manning v. State, 765 So. 2d 516 (Miss. 2000). *following remand.

Eskridge v. State, 765 So. 2d 508 (Miss. 2000).

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Puckett v. State, 737 So. 2d 322 (Miss. 1999). *remanded for ***Batson*** hearing.

Manning v. State, 735 So. 2d 323 (Miss. 1999). *remanded for ***Batson*** hearing.

Hughes v. State, 735 So. 2d 238 (Miss. 1999).

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Smith v. State, 729 So. 2d 1191 (Miss. 1998).

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Jordan v. State, 728 So. 2d 1088 (Miss. 1998).

Gray v. State, 728 So. 2d 36 (Miss. 1998).

Manning v. State, 726 So. 2d 1152 (Miss. 1998).

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Bell v. State, 725 So. 2d 836 (Miss. 1998), *post-conviction relief granted in part and denied in part*, 66 So.3d 90 (Miss. 2011).

Evans v. State, 725 So. 2d 613 (Miss. 1997).

986** ***Brewer v. State, 725 So. 2d 106 (Miss. 1998).

Crawford v. State, 716 So. 2d 1028 (Miss. 1998).

Doss v. State, 709 So. 2d 369 (Miss. 1996).

Underwood v. State, 708 So. 2d 18 (Miss. 1998).

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Wells v. State, 698 So. 2d 497 (Miss. 1997).

Wilcher v. State, 697 So. 2d 1087 (Miss. 1997).

Wiley v. State, 691 So. 2d 959 (Miss. 1997).

Brown v. State, 690 So. 2d 276 (Miss. 1996).

Simon v. State, 688 So. 2d 791 (Miss.1997).

Jackson v. State, 684 So. 2d 1213 (Miss. 1996).

Williams v. State, 684 So. 2d 1179 (Miss. 1996).

Davis v. State, 684 So. 2d 643 (Miss. 1996).

Taylor v. State, 682 So. 2d. 359 (Miss. 1996).

Brown v. State, 682 So. 2d 340 (Miss. 1996).

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****Jones v. State***, 517 So. 2d 1295 (Miss. 1987); ***Jones v. Mississippi*,** 487 U.S. 1230, 108 S.Ct. 2891, 101 L.Ed.2d 925 (1988) (vacating and remanding); ***Jones v. State***, 602 So. 2d 1170 (Miss. 1992) (remanding for new sentencing hearing).

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All Citations

300 So.3d 945

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APPENDIX B
to
Petition for Writ of Certiorari

Unpublished order denying rehearing dated September 10, 2020.

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
Office of the Clerk

D. Jeremy Whitmire
Post Office Box 249
Jackson, Mississippi 39205-0249
Telephone: (601) 359-3694
Facsimile: (601) 359-2407

(Street Address)
450 High Street
Jackson, Mississippi 39201-1082

e-mail:sctclerk@courts.ms.gov

September 10, 2020

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 10th day of September, 2020.

Supreme Court Case # 2017-DP-00504-SCT
Trial Court Case # B2401-15-500

Alberto Julio Garcia a/k/a Alberto J. Garcia a/k/a Alberto Garcia v. State of Mississippi

The Motion for Rehearing filed by Appellant is denied.

* NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS *
If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

Please note: Pursuant to MRAP 45(c), amended effective July, 1, 2010, copies of opinions will not be mailed. Any opinion rendered may be found by visiting the Court's website at: https://courts.ms.gov, and selecting the appropriate date the opinion was rendered under the category "Decisions."

APPENDIX C
to
Petition for Writ of Certiorari

Unpublished mandate issued September 17, 2020.

MANDATE
SUPREME COURT OF MISSISSIPPI

To the Harrison County Circuit Court 1st Judicial District - GREETINGS:

In proceedings held in the Courtroom, Carroll Gartin Justice Building, in the City of Jackson, Mississippi, the Supreme Court of Mississippi entered a judgment as follows:

Supreme Court Case # 2017-DP-00504-SCT
Trial Court Case #B2401-15-500

Alberto Julio Garcia a/k/a Alberto J. Garcia a/k/a Alberto Garcia v. State of Mississippi

Thursday, 14th day of May, 2020
Affirmed. Harrison County taxed with costs of appeal.

Thursday, 10th day of September, 2020
The Motion for Rehearing filed by Appellant is denied.

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

I, D. Jeremy Whitmire, Clerk of the Supreme Court of Mississippi and the Court of Appeals of the State of Mississippi, certify that the above judgment is a true and correct copy of the original which is authorized by law to be filed and is actually on file in my office under my custody and control.

Witness my signature and the Court's seal on September 17, 2020, A.D.

D. Jeremy Whitmire

CLERK

APPENDIX D
to
Petition for Writ of Certiorari

Competency Hearing Exhibit D-1, November 17, 2016 Report of court appointed forensic psychologist Robert Storer, Ph.D.

R.M. Storer, Ph.D.
Clinical & Forensic Psychologist
8261 Summa Ave, Suite C
Baton Rouge, LA 70809
225-255-0387 / psychsvcs@gmail.com

November 17, 2016

Ms. Angela Broun Blackwell
Assistant Public Defender
Office of the Public Defender
2600 24th Avenue
PO Drawer CC
Gulfport, MS 39502

Ms. Blackwell,

I am writing in response to your request that I summarize my concerns regarding deficits in Mr. Garcia's competence-related abilities, the foundation and rationale underlying those concerns, and my recommendations on how to address and hopefully remediate those deficits. Please note that this is a very brief summary of some of the data and not comprehensive. My full report on Mr. Garcia's competence will be comprehensive and include all of the relevant data that I am aware of.

It is my opinion that Mr. Garcia has significant deficits in his ability to attend to court proceedings and participate in his own defense due to symptoms of an anxiety disorder. It also is my opinion that his ability to make reasonable, rational decisions in his legal situation is likely also impaired by that anxiety disorder.

Given that the Mississippi Supreme Court stated in Crawford v Mississippi (2001) that a defendant who is competent to stand trial is one who, "[I]s able to perceive and understand the nature of the proceedings; (2) who is able to rationally communicate with his attorney about the case... (4) who is able to testify in his own defense if appropriate; and (5) whose ability to ratify the foregoing criteria is commensurate with the severity and complexity of the case," to the degree that Mr. Garcia is: Unable to attend to proceedings and therefore unable to meaningfully assist in his defense; Unable to testify in his own defense; And his ability to make reasonable and rational decisions in his legal situation is impaired, he is not competent to stand trial at this time.

