Circuit Court for Baltimore County
Case No. C-03-CR-19-004111

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1270 & 167

September Terms, 2020 & 2021

NICHOLAS BUSH

v.

STATE OF MARYLAND

Graeff,
Berger,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.
Dissenting Opinion by Raker, J.

Filed: April 1, 2022

Appellant Nicholas Bush was convicted of armed robbery with a deadly weapon in the Circuit Court for Baltimore County. He was sentenced to twenty-five years' incarceration without parole. Mr. Bush filed a motion for a new trial which was denied. The gravamen of Mr. Bush's motion for new trial was that there was a bona fide doubt that he was competent to stand trial, and that the circuit court failed to *sua sponte* determine his competency.

Mr. Bush presents five questions for our review,[1] which we have rephrased, for clarity, as follows:

> I. Whether the circuit court erred by not *sua sponte* determining Mr. Bush's competency.
>
> II. Whether Mr. Bush was competent to waive his right to counsel and a jury trial.

[1] Mr. Bush's original questions presented are as follows:

> 1. Did the lower court abuse its discretion in failing to *sua sponte* conduct a competency hearing and/or order a competency evaluation at any of several stages of the proceedings?
>
> 2. Did Appellant's incompetency to stand trial render him incompetent to knowingly, intelligently, and voluntarily waive his right to counsel and a jury trial?
>
> 3. Did the absence of a valid jury trial waiver deny Appellant his constitutional right to a trial by jury?
>
> 4. Does the trial court's failure to comply with Maryland Rule 4-246 mandate reversal?
>
> 5. Did the trial court err in denying Appellant's motion for new trial?

III. Whether Mr. Bush's waiver to a jury trial was valid.

IV. Whether the circuit court's failure to comply with Maryland Rule 4-246 by not announcing that Mr. Bush's waiver was made knowingly and voluntarily mandates reversal.

V. Whether the circuit court abused its discretion in denying Mr. Bush's motion for a new trial.

For the reasons explained herein, we shall affirm the judgment of the circuit court.

FACTS AND PROCEDURAL HISTORY

We set forth the pretrial and trial proceedings involving Mr. Bush to provide context for this appeal.

On August 5, 2019, the Exxon gas station at 1601 Belmont Avenue was robbed. Mr. Bush was arrested for the Exxon robbery after his involvement in a subsequent robbery in Baltimore City. The State charged Mr. Bush with nine armed robbery charges for his role in the Exxon robbery. After bail review in the District Court, Mr. Bush was held without bail. A bail review hearing was held in the circuit court and the Office of the Public Defender assigned Thomas Rafter, Esq. -- a panel attorney -- to represent Mr. Bush. Sometime later, however, Andrea Jaskulsky, Esq. -- another panel attorney -- entered her appearance on behalf of Mr. Bush, thereby striking Mr. Rafter's appearance. The circuit court held another bail review hearing, and addressed, and subsequently denied, Mr. Bush's request to discharge Ms. Jaskulsky. Mr. Bush was remanded to the Baltimore County Detention Center to be held without bail pending trial.

Mr. Bush filed another request for bail review, which was again denied. Trial was initially scheduled for August 27, 2020 but was rescheduled for January 21, 2021 due to the COVID-19 pandemic. Mr. Bush moved to vacate the order rescheduling the trial and requested an immediate bench trial.

The circuit court conducted another hearing on Mr. Bush's request to discharge Ms. Jaskulsky, and again determined that there was no meritorious reason to discharge counsel. The circuit court did, however, grant Ms. Jaskulsky's own motion to strike her appearance. The circuit court re-arraigned Mr. Bush and advised him of his right to counsel. At rearraignment, Mr. Bush decided to proceed pro se, waived his right to a jury trial, and requested a bench trial. The circuit court granted the State's motion requesting that the trial be scheduled for November 19, 2020. Just prior to trial, Mr. Bush sent a letter to the circuit court on November 4, 2020, informing the court that he was currently being housed at Clifton T. Perkins Hospital Center ("Perkins").

On November 19, 2020 the case proceeded to trial before Judge Dennis M. Robinson. At the outset of the trial proceedings, Judge Robinson asked Mr. Bush why he was transferred from the Baltimore County Detention Center to Perkins. Mr. Bush's response was meandering and non-responsive. Judge Robinson then asked Mr. Bush questions to confirm whether he knew where he was, whether he knew that a trial was occurring, and whether he understood the charges filed against him resulting from the robbery of the Exxon gas station. Mr. Bush was responsive and answered all the trial court's questions affirmatively. The trial court determined that Mr. Bush understood the

charges against him. The trial court further determined that Mr. Bush's responses did not indicate that there were any potential competency issues, and the case proceeded to a bench trial.

The trial proceedings began and, after a recess to consider evidence and testimony presented at trial, Judge Robinson found Mr. Bush guilty of armed robbery. At this point, Mr. Bush unequivocally expressed his desire to proceed to sentencing. Judge Robinson sentenced Mr. Bush to twenty-five years' incarceration without the possibility of parole.

Thereafter, Mr. Bush was represented by the Office of the Public Defender, which filed post-sentencing motions and a motion for a new trial on Mr. Bush's behalf. At the hearing on the motion for a new trial, counsel presented a competency evaluation prepared by the Maryland Department of Health in connection with a separate criminal case against Mr. Bush in the District Court of Maryland for Anne Arundel County (the "District Court"). The competency evaluation noted that Mr. Bush suffered from "psychotic symptoms" that "would impair his ability to consult with his attorney and comport his behavior to meet courtroom standards." The evaluation concluded that Mr. Bush "lack[ed] a factual and rational understanding of the nature of his charges or courtroom proceedings." Unbeknownst to Judge Robinson, the District Court -- in that case -- found that Mr. Bush was incompetent to stand trial while the case in the circuit court was pending. Counsel for Mr. Bush argued that Mr. Bush's behavior in the circuit court, coupled with the indication of the District Court's previous determination of incompetency, should have triggered the

circuit court's *sua sponte* obligation to determine his competency in the Circuit Court for Baltimore County.

Judge Robinson denied the motion for a new trial and issued a comprehensive Decision and Order (the "Order") explaining why the court denied Mr. Bush's motion. Judge Robinson announced that Mr. Bush's motion for a new trial was considered "against the backdrop of several pre-trial proceedings and how Mr. Bush conducted himself at the trial." Judge Robinson explained that Mr. Bush's correspondence and communications throughout the pre-trial proceedings "did not raise any issues regarding Mr. Bush's competency prior to trial." Judge Robinson stated: "Mr. Bush's behavior before the trial began was indicative of someone who was purposefully being uncooperative in an attempt to derail the trial, not someone who was unable to understand the nature and object of the proceedings or to provide his defense." Judge Robinson emphasized that he had "an opportunity to observe Mr. Bush and his conduct" during trial, and that "it did not appear to the court that Mr. Bush was exhibiting signs of being incompetent."

In its thorough Order, the trial court specifically addressed why the District Court's determination of incompetency did not require the circuit court to *sua sponte* determine Mr. Bush's competency in the current case. Furthermore, Judge Robinson determined that the court's *sua sponte* obligation to evaluate Mr. Bush's competency was not triggered by Mr. Bush's conduct and demeanor as he appeared before the court at trial. The trial court denied Mr. Bush's motion for a new trial finding that the evidence did not create a bona fide doubt that Mr. Bush was competent to stand trial. Mr. Bush filed this timely appeal.