The foundation for this opinion lies in Mr. Garcia's history as reported by multiple sources, records from Miami Children's Hospital, and your confirmation regarding Mr. Garcia's statements regarding his ability to attend to and participate in legal proceedings.

Regarding Mr. Garcia's history, multiple informants report that Mr. Garcia's home environment was quite unstable. His mother was reported to be largely absent and neglectful when present, possibly due in part to her involvement with drugs. Mr. Garcia's mother is also described as

being involved in abusive relationships with substance abusing men, exposing Mr. Garcia to physical violence in the home. In fact, Mr. Garcia was removed from his mother's custody and placed in the Foster Care system for a period of time. Unfortunately there are reports that Mr. Garcia did not adjust well to the Foster Care system. This type of environment is associated with higher levels of mental health problems and anxiety in particular.

Informants typically described Mr. Garcia as a loner, not only uninterested in interacting with others and avoidant of it, but sometimes responding violently when attempts were made to force him to interact. For example, Mr. Garcia's older brother, Mr. David Santana, reported:

> If Alberto is off doing his own thing... not messing with nobody, wants to be left alone, leave him alone... With my sister... Mom wanted us to clean the house... She was sweeping and my brother had a Play Station... She was sweeping the floor and instead of saying 'Excuse me,' she just swept and hit the control cable... Messed up the game... He got really upset... Grabbed the controller and threw it at my sister and he didn't stop hitting her till he was satisfied... He was what, probably about eight? Seven or eight. From there on we knew... not to mess with him when he was busy... in his little land or whatever.

Mr. Garcia and collaterals indicated that while somewhat odd and a loner, Mr. Garcia did not have significant conflicts within his family until around age six or seven. Asked if there was something that changed around this time leading to him having more frequent and more severe problems, Mr. Garcia reported that the family's living circumstances changed such that while he had previously been able to get off by himself and away from others, in their new living arrangements he could not do so and this was intolerable for him.

Records from Miami Children's Hospital note that at age 8 he was treated there from June 10, 1993 to October 8, 1993. His admission diagnosis was "Psychotic Disorder NOS," based on the reports of his mother, but those records do not document hallucinations, delusions, affective disturbance, or disorganized thoughts or behavior which are an integral part of a psychotic disorder. Instead, those records document behavioral disruptions and not a severe mental illness.

During my evaluation of him, Mr. Garcia reported that he has always had an extremely high level of anxiety triggered by being around people. Asked to specify what it is that he is fearful of when around others, Mr. Garcia replied he is simply, "Uncomfortable," and if he cannot get away by himself he begins to have tremors, shortness of breath, and chest pain. Asked when he last experienced these symptoms, Mr. Garcia replied, "In court... I told them and they said to try and relax but I couldn't... Told them to not let anyone touch me."

Mr. Garcia's reporting regarding symptoms of a Panic Attack during court proceedings was later confirmed by your report. Not knowing what Mr. Garcia had reported to me, you stated in an email that during a hearing:

> Alberto seemed to become anxious or panicked. He told Lisa that he was not feeling well and asked that no one touch him. During the next motion, Detective Chris Werner testified about Alberto's statements to him. Again, these were very damning statements

and Alberto was again anxious after hearing them. Alberto's demeanor never wavered—he sat still, had his head down, and did not speak to anyone during these hearings. At lunch time, he was provided with some sort of anxiety medication.

After the conclusion of our final motion (which was to change venue), Judge Dodson spoke with Alberto on the record. Alberto stated that he had an "anxiety issue" right before lunch, but he was seen by the nurse, and was feeling ok. He was very polite to Judge Dodson (as he always has been).

Therefore the concern that Mr. Garcia's anxiety and panic attacks could interfere with his ability to attend to and participate in court proceedings has actually been demonstrated on at least one occasion thus far.

Regarding the impact of anxiety symptoms on Mr. Garcia's ability to make reasonable, rational decisions in his legal situation, when asked about his preference regarding sentencing if he is convicted of Capital Murder, Mr. Garcia stated that he prefers to be given the death penalty rather than life in prison. Asked to explain his rationale for this, Mr. Garcia reported that with a life sentence, he would be around a number of other inmates with no way to get away from them. If given the death penalty he would spend 15 years or so on death row, in a single cell, and not have to be around others.

Asked if his preference was due to fear that he would be treated badly by other prisoners because of the nature of his alleged offense, Mr. Garcia said that he expects that but his primary concern is having to be around others without the ability to get away.

Therefore, it is my opinion that Mr. Garcia's ability to attend to and participate in court proceedings is currently impaired by symptoms of anxiety. Those symptoms of anxiety also may be impairing his ability to make reasonable rational decisions in his legal situation.

My recommendation is that Mr. Garcia be treated at the jail for his anxiety symptoms and be re-evaluated for competence after his symptoms have been effectively treated.

A full report of Mr. Garcia's competence evaluation will be ready in approximately two weeks.

Sincerely,

R.M. Storer, Ph.D.
Clinical & Forensic Psychologist

APPENDIX E
to
Petition for Writ of Certiorari

Transcript of Competency hearing of November 22, 2016
T. 371-411

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VERSUS CAUSE NO. 15-500

ALBERTO GARCIA DEFENDANT

TRANSCRIPT OF THE PROCEEDINGS HAD AND DONE IN THE HEARING OF THE ABOVE STYLED AND NUMBERED CAUSE, BEFORE THE HONORABLE LISA DODSON, CIRCUIT COURT JUDGE OF THE SECOND CIRCUIT COURT DISTRICT OF THE STATE OF MISSISSIPPI, ON NOVEMBER 22, 2016.

APPEARANCES:

Present and Representing the State:

HONORABLE W. CROSBY PARKER
District Attorney's Office
PO Box 1180
Gulfport MS 39502-1180

Present and Representing the Defendant:

HONORABLE ANGELA BROUN BLACKWELL
Office of Public Defender
PO Box CC
Gulfport MS 39502-0860

THE COURT: All right. This is Gulfport Cause 15-500. As I understand the issue this morning has to do with a possible competency issue; is that correct, Ms. Blackwell?

MS. BLACKWELL: It is, Your Honor.

THE COURT: All right. And you have a witness?

MS. BLACKWELL: We do, Your Honor.

THE COURT: All right. Bring him on up.

MS. BLACKWELL: Your Honor, we would call Dr. Robert Storer.

THE COURT: Come on up, sir.

(OATH ADMINISTERED)

THE COURT: All right, sir. If you'll have a seat right, there.

All right. And for the record, Ms. Blackwell, you provided to me a brief report, as I understand, it is not Dr. Storer's complete report, but it is a three-page reported dated November 17, 2016, which I have reviewed.

Did the state also received that or no?

MS. BLACKWELL: They did not, Your Honor.

THE COURT: All right. Mr. Parker, you understand, though, what the issue is this morning?

MR. PARKER: Yes, Your Honor. I received a letter from Ms. Blackwell on

November 17th that just briefly described that Mr. Storer had a concern regarding an anxiety disorder.

And that's about the extent of the information. But I also asked Ms. Blackwell to go ahead and put this in front of the court immediately so that we could get the information out, whatever it may be.

THE COURT: All right. So you feel like you're prepared to go forward.

MR. PARKER: Yes, Your Honor.

THE COURT: All right. Ms. Blackwell, go ahead.

MS. BLACKWELL: Your Honor, just before I begin questioning Dr. Storer, I would like to have that brief summary, if there's anyway to have that filed under seal in this case whether it's just for the purposes of this hearing.

THE COURT: Well, generally I do an order and file all of them under seal as I receive them. I simply have not had the opportunity to do that since I received this one, but certainly it will be filed in this record under seal. Now, do you want to make is a separate exhibit to the hearing or no?

MS. BLACKWELL: If I could do that under seal, yes, Your Honor, I would like to.

THE COURT: And then, Dr. Storer, am I

correct, this three pages is just a brief summary, it's not the full report, correct?

DR. STORER: That's correct, Your Honor. It was meant as a summary for the attorney just to let her know what my opinion was at the time.

THE COURT: All right. Go ahead, Ms. Blackwell.

MS. BLACKWELL: Thank you, Your Honor.

(OATH ADMINISTERED)

EXAMINATION BY MS. BLACKWELL:

Q. Would you state your name please.

A. Sure. Robert M. Storer. S-T-O-R-E-R.

Q. And where do you reside?

A. I reside in Baton Rouge, Louisiana.

Q. What's your profession?

A. I am a clinical and forensic psychologist licensed in both Mississippi and Louisiana.

Q. Could you give the court the benefit of your education, training, and experience?

A. Gladly. I have a bachelor's degree from Old Dominion University in Norfolk, Virginia. And that was in counseling with a minor in psychology. I have a master's degree in psychology from Old Dominion University.

I have a doctorate degree from Jackson State University in Jackson, Mississippi. I completed a one-year internship at Mississippi State Hospital as part of that doctoral training. I then did a one-year

post-doc experience at Mississippi State Hospital specifically focusing on criminal forensic evaluations.

Since then, I have resided in Baton Rouge where I worked for the state at the state hospital. I was the chief psychologist for the maximum security building at East Louisiana Mental Health Systems when I left there to go completely into private practice as a criminal forensic specialist.

Q. And you mentioned you are licensed in forensic psychology?

A. Well, the license is in clinical psychology and forensic. It's a specialty that I focus on.

Q. And you're licensed here in Mississippi?

A. I am.

Q. Are you a member of any sort of professional organizations?

A. Several. I'm a member of the American Psychological Association. I'm a member of the Mississippi Psychological Association. For several years I was on the executive board for the Louisiana Psychological Association, and there was the founding member for the committee on legal and ethical issues.

I've also served on the Mississippi Psychological Association in Psychology and Law task force just up until this year.

Q. Have you ever had the occasion to testify as an expert in the field of forensic psychology?

A. Quite often.

Q. Just an estimate, how many times?

A. I was chastising myself this morning for not bringing my vitae. This was on such short notice, I failed to do that. I would guess somewhere in the neighborhood of at least 40 times.

Q. Have you ever testified as an expert in the field of forensic psychology in this jurisdiction?

A. I have.

Q. About how many times would you say here in this jurisdiction?

A. In this courthouse I would say somewhere between three and six times. In this jurisdiction, you mean this county?

Q. In Harrison County.

A. Yeah, probably three to six times I think.

Q. Okay.

MS. BLACKWELL: Your Honor, at this time the defense would offer Dr. Robert Storer as an expert in the field of forensic psychology.

THE COURT: Mr. Parker?

MR. PARKER: No, objection.

THE COURT: All right. He will be accepted as an expert in that field.

BY MS. BLACKWELL:

Q. Dr. Storer, have you had the opportunity to conduct psychological testing on Alberto Garcia in this case?

A. I have.

Q. Do you see Alberto Garcia in the courtroom

today?

A. I do. He is seated on the bench next to Ms. Collums.

Q. What's he wearing?

A. He's wearing a jail issued jumpsuit with what they commonly refer to as Crocks.

Q. Okay.

MS. BLACKWELL: Your Honor, would the record reflect Dr. Storer has identified Alberto Garcia?

THE COURT: The record will reflect.

BY MS. BLACKWELL:

Q. You have conducted forensic testing on Mr. Garcia, have you not?

A. I've conducted a forensic evaluation that has consisted of several interviews along with psychological testing and information from available records as well as some six to eight collateral informants thus far.

Q. And by collateral informants, do you mean family members and friends?

A. Correct.

Q. Okay. How many hours would you say you have spent interviewing or speaking to Mr. Garcia?

A. Well, I've seen him on three, actually four occasions. I would say somewhere in the neighborhood of ten to twelve hours.

Q. Okay. Have you reviewed reports and documents related to Mr. Garcia in this case?

A. I have.
Q. Could you tell the court what documents or reports you have reviewed?
A. Probably the most voluminous records have been detailed records from Miami Children's Hospital where Mr. Garcia was treated for about a two-month period at age eight.
Beyond that, it has been difficult to gather records. Multiple informants have confirmed that he was in the foster care system for some time, but no actual records have been yet made available regarding his involvement there.
Multiple informants have said that there was child protective services involvement, but, again, those records have not been able to be produced. It's also been reported that he's been hospitalized at a couple of different places, and as of yet, I've not been able to get ahold of those records either.
Q. How many hours would you say you've worked on Mr. Garcia's case thus far?
A. Probably somewhere around 40 hours thus far.
Q. Okay. Do you have an opinion based on your education, training, and experience to a reasonable degree of psychological certainty as to whether or not Mr. Garcia is currently competent to stand trial?
A. I do.
Q. And what is your opinion?
A. My opinion currently is that Mr. Garcia is

not competent to stand trial. And would you like me to explain that?