DISCUSSION

Standard of Review

The principles of due process prohibit the prosecution of a criminal defendant who is incompetent to stand trial. *Peaks v. State*, 419 Md. 239, 251 (2011). There is a presumption, however, that a criminal defendant is competent to stand trial unless it appears "that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, [or] to assist in preparing his defense." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). "[I]ncompetent to stand trial" is defined as being unable to "understand the nature or object of the proceeding[]" or "assist in one's defense." Md. Code (2001, 2018 Repl. Vol., 2021 Suppl.), § 3-101(f) of the Criminal Procedure Article. Additionally, competency to stand trial "is much more a function of rationality than of mental health generally." *Muhammad v. State*, 177 Md. App. 188, 259–60 (2007).

A court will be required to determine the competency of a criminal defendant in one of three ways: "(1) upon motion of the accused; (2) upon motion of the defense counsel; or (3) upon a *sua sponte* determination by the court that the defendant may not be competent to stand trial." *Thanos v. State*, 330 Md. 77, 85 (1993). If at any point, "before or during a trial, the defendant in a criminal case . . . appears to the court to be incompetent to stand trial . . . the court shall determine, on evidence presented on the record, whether the defendant is incompetent to stand trial." Md. Code (2001, 2018 Repl. Vol., 2021 Suppl.), § 3-104(a) of the Criminal Procedure Article.

There are several factors that are relevant to determining if a defendant is incompetent to stand trial. "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient." *Drope*, *supra*, 420 U.S. at 180. Competency to stand trial is a factual determination by the court, and a court's decision regarding competency will not be reversed unless clearly erroneous. *Maggio v. Fulford*, 462 U.S. 111, 117 (1983); *Peaks*, *supra*, 419 Md. at 252.

I. The circuit court did not err in declining to *sua sponte* evaluate Mr. Bush's competency because the evidence in the record did not create a bona fide doubt that he was competent to stand trial.

In the instant case, neither Mr. Bush -- nor his prior counsel -- ever alleged that he was incompetent to stand trial. Therefore, the focus of our inquiry is whether the evidence in the record during the pre-trial, trial, and sentencing proceedings created a bona fide doubt that Mr. Bush was competent to stand trial such that the court had a *sua sponte* obligation to determine his competency. *Sibug v. State*, 445 Md. 265, 316 (2015) ("[A] bona fide doubt created by evidence on the record triggers the circuit court's *sua sponte* duty to evaluate competency."). We must consider the entire record in determining whether a trial court abdicated its *sua sponte* duty to evaluate a criminal defendant's competency. *Gregg v. State*, 377 Md. 515, 547 (2003).

Mr. Bush argues that from his first appearance in court, that his "behavior was paranoid, perseverant, and disconnected from the nature and object of the proceedings."

Mr. Bush contends that his consistent focus on irrelevant matters, meandering answers to the court's inquiries, and combativeness with the presiding judges are factors that should have triggered the court's *sua sponte* obligation to determine his competency. Additionally, Mr. Bush argues that circuit court's *sua sponte* obligation to evaluate his competency should have been triggered by the evidence of his housing at Perkins and his indication to the trial court judge that the Public Defender in the District Court case suspected him to be incompetent.

We disagree. Our review of the entire record reflects that the evidence before the circuit court did not create a bona fide doubt that Mr. Bush was competent to stand trial. In our view, under these circumstances, the circuit court was not required to *sua sponte* determine Mr. Bush's competency at any of the proceedings. We will discuss each proceeding below and explain our reasoning accordingly.

A. Pre-trial proceedings

The first of many pre-trial proceedings in the circuit court occurred on December 4, 2019. Mr. Bush appeared before Judge Nancy Purpura for purposes of bail review, but the hearing was continued to provide Mr. Bush an opportunity to obtain counsel. Throughout the bail review hearing, Mr. Bush asserted that he had been served "the same warrant twice under two different . . . Central Control Numbers." Judge Purpura redirected Mr. Bush by asking whether he wanted "to go forward without an attorney." Mr. Bush unequivocally responded: "I want an attorney." Judge Purpura then concluded the proceedings until Mr. Bush was represented by counsel.

Mr. Bush later appeared before Judge Robert E. Cahill, Jr. in connection with his request to discharge his counsel, Ms. Jaskulsky. When asked why he wanted to fire his attorney, Mr. Bush began a longwinded explanation that alleged a conspiracy "from the top of the courts all -- all the way down to the police, to the -- to the detention centers." Ms. Jaskulsky responded to Mr. Bush's claims stating: "[O]ne minute [Mr. Bush] is okay with me representing him, but as soon as I tell him I'm not filing criminal charges against anybody in the judicial system, then he believes I'm not on his side." Mr. Bush continued to interrupt Judge Cahill as the court announced that it was not discharging Ms. Jaskulsky. Judge Cahill concluded the hearing and decided to delay advising Mr. Bush of his right to self-represent because he was "too out of control."

Mr. Bush appeared again before Judge Cahill for another bail review. Mr. Bush acknowledged that the purpose of the hearing was for a bail review, but instead raised an argument under Maryland Rule 4-252(d) alleging that "the fifth count of the indictment fails to charge an offense." Judge Cahill instructed Mr. Bush that he only wanted to hear from Ms. Jaskulsky regarding the bail review, but Mr. Bush continually interrupted and insisted on arguing his Rule 4-252(d) claim. Judge Cahill denied bail and concluded the hearing, stating that the court would review bail at a later date.

Mr. Bush appeared before Judge Cahill again to address a second motion to discharge Ms. Jaskulsky. When asked why he again wished to discharge counsel, Mr. Bush asserted the issue of being "served the same warrant twice with the same Central Complaint number" as evidence that he was being illegally detained, and that Ms. Jaskulsky refused

to do anything about it. Despite Ms. Jaskulsky's assertion that she had investigated Mr. Bush's complaints, provided him discovery, and explained why he was being detained, Mr. Bush insisted on discharging her. Finding no meritorious reason to discharge Ms. Jaskulsky, Judge Cahill denied Mr. Bush's motion to discharge counsel. Thereafter, Mr. Bush threatened Ms. Jaskulsky stating that he was going to kill her. Ms. Jaskulsky further indicated that Mr. Bush had previously threatened her and her family, and she requested that the court strike her appearance.

Judge Cahill convened another hearing to discuss Mr. Bush's request to discharge counsel. Judge Cahill directly asked Mr. Bush whether he wished to discharge Ms. Jaskulsky. Mr. Bush responded: "No. I just want her to do the right thing." Mr. Bush then engaged in a series of disruptive behavior as the court attempted to move forward with the proceedings. Mr. Bush recited a list of grievances ranging from his recurring complaint on perceived warrant issues, to incorrect docket entries, to an allegation that his bail review had never occurred.

The hearing then shifted from its original purpose -- a motion to discharge counsel -- to a new topic, wholly initiated by Mr. Bush. When Judge Cahill indicated that a trial date had been set for January 21, 2021, Mr. Bush interjected and stated that he wanted a bench trial. No less than three times did Mr. Bush answer affirmatively that he wanted to waive his right to a jury trial and have a bench trial.

After the hearing was redirected to the matter for which it was scheduled, Judge Cahill ultimately struck Ms. Jaskulsky's appearance because of Mr. Bush's threats. Judge

Cahill then advised Mr. Bush of all the charges filed against him, during which, Mr. Bush continually interrupted. Judge Cahill again informed Mr. Bush that he had a right to counsel.

One last pre-trial proceeding was held before Judge Cahill to again inform Mr. Bush of his right to an attorney. Over the course of this proceeding, Judge Cahill thoroughly informed Mr. Bush of his right to an attorney, and the value of an attorney in a criminal trial. Mr. Bush unequivocally indicated that he understood the value of an attorney, but he, nevertheless, desired to proceed pro se. Judge Cahill then informed Mr. Bush of his right to a jury trial, which Mr. Bush also waived, insisting on a bench trial. A discussion on discovery materials followed, to which Mr. Bush stated that he wanted "the real discovery, not the fake one that they made up." Mr. Bush further complained that the State had not responded to three motions that he had made.

Based on our review of the pre-trial record which thoroughly reflected Mr. Bush's behavior and demeanor, there was nothing to suggest that there was a bona fide doubt that Mr. Bush was competent to stand trial. Mr. Bush argues that his "behavior was paranoid, perseverant, and disconnected from the nature and object of the proceedings[]" such that the court should have suspected that he was incompetent to stand trial. We disagree. Although Mr. Bush may have inappropriately focused on perceived issues with his arrest and processing, this does not necessarily imply that he was incompetent to stand trial. There is no indication that Mr. Bush misunderstood the nature of the proceedings or was incapable of assisting in his defense. Rather, the record clearly displays that Mr. Bush

understood what was happening, and further, that he fervently disagreed with the legitimacy and procedure underlying the State's prosecution.

The law merely requires that a criminal defendant understand the nature of the proceedings against him, not that he necessarily be at peace with them. *Thanos*, *supra*, 330 Md. at 586–87. In this particular case, although Mr. Bush was disruptive, argumentative, and offensive, this type of behavior does not mean that he was incompetent. *Id.* at 586 (holding that angry or offensive character is not evidence of incompetence, but rather, can be evidence that the defendant, "comprehended the situation enough to feel stress."). Furthermore, the content of Mr. Bush's angry and offensive disruptions indicates that he fully understood his situation. Mr. Bush repeatedly made arguments throughout the pre-trial proceedings that exhibited his general understanding of the nature of the proceedings against him. In that context, Mr. Bush: (1) argued a motion that his indictment was defective; (2) demanded discovery; (3) demanded an attorney that would file charges against the judicial system; and (4) argued procedurally defective claims and that he should not have been held without bail.

Additionally, although Mr. Bush inordinately focused on the perceived warrant issue and alleged corruption "from the top of the courts all -- all the way down to the police, to the -- to the detention centers[]", this does not mean that he misunderstood the nature of the proceedings. Mr. Bush clearly understood that he was being criminally charged. Indeed, his only misunderstanding during the pre-trial proceedings concerned the authority and the legitimacy of the State's prosecution. In our view, Mr. Bush's focus on the

warrants underlying his arrest and his allegations of a conspiracy are not indicative of incompetence, but rather, were either frivolous attempts to derail the proceedings or a misguided strategy to mount a defense against the State's prosecution.

Our review of the record reflects that the evidence did not give rise to a bona fide doubt that Mr. Bush understood the proceedings or was capable of defending himself. Belligerent and offensive conduct by itself is not indicative of incompetence but can rather indicate that the defendant "comprehended the situation enough to feel stress." *Thanos*, *supra*, 330 Md. at 586–87. Accordingly, we hold that the circuit court was not required to *sua sponte* determine competency because the evidence did not create a bona fide doubt that Mr. Bush was competent to stand trial at any of the pre-trial proceedings.

B. Trial proceedings

The bench trial before Judge Robinson began on November 19, 2020. At the outset of the proceedings, Judge Robinson inquired about Mr. Bush's housing at Perkins, which was first brought to the circuit court's attention in the letter filed on November 4, 2020. Judge Robinson noted that, "[a]lthough there are multiple reasons why someone could be there . . . one of the possible reasons is a prior finding of competency (sic) to stand trial." Judge Robinson indicated that he would not "simply overlook the possible reasons" as to why Mr. Bush could be housed at Perkins. Judge Robinson then recited, on the record, the Constitutional protections afforded a criminal defendant who is incompetent to stand trial, as well as Section 3-104(a) of the Maryland Criminal Procedure Article requiring a court

to determine whether a criminal defendant is competent to stand trial if it appears that he may be incompetent.

Judge Robinson then directly asked Mr. Bush why he was currently housed at Perkins. Mr. Bush gave a long winded, confusing, and vague answer which alleged that he was a political prisoner and could not be committed to multiple institutions because he was facing charges in both Baltimore County and Anne Arundel County. Mr. Bush concluded his answer by stating that the Public Defender in Anne Arundel County -- in a separate case -- informed the District Court that he suspected that he was not "competent enough to stand trial."

Upon hearing this answer, the following exchange occurred:

> THE COURT: So a court's duty to conduct a competency evaluation can be triggered in one of three ways. Um --
>
> MR. BUSH: It wasn't -- only until --
>
> THE COURT: Let me --
>
> MR. BUSH -- it wasn't that way. It -- that's not what happened.
>
> THE COURT: Okay. Well, I'm talking about for this case.
>
> Um so a court's duty to conduct a competency evaluation may be triggered in one of three ways. One of those is a motion of the defendant. Another is a motion of defense counsel, or another one is upon a *sua sponte* determination by the Court, *sua sponte* meaning "on my own", um, that the defendant may not be competent to stand trial.
>
> So I'm going to ask you at this point, are you alleging that you are incompetent to stand trial in this case?
>
> MR. BUSH: No, I'm competent.

THE COURT: Okay. Now, you and I have never met before, so I have no firsthand knowledge or experience regarding whether there are any potential issues regarding your competency to stand trial.

I know that you have appeared in this court previously, and there has been a finding that you knowingly, voluntarily, and intelligently -- intelligently waived your right to counsel, and were deemed capable of representing yourself in this case.

I also, um, understand that there has been a finding that you have knowingly, intelligently, and voluntarily waived your right to a jury trial. These findings are not the same as a determination of competency, but the related proceedings provided another judge of this court opportunities to assess the extent to which you understood your rights and were capable of making your own decisions regarding those rights.

According to Section 3-101(f) of the Criminal Procedure Article, incompetent to stand trial means not able to understand the nature or object of the proceeding or to assist in one's defense.

I'm going to ask you some preliminary questions. This is not intended to be a full-blown competency hearing, uh, because you're not alleging that you're incompetent to stand trial, and also at this point, there's no basis, uh, for it to appear to me that you may be incompetent to stand trial.

And again, I want to make sure that we adequately protect your rights in connection with this case.

So, I'm going to -- some of these questions I know may seem basic but, um bear with me.

So do you know where you are today?

MR. BUSH: Yes.

THE COURT: Where are you?

MR. BUSH: Baltimore County Circuit Court.

> THE COURT: Do you know why you're here?
>
> MR. BUSH: Yes, to go to trial today.
>
> THE COURT: Okay. Do you know for what charges you are on trial today?
>
> MR. BUSH: Yes. Um, the -- or I have a question, or I need to bring something up about that.

Mr. Bush then recited his concerns regarding the warrants underlying the State's prosecution. Mr. Bush insisted that there were errors in his arrest and processing -- seemingly that he was either arrested or processed on duplicate warrants for the same criminal conduct. Mr. Bush further argued that the first warrant was never reported, thereby violating certain statutory provisions. Judge Robinson again asked Mr. Bush if he "ha[d] an understanding about what the nature of the charges is, such as what the State's alleging that you did." Mr. Bush's response in this instance was clear:

> MR. BUSH: Yes. I, uh, uh, the -- first warrant says I have four charges, armed robbery, um, I want to say, uh, uh, wear and carry, theft -- theft and, um, second degree assault.
>
> THE COURT: Okay.
>
> MR. BUSH: The second warrant has nine charges. Um, armed robbery, robbery, uh, theft, wear and carry. There's two armed robbery charges for the indictment. Um, two -- two thefts. Um, they -- they added the robberies -- it's -- it's -- I pretty much know all the charges.