Q. I would. That was going to be my next question.

A. Mr. Garcia has no deficits whatsoever regarding his intellectual functioning. He's an averagely bright person, above average for forensic population.

He has a good grasp intellectually, has a good rational understanding of the nature and object of the proceedings against him. However, going back all the way into his childhood, there is a consistent theme of anxiety that has interfered with his performance even to the degree that, according to him, the reason he dropped out of school was due to his anxiety and not being willing to stay inside a classroom with multiple others around him.

This anxiety has resulted in at least one time that he actually had a panic attack during court proceedings that I'm aware of. And, you know, anxiety exists in a -- it's not -- the relationship between anxiety and performance exists in a curvilinear relationship. You need to have some anxiety to perform well.

But beyond a certain point, it interferes significantly. And the description both from Mr. Garcia and from his defense team independently was that during Mr. Garcia's periods of anxiety in the court, he's unable to attend to proceedings. He doesn't

participate. He's not consulting with his attorneys. He's not able to interact with them. And so he really cannot, in a meaningful way, assist in his defense.

Beyond that I have some concerns about his ability to make reasonable, rational decisions regarding his legal situation based upon that anxiety.

Specifically, when I asked him about his preference if convicted of this charge, he stated to me that his preference was to receive the death penalty rather than life in prison.

Now, someone who is fearful of the prison environment possibly because of the charge, that could be perfectly reasonable, rational decision making. But when I questioned him for the foundation of that decision, that was not what was driving it.

What appeared to be driving it was, again, his anxiety and what he said was, I can handle being alone, locked up by myself, that wouldn't bother me. It would be having to be around all the other inmates for whatever number of hours it was per day.

I even asked him what his understanding was of conditions on death row versus a life in prison. And what he described to me was actually pretty realistic. It was not Illogical, irrational. He talked about being in a cell possibly with only one other person and that would be okay, but that then for a number of hours, the cell would be open and he would be expected to be mingling with others, and that was absolutely intolerable for him.

So in my opinion Mr. Garcia's ability to participate in legal proceeding, to attend to what's going on, and to actually consult and work with defense counsel over the course of a trial is significantly impaired by his anxiety. And I fear that his decision making may also be effected by that anxiety.

Q. And that's based on his statements to you regarding sentencing?

A. Correct. That latter part, the decision making component, yes, that's based on his statements regarding sentencing.

Q. As far as do you know what medications Mr. Garcia is taking at the ADC right now?

A. Well, there seems to be some confusion about that. When I got the medical records from the jail, the only thing that I noted that he was being prescribed was mirtazapine, which is also known as Remeron which is an antidepressant and melatonin which is a asleep aid.

I was not aware of any other medications that he was getting. I've gotten some information from you and from him, however, that he apparently is also being prescribed Vistaril which is an anxiolytic, but it's a short-acting anxiolytic.

So to the best of my knowledge, those are the only medications that he's currently getting. I'm not a physician, and I don't prescribe medicines. But I am a mental health expert, and I know that in this kind of situation where somebody has long-standing

anxiety that is crippling them in this way that what's needed is a long-acting anxiolytic rather than a short-acting, again, going back to that curvilinear relationship, while it is going to be competence related impairing -- that's a horrible sentence. I apologize.

While it is going to be an impairment in his competence related abilities for him to have highly elevated anxiety during court proceedings, it would be also impairing if he had no anxiety at all. So if he simply is given an anxiolytic prior to court proceedings, then he'll be calm, but he'll be too calm if you follow me.

Q. Yes.

A. I believe that what needs to happen and, again, I'm not a physician and I don't prescribe medicine, but I believe what needs to happen is that Mr. Garcia needs treatment for his anxiety disorder with a long-acting anxiolytic so that it can bring the anxiety level down and be a steady state.

Q. And just for the record, what is an anxiolytic?

A. I'm sorry. An anxiolytic is any kind of medicine really that reduces anxiety. So the usual, the usual drugs that are used to treat anxiety like this are benzodiazepines.

They are not the first choice for people that are not incarcerated because of their potential for abuse as well as the potential for interactions

with other drugs of abuse. Overdoses when combined with alcohol is a big problem.

In Mr. Garcia's setting, however, the controlled environment, the fact that he would not be dispensing the medication, I would think that the benzodiazepines would probably be a good choice. But, again, I'm not a physician, and I don't prescribe medicine.

Q. Yes, sir. As far as restoring Mr. Garcia's competence to stand trial, is it your professional opinion that this anxiety could be treated locally at the Harrison County ADC?

A. It is. I do not believe Mr. Garcia needs to go anywhere else for treatment. I think that if the jail was to provide this treatment that within 30 days I would think a reevaluation would show a very different outcome.

Q. So you would agree that at this point there's no need to transport him to the state hospital at Whitfield?

A. No, ma'am. I don't think there's any reason to do that.

Q. Okay. And just to reiterate, in your professional experience, benzodiazepines could be provided to Mr. Garcia to diminish his anxiety.

A. I think that that would be a good choice.

Q. Okay. And in your professional experience, about 30 days you would see the effects of maybe a decrease in anxiety?

A. Correct.
Q. And at that point you would like the opportunity to reevaluate this issue?
A. Yes, ma'am.
Q. As far as the anxiety?
A. That's correct. I certainly am prepared to write this competence report right now. It will take me a couple of weeks to get it together. There's a lot of information from informants. There's a lot of the records for Miami Children's Hospital that I think need to be included.

It makes more sense to me that if the jail is going to do treatment, that I would -- that it would be better more efficient use of time and resources to simply hold off and go see him again in about 30 days and see where he's at then.

Q. Okay.

MS. BLACKWELL: Nothing further, Your Honor.

THE COURT: All right. Mr. Parker.

MR. PARKER: Yes, Your Honor, briefly.

EXAMINATION BY MR. PARKER:

Q. And, Dr. Storer, just so I'm -- I completely understand, there's no intellectual deficits of Mr. Garcia, correct?
A. That's correct. I actually did IQ testing, and he scored in the average range.
Q. And as far as you said he had a good grasp of the legal proceedings?