Judge Robinson then asked the State to clarify what counts it was pursuing in the indictment. The State confirmed that it was bringing five counts against Mr. Bush, requesting a severance of four other offenses. Judge Robinson granted the severance and

read the final five remaining charges into the record: (1) armed robbery; (2) robbery; (3) second-degree assault; (4) theft; and (5) a related weapons charge. As Judge Robinson was describing the five charges, Mr. Bush continually interrupted with his complaints regarding his arrest and processing. Judge Robinson told Mr. Bush that he was "continuing to interrupt me while I'm asking you please -- not interrupt me," to which Mr. Bush responded: "Because my life on the line."

Before the State proceeded to present its case, Judge Robinson allowed Mr. Bush to present two motions. Mr. Bush presented a motion that the indictment was defective, and another motion to dismiss the complaint on his premise that he had been served the same warrant twice. The State was given the opportunity to respond to Mr. Bush's motions. Mr. Bush frequently interrupted, stating: "That's not the law." During these interruptions, Mr. Bush gave clear -- although legally incorrect -- rebuttals as to why the State's arguments were unfounded. Judge Robinson denied Mr. Bush's motions and the trial began.

The State presented its case and offered video and photographic evidence of the robbery of the Exxon gas station. Mr. Bush was given the opportunity to review this evidence and raised no objections. The State then presented three witnesses: (1) Mr. Jifara, the Exxon employee who Mr. Bush allegedly robbed; (2) Officer Torres, the arresting officer who arrested Mr. Bush; and (3) Officer Heins, the investigating officer for the Exxon gas station robbery.

Mr. Bush cross-examined all three witnesses. During each cross-examination, Mr. Bush not only asked appropriate questions, but also asked questions that were logically

related to his defense. Mr. Bush tailored his questions towards a general argument that there were defects in his identification. Mr. Bush asked questions to impeach witnesses, and also asked questions aimed at revealing issues with his arrest and processing. Indeed, Mr. Bush questioned Officer Heins about the warrants and his processing -- which finally connected Mr. Bush's continuing complaints about the warrants to a planned trial strategy.

Mr. Bush declined to testify and invoked his right to remain silent. Both parties presented their closing arguments. Mr. Bush's closing argument clearly and logically connected the questions and arguments that he developed while cross-examining witnesses, to his conclusion that he could not be convicted for armed robbery.

Mr. Bush argues on appeal that: (1) his housing at Perkins; (2) his indication to Judge Robinson that he was suspected to be incompetent in the District Court case; (3) his claim of illegal detention; (4) his fixation on warrant issues; and (5) his quarrelling and meandering answers were all red flags that should have triggered the trial court's *sua sponte* obligation to determine his competency to stand trial. Mr. Bush further argues that the trial court's less-than-full-blown evaluation merely paid lip-service to its statutory obligations and was insufficient to determine his competency.

Based on our review of the record as whole, the evidence did not create a bona fide doubt that Mr. Bush was competent to stand trial. Indeed, Mr. Bush's behavior during trial indicates that he clearly understood the nature of the proceedings against him and that he was able to assist in his own defense.

As an initial matter, the fact that Mr. Bush was housed at Perkins does not automatically trigger -- by itself -- the trial court's *sua sponte* obligation to conduct a competency evaluation in the current case.[2] As the trial court properly stated on the record, "there are multiple reasons why someone could be [at Perkins] . . ." [3]

Turning to the trial court's preliminary competency evaluation, we believe that Mr. Bush's answers to the trial court's inquiries support the inference that there was no bona fide doubt that he was competent to stand trial. Mr. Bush stated that he knew where he was and that he knew that he was going to trial. Although some of Mr. Bush's answers were riddled with tangential and confusing complaints about the warrants, this does not detract from the fact that Mr. Bush recited -- and therefore knew -- the criminal charges against him. As we stated in Part I. a. *supra*, Mr. Bush's recurring complaints about the warrants does not indicate that he misunderstood the nature of the current proceedings.

[2] Mr. Bush's argument regarding the denial of his motion for a new trial is largely built upon a theory that his housing at Perkins and his brief statement that the Public Defender in the District Court suspected him to be incompetent should have triggered the trial court's *sua sponte* obligation to determine his competency in the current trial. Because this argument is primarily presented in the section of Mr. Bush's brief concerning the denial of a motion for a new trial, we reserve a more comprehensive discussion to Part V. b. *infra*.

[3] Notably, competency is much more a determination of rationality than it is of mental health generally. *See Muhammad*, *supra*, 177 Md. App. at 259–60. Although Perkins is indeed a State hospital for treating mental illnesses, not all mental illnesses necessarily present symptoms of irrationality such that an individual would be incompetent to understand trial proceedings. Mental illness takes many forms, and only certain forms result in irrationality. Additionally, mental illness is a fluid concept that can change over time. "Mental illness itself is not a unitary concept. It varies in degree. It can vary over time." *Indiana v. Edwards*, 554 U.S. 164, 175 (2008).

Rather, it indicates that Mr. Bush believed -- although erroneously -- that this perceived issue with the underlying warrants was a viable defense to the State's prosecution. Indeed, Mr. Bush continually raised the issue related to the warrants because he was fully aware that his "life [was] on the line" -- indicating that he understood the nature of the charges against him and the nature of the current proceedings.

Turning to Mr. Bush's behavior, although his conduct and behavior was aggressive and combative at times, it was not such that it would create a bone fide doubt of his competency to stand trial. *See Thanos*, *supra*, 330 Md. at 586–87. The pre-trial and post-trial proceedings were bookended by Mr. Bush's interruptive and combative behavior. Mr. Bush's behavior during the trial, however, changed drastically. He was no longer disruptive and aggressive, but was instead polite and responsive.

Mr. Bush's conduct during the trial is not dispositive on the issue of competency simply because he temporarily ceased his belligerent behavior. Instead, Mr. Bush's conduct during the trial is relevant in this unique case because it indicated that he had a rational understanding of the charges against him. Mr. Bush cross-examined the State's witnesses and asked questions that were generally tailored to arguing that there were discrepancies or failures in his identification. Mr. Bush thoroughly questioned the arresting officer about his warrants and processing. This line of questioning connected Mr. Bush's continuing complaints about these perceived issues to a planned trial strategy. Further, in his closing argument, Mr. Bush clearly connected the arguments that he developed during cross-examination to a coherent closing argument which asserted that he could not be found

guilty due to misidentification, police-bias, and the alleged issues with his warrants and processing.[4]

In short, Mr. Bush's conduct and behavior before and during the trial indicates that he fully understood the current proceedings against him, that he could aid in his own defense, and that he possessed the minimal rationality to be competent to stand trial. Accordingly, we hold that under the circumstances of this case, the circuit court was not required to *sua sponte* determine Mr. Bush's competency.

C. Post-trial and sentencing proceedings

After a recess to consider the evidence, Judge Robinson found Mr. Bush guilty of robbery with a dangerous weapon. Not unexpectedly, Mr. Bush's behavior reverted to combative and argumentative. The State requested sentencing on only the single count for armed robbery, but sought enhanced penalties because Mr. Bush was a repeat offender. Mr. Bush expressed his desire to proceed directly to sentencing.

As the court proceeded to sentencing, Mr. Bush again returned to interrupting with his complaints about the warrants and his processing. Mr. Bush alleged that he was being subjected to double jeopardy, that there was a conspiracy and cover-up, and reiterated the perceived defects in his processing. When these complaints failed to persuade the court,

[4] The Supreme Court has held that "[e]ven when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Drope, supra*, 420 U.S. at 181. We note that Mr. Bush's behavior during trial had the reverse effect. Indeed, Mr. Bush's change in behavior once trial began, and clear ability to effectively participate in his defense, reinforces Judge Robinson's overall conclusion that there was no bona fide doubt that Mr. Bush was competent to stand trial.