A. Intellectually, yes, sir.
Q. Okay. And a good grasp of what he's facing and what the charges are?
A. Yes, sir.
Q. And your concern is anxiety. Is it anxiety that he feels when he's in the actual courtroom?
A. Actually the anxiety report goes back to childhood. He told me in interviews that he was always uncomfortable being around others. But, you know, I -- you never accept a single source of information in these kind of evaluations. You always look for convergence of the data.

And literally every collateral informant that I talked to described him as a loner, somebody who didn't like being around others. If he was forced to be around others, he became irritable, and there was some reports of his actually getting in fights with his relatives when they did try to interact with him when he wanted to be left alone.

In the records from Miami Children's Hospital, this was also reflected. So it's a long-standing issue of anxiety and not -- he calls it comfortable. But what he describes is actually panic attack symptoms that are increasing the more he has to spend time around others.

So it's not just the anxiety coming into the courtroom, although, coming into the courtroom certainly elevates that anxiety to the point that he doesn't attend to what's going on and makes it

difficult, if not impossible, for him to truly participate.

Q. And I guess that's what I'm getting to the point is, the manifestation of this anxiety is his inability to participate in the courtroom?

A. That's the worst part of it, yes, sir. That's the part I'm most sure of.

Q. Because you're not saying that he can't interact with his defense counsel or things like that. You're most concerned with the manifestation of when or if he may shutdown during courtroom proceedings. Does that make sense?

A. That's a fair statement. Although I will say, again, that I'm concerned that his anxiety and his long-standing untreated anxiety, he's made some attempts apparently to try and treat it on his own with substance use, but really this has been untreated for a long long time.

And I'm afraid also that that untreated anxiety is affecting his decision making when consulting with his legal team as well.

Q. So your recommendation is to look at certain types of medication that might be long lasting than the short anxiety medication or the short burst of anxiety medication he's getting now?

A. That's exactly right.

Q. So to go forward, we need to get this information to his treating physician?

A. At the jail.

Q. At the jail. And you think, based on your experience, that this could have an affect to be able to get him to where he's able to medicate the anxiety.

A. That's correct. I believe that with treatment with a long-lasting anxiolytic, something like a benzodiazepine that given 30 days of treatment that that will make a big difference and that he, I think, will be restored to competence at that point.

I do not think he's competent right now. I think that medication would restore him to competence.

MR. PARKER: Your Honor, that's all the questions I have.

THE COURT: Ms. Blackwell, any follow-up?

MS. BLACKWELL: No, Your Honor.

THE COURT: All right.

EXAMINATION BY THE COURT:

Q. Dr. Storer, let me ask a couple of things. First of all, you note in your report some information with regard to a prior court hearing. And you in fact testified to that he had an anxiety attack in court.

A. Yes, ma'am.

Q. So let me ask you a couple of things about that. First of all, are you aware that he was not given his regular medication that day before he came to court?

A. Well, and, again, I go about back to there seems to be some confusion at least on my part about what it is he is prescribed because my understanding

from the medical records was that he only getting an SSRI antidepressant, Remeron, which does have some anxiolytic effect but certainly not enough with someone with an anxiety disorder such as what I believe Mr. Garcia has.

And the only other medication I was aware of was the melatonin for sleep. So I was not even aware that he was being given Vistaril until just recently.

Q. All right. And you're aware that he had no problem actually in the courtroom. There was no anxiety attack, no panic attack, no misbehavior of any kind on his part. He simply related to the attorneys at the lunch break that he was feeling uncomfortable.

A. Well, ma'am, my understanding is that while Mr. Garcia did not cause any kind of disruption or anything like that, that his demeanor was that he was sitting with his head down, not looking at things, not asking questions, and that that kind of has been the consistent theme, that while he's not presenting any kind of behavioral problem, that he's also really not participating. He's not interacting with his attorneys, he's not paying attention.

I understand that -- the report to me was that after he did receive the Vistaril, that he was able to engage in a back and forth interaction with you during that hearing and that he was fine for that.

Q. So what you're calling an anxiety attack is he's sitting there not talking with his attorneys and

reacting. Is that what you're calling an anxiety attack?

A. No, ma'am. I'm calling an anxiety attack when he reports to me that on that specific occasion and on others while in court that he begins to have tremors, shortness of breath, chest pain, racing heart.

And, unfortunately, those symptoms don't necessarily show themselves to others unless you pay attention to them. People who have rare panic attacks when they get to that point will usually cry out and ask for help. Sometimes they go to the emergency room and show up there.

People who are actually used to having those kind of panic attacks have their own ways of dealing with it, and Mr. Garcia's way seems to be to draw in on himself, isolate himself from people as much as possible and to just wait it out.

Q. Do you find it unusual that a defendant on a felony change, and in particular on a capital murder charge, would have those symptoms?

A. No, ma'am. I don't find that unusual at all. But, again, there is a long-standing history of anxiety and isolation as a result of that anxiety which has me concerned about Mr. Garcia's competence and his ability to attend to and participate because of that.

Q. All right. And you commented a moment ago you understood he responded, and you understand each and every time he has responded appropriately to the questions asked?

A. Yes, ma'am.

Q. And he's asked questions, et cetera. He has indicated he fully understands what's going on.

A. I do know that he indicated that he understands what's going on, and I don't have any doubts about his understanding what's going on. Again, intellectual functioning is fine, rational understanding is fine.

This is not a severe and persistent mental illness of the type that would alter someone's perception of reality. But what it does do is it shuts him down to where he's not paying attention and listening and processing information, and he's not able to ask questions of his attorneys as appropriate or point things out.

I'm not aware that he has been able to ask questions during hearing prior to this.

Q. All right. And so with regard to his ability to participate, generally when we are in trial, we take a break every hour to hour and a half, sometimes a little longer depending on how the testimony's going.

With that timeframe with him being able to take those breaks if he wanted to be by himself, if he wanted to speak with his attorneys, whatever, during those breaks, would that make a difference to his ability to function in the courtroom?

A. I'm afraid that in my opinion it would not make enough of a difference. While it would allow for

a respite for a break from the anxiety, my concern is that the anxiety during proceedings would prevent him from letting his attorneys know if a witness's testimony was inaccurate, would prevent him from thinking clearly about how to challenge evidence that was being presented that he said was not accurate.

Q. Because why? That's what I need you to explain to me. Why would that prevent him from doing that?

A. When someone is particularly anxious and on the verge of a panic attack, what they do is they focus all of their attentional resources either inwardly on themselves to try and sort out what's going on or in a hypervigilant way looking for threats.

Anything that's not a threat is dismissed. And so you end up with someone sitting there who is paying attention to what's going on inside and hypervigilant for threats, but not paying any attention to what's being said, not thinking conceptually, not thinking about evidence that's been presented.

Q. Okay. I have another question to ask you.

A. Yes, ma'am.

Q. You have part of your decision or opinion, as I understand, about his decision-making ability rests largely in your question to him about his preference with regard to sentencing.

A. Yes, ma'am.

Q. Is not his preference a valid choice?

A. It is if it is based on logical, rational

reasoning.

Q. Tell me what's illogical and irrational about someone wanting to have their own cell with their own television, their own music, their own bathroom or not a bathroom, a toilet, et cetera. Tell me why that's irrational.

A. It may not --

Q. And before you answer that, doctor, let me tell you that for many years I have expressed the opinion that if I were in this position, I would rather have the death penalty than a life without for several reasons. One of which is that I would have my own cell where no one else would be and my own things that no one else would bother.

I don't find that at all irrational. I find it very much like those who perhaps have a life-threatening disease, make a choice either for treatment or no treatment. So tell me why it's irrational in this case.

A. Well, in this case, ma'am, these are great questions, and these are the questions that I struggled with during this evaluation. And you'll note that I have qualified myself by saying his decision making may be effected.

Q. I understand that. I'm just trying to understand why you feel that way is where I'm going with this. I'm not saying you're right, you're wrong, I'm right, I'm wrong. I'm simply telling you I think it's a valid decision. Folks who have cancer sometimes

choose not to have treatment.

A. Correct.

Q. Others choose every treatment they can find. So I need -- I'm trying to get you to explain to me where you are with this.

A. The deciding point, the rubicon, if you will, in my mind is is this decision primarily based upon someone's individual preferences. Is it based just on personality. It is based just on what they like or don't like or is it being driven by some type of mental illness.

And an anxiety disorder is a mental illness. It goes beyond simple preference. If Mr. Garcia gets appropriate treatment for the anxiety disorder and this is still his preference, then that's fine as far as I'm concerned.

My concern right now, and I'm not certain of it. I wouldn't even say this to a reasonable degree of psychological certainty because it's not there. But I do have a concern that his anxiety disorder and his decision making in his legal situation are conflating in a way that suggests impairment.

I don't know that for certain. I do know for certain that his ability to attend and participate is being impaired. I'm concerned that his decision making may also be impaired.

Q. So your concern is that rather than a preference or a well thought out, this is what would work best for me, instead of that it's, just I don't

want to be around people, so this is my option.

A. Stemming from his anxiety disorder, yes, ma'am.

Q. Kind of lay person's --

A. Yes, ma'am.

Q. -- boiling it down. All right.

A. Good way to say it.

Q. All right.

THE COURT: Ms. Blackwell, any follow up to that?

BY MS. BLACKWELL:

Q. Your Honor, I just want to ask Dr. Storer, did I inform you that during that panic attack episode, as I guess we would call it, that Mr. Garcia asked that nobody touch him, he actually informed Ms. Collums of that?

A. You did. And that was actually reported to me by him as well. And that, you know, lends to me some additional validity, the fact that I've got behavioral observations from the defense team that matched up very, very well with what was reported to me by Mr. Garcia.

Q. And those were independent of one another?

A. That's correct.

MS. BLACKWELL: That's all I have, Your Honor.

THE COURT: Anything, Mr. Parker?

MR. PARKER: No, Your Honor.

THE COURT: All right. Thank you,

doctor. You can step down. All right, Mr. Garcia, can you stand up for me, please, sir.

Mr. Garcia, it sounds to me like you fully participated and talked with Dr. Storer; is that true?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. And you think that you answered all of his questions to the best of your ability?

THE DEFENDANT: Yes, ma'am.

THE COURT: Is it what he's saying what you feel? Do you think he's correct?

THE DEFENDANT: Yes.

THE COURT: All right. So tell me with regard to -- you know what anxiety is, right?

THE DEFENDANT: Yes, I do.

THE COURT: All right. Tell me with regard to that, have you truly had that problem consistently for your life or has it been an on and off thing?

THE DEFENDANT: Yes, ma'am. I wouldn't attend birthday parties for myself either. I wouldn't go around large groups of people.

When all my brothers and sisters were in the living room, I would go to my bedroom. And if they were all in the room, I'd be in the living room by myself.

I never like being around a lot of people in general. And that led to a lot of

school time being missed because of it.

THE COURT: All right. And let me just ask you since you said that and Dr. Storer both said that. With regard to school time, was it the fact that you had to sit in the classroom with everybody else or was it playtime, recess time or both?

THE DEFENDANT: At recess time when I was younger, it was easier. I played by myself. I stayed away from all the other kids.

As I got older and had to be in the classroom all the time, I just couldn't handle it, ma'am. No, I couldn't do it.

THE COURT: And was that because you just didn't like people being close to you or just around you at all?

THE DEFENDANT: Just in that small confines with so many people, no, ma'am. And in groups in general, no. I had maybe three friends at most. And whenever there was more than three, I couldn't handle it.

THE COURT: Okay. All right. And let me ask you, when you would have those issues, if you went away from that, like you took a break like I was talking about, did that help? Did that seem to help and you were able to reengage or no?

THE DEFENDANT: At first, no. After

they brought me my medication and it, I guess, started kicking it, I started to calm down, I felt better and I was able to come back in. But when I first went out there, it kept getting worse and worse while I was in the cell.

THE COURT: Okay. I understand that. And when you have one of these, and Ms. Blackwell called it a panic attack. I don't know if that's a proper. But that's what lay people refer to it as.

But when you're having one of these episodes, can you tell me how it affects you as far as what your body is doing, what are you thinking, just in general. I know you can't tell me each time.

THE DEFENDANT: Like I stated to the -- Dr. Storer, my heart starts beating real hard. I feel like tingles all over. I start getting a little lightheaded. I start feeling -- it's hard to explain, like tight, and I don't want people touching me.

And it just makes me -- like I can't really explain it. It's like, don't touch me. I want to get away from everyone type of deal.

THE COURT: All right. You just want to deal with it yourself, fair enough?