Mr. Bush expressed his frustration by making direct threats to arrange the murder of the trial judge.

On appeal, Mr. Bush has argued that his behavior at sentencing and his inability to focus on sentencing should have triggered the court's *sua sponte* obligation to determine his competency. We disagree. For the same reasons stated *supra*, we hold that Mr. Bush's focus on the warrants does not necessarily indicate that he was incompetent to stand trial. Mr. Bush may have improperly believed that these perceived issues regarding warrants excluded him from prosecution. He stated "[c]an you prosecute a man that the warrant was never reported to the CJIS Department? You can't. And -- and still you're trying to." This belief, however, does not mean that Mr. Bush misunderstood the nature of the proceedings. The fact that a criminal defendant offers legally insufficient arguments and allegations of a conspiracy as his defense does not make him incompetent -- no matter how aggressively or incessantly he argues his faulty premise.

We agree with the trial court that there was no indication that Mr. Bush misunderstood the proceedings or was incapable of defending himself. Accordingly, we hold that the circuit court was not required to *sua sponte* determine Mr. Bush's competency because the evidence did not create a bona fide doubt that he was competent to stand trial during the sentencing proceedings.

II. The circuit court did not err in finding that Mr. Bush was competent to waive his right to counsel and a jury trial.

"Competence to decide to represent oneself is the same thing as competence to stand trial." *Muhammad*, *supra*, 177 Md. App. 188, 257–58 (2017). Indeed, competency

standards are the same for waiver, even though a valid waiver may require an additional finding that it was made knowingly and voluntarily. *Thanos*, *supra*, 330 Md. at 519–20; *see also Godinez v. Moran*, 509 U.S. 389, 396–97 (1993).

For the reasons stated *supra*, we hold that Mr. Bush was competent to waive his right to counsel and a jury trial. The evidence did not create a bona fide doubt that Mr. Bush was competent to stand trial during the pre-trial proceedings. Although Mr. Bush was combative and argumentative during all the proceedings with Judge Cahill, the Court of Appeals has previously held that "angry and offensive character" -- by itself -- "does not mean that [a criminal defendant] [is] incompetent to stand trial." *Thanos*, *supra*, 330 Md. at 587–88.

Indeed, Mr. Bush's combative behavior "indicates that he comprehended the situation enough to feel stress." *Thanos*, *supra*, 330 Md. at 587–88. Although Mr. Bush continually raised complaints about the warrants and perceived conspiracies underlying the State's prosecution, "[t]he law only requires that a defendant understand the proceedings, not be at peace with them." *Id.* Accordingly, for the same reasons that Mr. Bush was competent to stand trial, we further hold that he was also competent to waive his right to an attorney and to a jury trial.

III. The circuit court did not err in finding that Mr. Bush's waiver to a jury trial was valid.

A criminal defendant's right to a jury trial is secured by the Sixth Amendment to the United States Constitution and the Maryland Declaration of Rights. *Owens v. State*,

399 Md. 388, 405–06 (2007); *see* Md. Rule 4-246. A waiver of the right to a jury trial must be made both knowingly and voluntarily:

> A defendant may waive the right to a trial by jury at any time before the commencement of trial. The court may not accept the waiver until, after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that the waiver is made knowingly and voluntarily.

Md. Rule 4-246(b).

Mr. Bush asserted a waiver to a jury trial during two separate pretrial hearings before Judge Cahill. Mr. Bush's first assertion of waiver occurred on September 21, 2020. As Judge Cahill announced the scheduled trial date, Mr. Bush unequivocally stated: "I want a bench trial." He then confirmed this assertion -- three times -- after Judge Cahill asked if he wanted a bench trial. This exchange is sufficient to demonstrate that Mr. Bush voluntarily asserted his right to waive a jury trial. Mr. Bush again asserted his desire for a bench trial at another hearing before Judge Cahill on October 5, 2021. Mr. Bush stated twice that he wanted, "[a] judge trial." Thereafter, Judge Cahill thoroughly advised Mr. Bush of his right to a jury trial, and what a jury trial entails, and asked Mr. Bush: "[D]o you feel like you understand what a jury trial is?" Mr. Bush unequivocally responded: "Yes." Judge Cahill then asked Mr. Bush if he wished to waive his right to a jury trial, "and have your case tried in front of a judge?" Again, Mr. Bush unequivocally responded: "Yes."

Mr. Bush argues that because Judge Cahill elicited his election prior to advising him of his right to a jury trial, that the subsequent colloquy "seem[ed] irrelevant to [Mr. Bush's] decision." We disagree. Although Mr. Bush's waiver occurred over the course of two hearings, and was made prior to Judge Cahill's colloquy, Mr. Bush reaffirmed his desire to waive his right to a jury trial after his colloquy with the court.

Mr. Bush further argues that Judge Cahill failed to inquire as to whether he was subject to coercion or under the influence of substances that might affect his decision. The Court of Appeals has held, however, that "[t]here is no uniform requirement explicitly to ask a defendant whether his or her waiver decision was induced or coerced, *unless there appears some factual trigger on the record*, which brings into legitimate question voluntariness." *Kang v. State*, 393 Md. 97, 110 (2006) (emphasis added). There is no trigger on the record which draws into question Mr. Bush's voluntariness. The fact that Mr. Bush initiated the request for waiver and confirmed his request multiple times before and after being fully advised of his right to a jury trial reinforces our conclusion that his waiver was voluntary. Accordingly, we hold that the circuit court did not err in finding that Mr. Bush had knowingly and voluntarily waived his right to a jury trial.

IV. The circuit court's failure to fully comply with Maryland Rule 4-246 does not mandate reversal because the issue was not preserved for appeal.

Mr. Bush's next contention is that the circuit court's failure to announce on the record that his waiver was made knowingly and voluntarily mandates reversal. Maryland Rule 4-246(b) requires a two-step procedure for a proper knowing and voluntary waiver: (1) an examination of the defendant on the record in open court; and (2) a determination

and announcement on the record that the waiver was made knowingly and voluntarily. Md. Rule 4-246(b); *see Nalls v. State*, 437 Md. 674, 687 (2014). The record in this case reflects that Judge Cahill advised Mr. Bush in open court, and that it was clear that Mr. Bush's waiver was made knowingly and voluntarily.

Nevertheless, the circuit court failed to explicitly announce that Mr. Bush's waiver was made knowingly and voluntarily. *Nalls*, *supra*, 437 Md. at 691–92 (holding that a trial judge's failure to make "an explicit announcement that the waiver was knowing and voluntary" constitutes a failure to comply with Rule 4-246(b)). Notably, even though the court failed to fully comply with the announcement requirement of Rule 4-246(b), Mr. Bush never raised an objection. To preserve an issue for appellate review, "the complaining party must have raised the issue in the trial court." Md. Rule 8-131(a); *see*, *Nalls*, *supra*, 437 Md. at 691. Although waiver of a jury trial is of the highest Constitutional significance, the Court of Appeals has held that noncompliance with Rule 4-246(b) is not reviewable unless the issue has been properly preserved. *Nalls*, *supra*, 437 Md. at 693.