THE DEFENDANT: Yes, ma'am.

THE COURT: And besides medication, what do you do to deal with that? Do just go away from people and deal with it? Do you read, do you sing?

THE DEFENDANT: When -- usually when I was younger, I played my video games. I went into a separate room, and I sit and played, and played, and played, and played and stayed focused. It would calm me down.

Or I would read. And I read incessantly. That was the number one thing I had 24/7 because I couldn't always go and play video games, I would read.

THE COURT: Right.

THE DEFENDANT: And reading would calm me down, and I would stay focused on everything. And I would just read, and read, and read.

THE COURT: Okay.

THE DEFENDANT: And I would read maybe -- if I was having issues, I would read maybe two books in a day. I read Twilight part one and part two right when I had a panic attack.

THE COURT: So it gave you -- in other words, if you concentrate on something besides yourself --

THE DEFENDANT: Yes, ma'am.

THE COURT: -- it will calm you down,

something you enjoy doing.

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. Anything else you want to tell me about this?

THE DEFENDANT: Not that I know of, ma'am.

THE COURT: All right. Now, I've asked you at every hearing, you're able to talk with your attorneys, correct? Maybe not in the courtroom, but you're able to talk with them when they come see you?

THE DEFENDANT: Yes, ma'am. And they -- when they see me, I only see maybe two to three of them at a time so I can handle that.

THE COURT: All right. When you're here in the courtroom, are you able to talk to them or you feel like that's a problem?

THE DEFENDANT: Sometimes I'm worried if I'm allowed to mostly. And sometimes I feel a little uncomfortable talking in general because I -- being surrounded by so many people, I would say a little interferes.

But if I can push myself, I can probably ask a question or two. But I'm not so sure if when actual trial happens if I can do it because I know there's going to be even more people. During my preliminary, ma'am, I -- I -- I -- couldn't even at all.

THE COURT: All right. Well, and you

know in the courtroom when you do come in for trial when you come in for trial when we get to that point, and I'm assuming at some point we will, the jurors will be in the jury box. We'll be in a different courtroom. It's that other one that you've been in.

So they'll be in the jury box. They won't be where they're close to you, right. You understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: And no one would be sitting close behind you. You understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: And so you would freely be able to speak with your attorneys. There's no rule against that as long as you're not talking loud because, of course, you don't want everybody to hear. So you understand you would have permission to do that?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you think in that situation that you would be able to do that with the breaks that we've talked about?

THE DEFENDANT: I've --

THE COURT: And it's hard to predict I know. But just give me an idea of how you're feeling right now.

THE DEFENDANT: I'm feeling fine, right now. I actually -- ma'am, they gave me a

double dose of the usual anxiety medication because they ran out of the other one. I know it's a really big pill as opposed to the small one they gave me. So I'm actually feeling okay.

THE COURT: So today you might be able to do it.

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. And reasonably with the parameters kind of that I told you, with nobody sitting close to you but perhaps your counsel, do you think you would be able to feel comfortable at least asking them questions and talking with them if you had your medicine?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. All right. Anything else you want to tell me just on this issue right now? You know I'll ask you in a moment if there's any other issues.

THE DEFENDANT: Off the top of my head, ma'am, I can't really think of one.

THE COURT: Okay.

THE DEFENDANT: Sorry.

THE COURT: Well, let me ask one more thing about this. Dr. Storer believes, and of course he can't prescribe this medicine for you. And what he said may not be the exact kind of medicine, but assuming that the

physician at the jail or the psychiatrist were to prescribe a long-acting medicine for you, whether it's the one Dr. Storer suggested or another one, would you be willing to take it?

THE DEFENDANT: Yes, ma'am. And since I've started taking the first the lithium, I was taking it, and I started wanting to take it more once I started. Before when I was refusing it, it sort of like kept making me not want to take it.

Then when they actually starting forcing me to take it and I started to want do it willingly. But then I had to switch to the antidepressant because the lithium was causing problems physically.

THE COURT: Okay.

THE DEFENDANT: Then when I got to the antidepressant, I was able to think more clearly to speak to -- I believe his name is nurse practitioner Taylor who I informed him, I said, I have a lot of anxiety issues. I still don't want to come out of my cell. And being in that large room even with just one person, that big open area causes me a lot of anxiety.

THE COURT: Okay.

THE DEFENDANT: I would run out and use the shower because the shower is an enclosed

space, and then come back out. And then I would just go back to my cell. But I can't handle it.

So he started prescribing me something, an SR1. And starting out giving me then anxiety and kept increasing the dosage until I was able to start coming out to the day room time to get my day room time.

THE COURT: And feeling better about it?

THE DEFENDANT: Yeah, and then --

THE COURT: Is that the Vistaril? Is that what they're talking about or do you know the name?

THE DEFENDANT: One's mirtazapine, Vistaril, Buspar, and then the melatonin. And then at night I take melatonin.

THE COURT: And so that seems to help so far?

THE DEFENDANT: Yes. It allows me to come to the day room for an hour. But there's some days, like maybe twice a week I don't feel comfortable coming out, and I'll go back in.

THE COURT: All right. Thank you, sir. You can have a seat. All right. Ms. Blackwell, anything else on this matter?

MS. BLACKWELL: No, Your Honor. We just would like for Mr. Garcia to be seen by a psychiatrist or whomever has prescription

privileges in the jail to try to get him on some sort of long-acting anxiolytic so that we can more forward.

THE COURT: All right. Well, based on the testimony, and of course my observances of Mr. Garcia, it does not appear to me that he is in any manner incompetent in terms of intellectual functioning or his ability to understand and appreciate what is going on or in fact in his ability to consult with his attorneys.

I do have some question, based on Dr. Storer's testimony, with regard to if we were to go to trial, how he would handle that in the courtroom because I do recall that at some point it was reported to me that he was beginning to experience some anxiety on one of our hearings previously.

It was also reported to me he had not received his medication that morning, and the nurse I believe actually traveled here to the courthouse to provide him with that. And he did much better and was much more relaxed, insofar as my observations, for the portion after the lunch break.

It appears it me that clearly he could participate during trial. And I think that based on that, we probably need to follow Dr. Storer's recommendation in that regard and

have Mr. Garcia seen by whomever at the jail can make the determination as to the appropriate medication and determine if, in fact, they believe a long-acting medication would be better than what he is taking or a different dose of what he's taking would be better and to allow him that 30 days to get that, as I understand it, therapeutic level is what Dr. Storer is talking about, and then have Dr. Storer again speak with him in that regard.

So at this point I find him competent but for that potential issue, and I'll reserve that issue to see if in fact the medication which Mr. Garcia states he's more than willing to take because it seems to make him feel better and function better, and we'll see what sort of result that has because I think at this point he probably could make it through a trial, and he probably would do all right going through a trial.

But I think it would take a great deal of patience on his part and his attorney's part. It might take more frequent breaks, et cetera. And once we're into the trial, it would be very difficult at that point. If in fact he did have one of these as attacks and was unable to participate, we would be unable

to move forward.

So I think the better course is to try to treat this first and see where we stand in about 30 days. So with that, state, I'm assuming that you and Ms. Blackwell can coordinate with the jail to see to it that he's immediately evaluated for the proper medication concerning Dr. Storer's opinion?

MR. PARKER: Yes, Your Honor.

THE COURT: Ms. Blackwell?

MS. BLACKWELL: Absolutely, judge.

THE COURT: All right. And so then in 30 days, Dr. Storer, you're still here, you'd be willing to see him again in about 30 days?

DR. STORER: Yes, ma'am.

THE COURT: All right. Now, I'm saying 30 days. I'm assuming you mean 30 days from when he starts the medication.

DR. STORER: That's correct.

THE COURT: Okay. So, Ms. Blackwell, we're going to have to find out when that is, when he starts and then let Dr. Storer know so he can do that evaluation.

MS. BLACKWELL: Yes, ma'am. I'll talk to the jail this evening.

THE COURT: All right. Now, that being the case, of course we're coming up pretty close, about two months out of trial time. So we need to do all this timely.

So, Mr. Parker, give me some idea, if you know, how long for the jail to tend to this. Do you think they can do it today, tomorrow? I know holidays are on us.

MR. PARKER: Your Honor, we will call immediately after this to setup an appointment for Mr. Garcia so that we can immediately get this started.

We understand the time constraints. And I think we can make that happen.

THE COURT: All right. Ms. Blackwell, anything else we need to take up today? I know you filed a motion in limine that you mentioned. Do we need to pick a day to try to hear that? It has to do with an Xbox?

MR. PARKER: Yes, Your Honor. And I think it would be best if Ms. Blackwell and I discuss that so I can make sure because it's going to require witness testimony, and this witness is out of town. And I think that would be best for to us get together and then come to you, Your Honor, with some dates.

THE COURT: All right. And I would prefer to do that the first week of December if we can, first or second week at the latest just so we know where we stand on that because then the third week, you've got your omnibus, which you guys also need to think about in terms of where we stand with Dr.

Storer's reevaluation.

MS. BLACKWELL: Yes, ma'am. And Mr. Parker and I will discuss -- like I said, he has made his expert witness available. Actually we had a conference call. I'm available whenever.

THE COURT: All right. Now, my preference would be, and I think Dr. Storer is entirely correct, it seems a little silly to me for him to do a, quote, final report, and then in 30 days do another evaluation.

My preference would be for him to go ahead and be working on that report because I expect it to be fairly lengthy. I've read a number of Dr. Storer's reports in the past, and I expect it to be thorough and lengthy, but to not provide an actual final report until we have this 30 day trial. Fair enough?

MS. BLACKWELL: Fair enough, Your Honor. And I think that's what he would prefer as well.

THE COURT: Mr. Parker, any objection to that?

MR. PARKER: No, Your Honor.

THE COURT: Does that work for you, Dr. Storer?

DR. STORER: Yes, ma'am.

THE COURT: Okay. All right. Mr.

Garcia, if you would stand up one more time for me. Any questions about what's happened?

THE DEFENDANT: No, ma'am. I understood what happened.

THE COURT: All right. Now, Dr. Storer says you have a preference in this case that you've expressed to him about sentencing. I've told him an opinion I've held for some time about sentencing.

I don't want you to be swayed by my opinion one way or the other.

THE DEFENDANT: No, ma'am. I won't.

THE COURT: Because I'm not in your situation.

THE DEFENDANT: I understand, ma'am.

THE COURT: It's an academic exercise for me in terms of my years of practice, et cetera. So I don't want you to be swayed by that. I asked him that because I wanted to know really truly what he was thinking on that.

THE DEFENDANT: Yes, ma'am. I understood about that.

THE COURT: Okay. All right. So whatever decision you make ultimately, I just want you to make sure you discussed it throughly with your attorneys.

THE DEFENDANT: Yes, ma'am.

THE COURT: And that you've gotten their

advice even though ultimately what happens at trial is your decision.

THE DEFENDANT: Yes, ma'am. Thank you.

THE COURT: All right. Any questions at this point?

THE DEFENDANT: For you, ma'am, no, I don't have any questions. I just have a couple of questions --

THE COURT: I'm going to let you have plenty of time to talk to them once we've recessed because of course you've got to do that in private.

Any issues you think we need to bring up today that we haven't brought up understanding we've still got some motions to be heard?

THE DEFENDANT: No, ma'am. I don't think I have any, ma'am.

THE COURT: All right, sir. Thank you very much.

(DEFENDANT'S EXHIBIT 1 IN EVIDENCE)

STATE OF MISSISSIPPI
COUNTY OF HARRISON

CERTIFICATE OF COURT REPORTER

I, R. Michelle Stewart, CCR 1305, Official Court Reporter for the Second Circuit Court District of the State of Mississippi, do hereby certify that the foregoing 40 pages constitute, to the best of my skill and ability, a true and correct transcript of my stenographic notes of the HEARING had on the 22 day of November, 2016, before the Honorable LISA DODSON, Circuit Court Judge of the Second Circuit Court District of the State of Mississippi, being a regular day in the November Term of Harrison County Circuit Court at Gulfport.

This is to further certify that I have this date filed the original and one copy of said transcript, along with one CD in PDF language, for inclusion in the record on appeal, with the Clerk of the Circuit Court of Harrison County, Mississippi, and have notified the attorneys of record and the Supreme Court of my actions herein.

I do further certify that my certificate annexed hereto applies only to the original and certified transcript and electronic disks.

WITNESS MY SIGNATURE, April 18, 2017.

R. MICHELLE STEWART, CCR 1305
Official Court Reporter

COURT REPORTER'S FEE: $98.40