Mr. Bush argues that the circuit court's failure to fully comply with Rule 4-246(b) should preclude review under *Nalls* because Mr. Bush was self-represented. Mr. Bush cites to *State v. Westray*, in which the Court of Appeals observed that "in many instances under Rule 4-215, it may be unfair to expect a lay defendant to know the rule and to require a contemporaneous objection if the defendant is pro se[.]" *State v. Westray*, 444 Md. 672, 686 (2018). We are unpersuaded. First, it is true that Mr. Bush was acting pro se when he waived his right to a jury trial. Nevertheless, he was fully informed of his right to a jury

trial and what he was waiving by asserting his desire for a bench trial. As stated in Part III *supra*, Mr. Bush asserted his desire for a bench trial multiple times, both before and after he was informed of his right to a jury trial. Second, *Westray* concerns the similar, but merely analogous Rule 4-215 which addresses the waiver of the right to counsel, and therefore is not directly instructive on this issue.

Additionally, although we are not insensitive to a pro se criminal defendant's decisions regarding his Constitutional rights, it is a requirement in all criminal proceedings that the defendant has the final word on decisions regarding his defense. *See Grandison v. State*, 341 Md. 175, 202 (1995) ("[T]he defendant [in a criminal case] ordinarily has the ultimate decision when the issue at hand involves a choice that will inevitably have important personal consequences for him[.]"). Furthermore, "we have long held that a defendant in a criminal case who chooses to represent himself is subject to the same rules regarding reviewability and waiver of questions not raised at trial as one who is represented by counsel." *Id.* at 195. Accordingly, although Mr. Bush was self-represented, he is subject to the same rules regarding reviewability and waiver. Mr. Bush understood what he was doing when he voluntarily waived his right to a jury trial. He raised no objection to the court's failure to make an explicit announcement of his waiver as required by Rule 8-131(a). Because this issue has not been properly preserved, we decline to address it on appeal.[5]

[5] Mr. Bush also raises the argument that the general rule requiring that an issue be preserved does not apply here because the circuit court "misadvised" him of his right to a

V. The trial court did not abuse its discretion in denying Mr. Bush's motion for a new trial.

We will review the denial of a motion for a new trial for an abuse of discretion. *Williams v. State*, 462 Md. 335, 344 (2019).

> "Generally, abuse of discretion is the appropriate standard because the decision to grant or deny a motion for new trial under Rule 4-331(a) depends so heavily upon the unique opportunity the trial judge has to closely observe the entire trial, complete with nuances, inflections, and impressions never to be gained from a cold record[.]"

Id. at 344–45 (internal quotation and citation omitted).

"To reverse the denial of a new trial on appeal, when utilizing the abuse of discretion standard, the reviewing court must find that the 'degree of probable prejudice [was] so great that it was an abuse of discretion to deny a new trial.'" *Williams*, *supra*, 462 Md. at 345 (citing *Merritt v. State*, 367 Md. 17, 29 (2001)). We will find an abuse of discretion "when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of law." *Campbell v. State*, 373 Md. 637, 666 (2003).

A. The circuit court did not abuse its discretion in denying the motion for a new trial because Mr. Bush's behavior and demeanor at trial did not raise a bona fide doubt that he was competent to stand trial.

The only issue presented in Mr. Bush's motion for a new trial was whether the record presented a bona fide doubt to Mr. Bush's competency to stand trial that would

jury trial, and alternatively, that the court's failure to fully comply with Rule 4-246(b) was plain error. There is no indication on the record that Judge Cahill either misadvised Mr. Bush of his right to a jury trial, or committed any error -- plain or otherwise. We, therefore, further decline to address the issue on appeal because there is no evidence that Mr. Bush was either misadvised of his right to a jury trial or that the court committed plain error.

trigger the trial court's obligation to *sua sponte* determine his competency. For the reasons explained *supra*, we hold that the trial court did not abuse its discretion in denying Mr. Bush's motion for a new trial. We discuss our reasoning below.

The abuse of discretion standard is especially applicable when the basis for the motion for a new trial is premised on an argument that a criminal defendant was incompetent to stand trial. It is the trial judge's unique perspective of a criminal defendant that allows him to determine if the defendant is competent to stand trial. Indeed, "abuse of discretion is the appropriate standard [when] . . . the trial judge has to closely observe the entire trial, complete with nuances, inflections, and impressions never to be gained from a cold record[.]" *Williams*, *supra*, 462 Md. at 344–45 (2019). This is a unique case where we have the unusual benefit of the trial court's Order that details the reasons why it did not believe that there was evidence creating a bona fide doubt that Mr. Bush was competent to stand trial. Here, Judge Robinson aptly stated in the Order that he "had the unique opportunity to observe and assess Mr. Bush's speech, body language, tone and mannerisms." Accordingly, we will not disturb the trial court's finding unless there is evidence of an abuse of discretion that was arbitrary or capricious.

The record before us -- and Judge Robinson's comprehensive Order -- are replete with examples and explanations as to why the trial court did not believe that there were any issues regarding Mr. Bush's competency. Judge Robinson asked Mr. Bush preliminary questions to evaluate whether he knew why he was at trial. None of Mr. Bush's responses to this inquiry indicated that he misunderstood "the nature of the proceedings against him."

Although Mr. Bush's responses were meandering and unduly focused on the warrants, it was clear that Mr. Bush knew the charges against him -- as he recited the charges nearly verbatim on the record. The record also indicates that Mr. Bush comprehended the serious nature of the criminal charges as well as the State's prosecution against him.

Furthermore, Mr. Bush's behavior and conduct during the trial did not present evidence creating a bona fide doubt regarding his competency. Mr. Bush may have been combative and belligerent during the pretrial proceedings and after trial. During trial, however, Mr. Bush clearly argued motions that were logically related to his defense against the State's prosecution for armed robbery. *See Thanos, supra*, 330 Md. at 584–87 (holding that a defendant's "obnoxious and angry outbursts" did not require the court to *sua sponte* determine the defendant's competency to stand trial.)). Further, even though Mr. Bush's motions were legally defective, it does not follow that he was incompetent. Indeed, "[t]he defendant's skill, or lack thereof, in conducting a pro se defense, when that is the issue, is an irrelevant consideration." *Muhammed, supra*, 177 Md. App. at 258. As Judge Robinson stated in his opinion: "Although there were times when Mr. Bush's arguments did not make sense, that happens with attorneys sometimes too."

Accordingly, we hold that Mr. Bush understood the nature of the proceedings against him and was capable of assisting in his defense. The trial court, therefore, did not abuse its discretion in denying Mr. Bush's motion for a new trial because the evidence in the record of Mr. Bush's behavior and demeanor did not create a bona fide doubt that he was competent to stand trial.

B. Mr. Bush's housing at Perkins and the limited evidence of the District Court's previous finding that Mr. Bush was incompetent to stand trial in Anne Arundel County did not create a bona fide doubt that Mr. Bush was competent to stand trial that would trigger the circuit court's *sua sponte* obligation to determine his competency.

This case presents a unique issue concerning whether limited evidence of a previous judicial determination of a defendant's incompetency to stand trial -- made in a separate case and jurisdiction -- triggers a current court's *sua sponte* obligation to determine the defendant's competency. Mr. Bush has argued that his housing at Perkins and his statement to Judge Robinson that the Public Defender in the District Court case suspected that he was incompetent to stand trial should have triggered the circuit court's *sua sponte* obligation to determine his competency in the current case.

We agree with the circuit court's determination that Mr. Bush's housing at Perkins and the limited evidence of the District Court's finding of incompetency did not create a bona fide doubt to Mr. Bush's competency that would trigger the circuit court's *sua sponte* obligation to determine his competency in this case. We discuss our reasoning and the case law relevant to this issue below.

The first case instructive in this case is *Gregg v. State*, 377 Md. 515 (2003). John Leon Gregg was charged with second degree assault in the District Court of Maryland for Anne Arundel County. *Id.* at 518. Mr. Gregg was initially found incompetent by a health evaluator, but upon further court evaluation of his conduct and behavior, he was ultimately determined to be competent to stand trial. *Id.* 518–22. Mr. Gregg then prayed a jury trial, and his case was transferred to the Circuit Court for Anne Arundel County. *Id.* at 523.

Mr. Gregg was convicted for second-degree assault, and appealed his conviction before this Court, arguing that "his history of mental illness, should have triggered the trial court's *sua sponte* obligation to conduct a hearing on his competency to stand trial." *Gregg*, *supra*, 377 Md. at 524 (internal quotation marks omitted). We disagreed and held that the record sufficiently supported the inference that he was competent to stand trial. *Id.* at 525.

The Court of Appeals granted Mr. Gregg's petition for certiorari and considered "whether the [trial court] was required to evaluate [Mr. Gregg's] competency *sua sponte*." *Gregg*, *supra*, 377 Md. at 541. The Court of Appeals determined that once Mr. Gregg prayed a jury trial, that the District Court "[was] divested of its jurisdiction and jurisdiction [was] then conferred on the Circuit Court." *Id.* at 542. The Court reasoned that once the case was removed to the Circuit Court, that the proceeding began anew, and the issue of competency must be raised again. *Id.* at 543. The Court emphasized that Section 3-104(a) "places [the] burden on the 'court' to determine whether the defendant is incompetent to stand trial." *Id.* 542–43. The "court" is "a court that has criminal jurisdiction." Md. Code (2001, 2018 Repl. Vol., 2021 Suppl.), § 3-101(c) of the Criminal Procedure Article.

Critically, the Court of Appeals reasoned that when the District Court considered and ruled on Mr. Gregg's competency, it did so, "*as it appeared to that court*." *Id.* at 543. (emphasis added). The Court stated:

> The mere facts that (1) there was a competency evaluation in the District Court resulting in a finding of competency, and (2) there may exist a report generated in the District Court proceeding assessing [Mr.] Gregg's competency are not alone

> sufficient indicia of incompetency to trigger the Circuit Court's *sua sponte* duty to make a new competence determination. The Circuit Court below never ruled on the issue of competency because that issue was not properly before the court.

Gregg, *supra*, 377 Md. at 543.

The issue of Mr. Gregg's competency was not properly before the circuit court because neither Mr. Gregg, nor his defense counsel, raised the issue. The issue was also not properly before the court because Mr. Gregg did not "appear[] to the court to be incompetent to stand trial." Md. Code (2001, 2018 Repl. Vol., 2021 Suppl.), § 3-104 of the Criminal Procedure Article.

The Court ultimately held:

> Because the impending trial in the Circuit Court was a proceeding separate and distinct from the proceedings in the District Court, the competency issue as it arose in the District Court was not also transferred automatically to the Circuit Court for additional or new pretrial proceedings. The defendant's competency to stand trial must be raised anew in the Circuit Court proceedings - by motion of the defendant or defense counsel, *or by conduct by the defendant* sufficient to trigger *sua sponte* consideration by the trial judge-in order to compel the need for a competency determination. Respondent incorrectly analyzes this as an issue of the trial judge's discretion to reconsider an initial competency determination. As the record contains no motion to evaluate Gregg's competency, *the only way in which competency would be before the Circuit Court was if the defendant "appear[ed] to the court to be incompetent to stand trial."*

Gregg, *supra*, 377 Md. at 545 (emphasis added).

In short, *Gregg* holds that a prior competency determination -- in a separate criminal jurisdiction -- does not automatically transfer to a subsequent criminal jurisdiction, such

that additional competency determinations would automatically be required. Thus, in such cases, competency must be raised anew before the subsequent court either by motion of the defendant or defense counsel, or, if the defendant appears to that court to be incompetent.

The next case instructive on the issue of competency is *Sibug v. State*, 445 Md. 265 (2015). In January of 2000, Mario Sibug was found to be incompetent to stand trial by the Circuit Court for Baltimore County. Mr. Sibug was committed to the Department of Health and Mental Hygiene until "[the] Court [was] satisfied that Mario Sibug is no longer incompetent to stand trial . . ." *Id.* at 270. After a series of re-evaluations over a three-year period, the Department ultimately determined that Mr. Sibug was competent to stand trial. *Id.* at 278. The case proceeded to trial -- without the trial court making its own determination that Mr. Sibug was competent to stand trial.

In May 2004, Mr. Sibug was found guilty and sentenced to four and a half years' imprisonment. *Sibug*, *supra*, 445 Md. at 278. Once convicted, however, Mr. Sibug faced deportation to the Philippines. *Id.* While in custody of Immigration and Nationalization Service, Mr. Sibug filed, and was granted, a petition for writ of *error coram nobis* because his counsel had failed to advise him of the immigration consequences if he was convicted. *Id.* at 278–79. A retrial began in September 2008. *Id.* at 279.

At the retrial in 2008, a jury found Mr. Sibug guilty on most of the charges against him. *Id.* at 283. Prior to sentencing, Mr. Sibug's counsel requested a delay because -- in retrospect -- counsel believed Mr. Sibug to be incompetent to stand trial. *Id.* The trial

court concluded that Mr. Sibug was competent, and sentenced him to 10-years' incarceration. *Id.* at 289.

Mr. Sibug appealed to this Court, and we affirmed the trial court's decision. *Sibug v. State*, 219 Md. App. 358, 374 (2014), *rev'd*, 445 Md. 265 (2015). We held that the trial court was not required to determine Mr. Sibug's competency because the issue of his competency was never properly raised before the trial court in the retrial. *Id.* We relied on the holding in *Gregg* and determined that Mr. Sibug's new trial -- like Mr. Gregg's subsequent trial in the circuit court -- was "separate and distinct" and that the new trial "wiped the slate clean." *Id*. at 370–71. Therefore, we held that Mr. Sibug was required to raise the issue of competency anew at the retrial. *Id* at 371.

The Court of Appeals disagreed. *Sibug*, *supra*, 445 Md. at 292. The Court distinguished Mr. Gregg's situation from that of Mr. Sibug: "The situation in *Gregg* is inapposite to the situation which presents itself in the instant matter. In the present case, we have one case in one circuit court, albeit with a circuitous history. The circuit court's jurisdiction continued throughout the case without divestment." *Id.* at 302. The Court reasoned that because Mr. Sibug had been found incompetent by the trial court in 2000, and had not been judicially assessed for competency until pre-sentencing in 2008, that "there needed to be a subsequent adjudication of competency once [Mr.] Sibug was determined to be incompetent *in the same case, in the same court*." *Id.* at 315 (emphasis added).

The Court expressly declined to accept that there was a presumption of Mr. Sibug's incompetency as a result of the trial court's previous incompetency determination in January of 2000. *Id.* at 306–07. Rather, the Court stated: "[I]t is sufficient on the facts before us that the tenets of Section 3-104 were engaged during the retrial in 2008, requiring a determination of competency, *because [Mr.] Sibug had been adjudicated incompetent in the same case in the same court*." *Id.* (emphasis added).

Lastly, although the Court held that a competency determination was required prior to the 2008 retrial because Mr. Sibug had been previously found incompetent in the same case and court, the Court also noted that Mr. Sibug's testimony at trial "clearly reflected the same belief system on [Mr.] Sibug's part that led the Department to repeatedly opine that [he] was incompetent . . ." *Id.* at 316. Therefore, the Court concluded that not only was a competency determination required because of the prior incompetency determination, but also, "that the [trial] judge clearly erred in determining at sentencing that [Mr.] Sibug was competent[]" because of Mr. Sibug's conduct and demeanor as he appeared in court. *Id.* at 316.

Sibug holds that a prior determination of incompetency -- when made in the same case and in the same court -- is sufficient to trigger a current court's obligation to *sua sponte* determine the defendant's competency. As a result, it is incumbent on the court to re-evaluate the defendant's competency when he has previously been found incompetent to stand trial in the same case in the same court.

Mr. Bush has not argued that the District Court's prior determination of incompetency was binding on the circuit court. Neither has Mr. Bush argued in the circuit court or on appeal that he was actually incompetent during trial, nor that there was a presumption of incompetency arising from the District Court's prior determination.[6]

[6] The dissent relies on federal circuit case law distinguishing procedural and substantive incompetency claims. A procedural incompetency claim arises when a defendant was improperly denied a competency evaluation in light of evidence that he was incompetent to stand trial. A substantive incompetency claim arises when a defendant is tried and convicted while actually incompetent. The dissent asserts that Mr. Bush was actually incompetent as a result of the District Court's prior determination, and therefore, that he was denied his substantive due process rights when he was tried in the circuit court.

We reiterate that counsel for Mr. Bush has not asserted that Mr. Bush was actually incompetent when he was tried in the circuit court, i.e., a substantive incompetency claim. Mr. Bush has only argued that the trial court erred by not evaluating his competency in light of evidence creating a bona fide doubt that he was competent to stand trial. Although the dissent maintains that a substantive incompetency claim is not waivable, we decline to address the issue of substantive incompetency because it was not raised at the motion hearing for a new trial, was not briefed by either party on appeal, and was not adopted by Mr. Bush's counsel at oral argument.

Notably, the dissent liberally construes Mr. Bush's procedural incompetency claim in order to arrive at an unasserted substantive incompetency claim. In this respect, the dissent interprets a single paragraph from Mr. Bush's motion for a new trial as a substantive incompetency claim, and then concludes that Mr. Bush has made a substantive incompetency claim on appeal. On this premise, the dissent suggests that once Mr. Bush was found incompetent by the District Court, the State was required to establish his competency beyond a reasonable doubt before proceeding to trial in the circuit court. The dissent's position, however, is contrary to the factual and procedural circumstances of this case. The State could not have failed to rebut the District Court finding of incompetency *because the State did not have an incompetency finding to rebut*. Simply put, even if we were to liberally construe Mr. Bush's argument as both a procedural and substantive incompetency claim, Mr. Bush's substantive incompetency claim would be without merit because the State -- in the circuit court case -- had no burden to rebut the prior finding of incompetency that was made in a separate case and separate jurisdiction. In our view, this case is not about what burden the State may or may not have had. The only burden at issue

Rather, Mr. Bush argues that his housing at Perkins and his brief comment that the Public Defender in the District Court case suspected him to be incompetent should have "triggered the court's obligation to conduct a competency hearing or order a new/updated evaluation so that it could determine [Mr. Bush's] competency to stand trial in this case." Mr. Bush argues that the circuit court erred in denying his motion for a new trial by determining that the issue hinged on whether *Gregg* or *Sibug* was dispositive. We disagree with Mr. Bush and hold that the circuit court did not abuse its discretion when it denied his motion for a new trial.

As an initial matter, we agree with the circuit court that the facts of Mr. Bush's case bear a far closer resemblance to *Gregg* than *Sibug*. The original finding of Mr. Bush's incompetency was made in the District Court, similarly to *Gregg*. Furthermore, Mr. Bush's

in this case was the burden on the trial judge to be vigilant in addressing any issues regarding Mr. Bush's competency. This was the only issue presented at the hearing on the motion for new trial and remains the only issue on appeal.

Further, the dissent's overall conclusion regarding the effect of prior findings of incompetency is directly at odds with existing law as set forth in in *Sibug*. *Sibug*, *supra*, 445 Md. at 306–07. In *Sibug*, the Court of Appeals declined to embrace a presumption of incompetency arising from a prior incompetency determination -- even when the determination was made in the same case and the same court. *Id*. ("[W]e need not go so far as to embrace that a presumption of incompetency existed as a result of the first adjudication. Rather, it is sufficient on the facts before us that the tenets of Section 3-104 were engaged during the retrial in 2008, requiring a determination of competency, because Sibug had been adjudicated incompetent in the same case in the same court."). Mr. Bush was not adjudicated incompetent in the same case, nor even in the same jurisdiction. We, therefore, decline to depart from *Sibug* and reject the dissent's interpretation that would embrace a presumption that Mr. Bush was incompetent to stand trial in the circuit court because of the District Court's prior determination in a separate case and jurisdiction.

current case in the circuit court was not only a separate jurisdiction, but also a separate case. The District Court of Maryland for Anne Arundel County's determination that Mr. Bush was incompetent to stand trial was not automatically binding on the Circuit Court for Baltimore County in this case. Indeed, *Gregg* and *Sibug* both reaffirm this conclusion. *Gregg*, *supra*, 377 Md. at 545; *Sibug*, *supra*, 445 Md. at 302.

Because neither Mr. Bush nor his prior counsel raised the issue of competency, Mr. Bush's competency could only be appropriately before the circuit court if there was evidence creating a bona fide doubt to trigger: "a *sua sponte* determination by the court that the defendant may not be competent to stand trial." *Thanos*, *supra*, 330 Md. at 85. At the time of trial, the circuit court had before it the following evidence regarding Mr. Bush's competency to stand trial: (1) Mr. Bush's conduct and demeanor as he appeared before the court; (2) the trial court's colloquy with Mr. Bush prior to commencing trial; (3) the lack of any indication of any competency issues during the pre-trial proceedings before Judge Cahill; and (4) evidence that Mr. Bush was housed at Perkins, and Mr. Bush's brief statement that the Public Defender in the District Court case suspected him to be incompetent.

Whether Mr. Bush's housing at Perkins and brief statement that he was suspected to be incompetent by the Public Defender in the District Court case created a bona fide doubt to his competency is one of many factors the court may consider. *See Drope*, *supra*, 420 U.S. at 180. The trial court was aware that Mr. Bush was housed at Perkins, but there was no explanation presented to the court describing why Mr. Bush was at Perkins -- other

than Mr. Bush's brief statement that the Public Defender in the District Court case suspected him to be incompetent.[7] At this point in time, all Judge Robinson knew of Mr. Bush was that he was housed at Perkins, not the underlying reasons for his commitment. [8]

Mr. Bush's housing at Perkins -- absent any substantial explanation -- does not automatically imply that Mr. Bush was currently incompetent to stand trial. Indeed, Judge Robinson stated that "there are multiple reasons why someone could be [at Perkins] . . ." Nevertheless, even accepting that Mr. Bush's housing at Perkins was evidence of mental illness or incompetence, this inference alone does not mean that Mr. Bush *was currently incompetent to stand trial*. The Supreme Court has recognized that "[m]ental illness itself is not a unitary concept. It varies in degree. It can vary over time." *Edwards*, *supra*, 554 U.S. at 175. In other words, competency to stand trial is a fluid concept when premised on mental illness, and must be determined only if the defendant currently "appears to the court to be incompetent to stand trial . . ." Md. Code (2001, 2018 Repl. Vol., 2021 Suppl.), § 3-104(a) of the Criminal Procedure Article.

[7] "So I told the Public -- I wrote -- I raised my hand and told the judge I wanted a jury trial, I'm not accepting their plea. As soon as I said that the Public Defender told the -- judge they don't think I'm competent enough to stand trial."

[8] Judge Robinson was unaware of the underlying reasons for Mr. Bush's housing at Perkins because Mr. Bush was committed by a court of another criminal jurisdiction. Section 3-108(a)(1) of the Criminal Procedure Article only requires the Department of Health and Mental Hygiene to "report to *the court that has ordered commitment* of a defendant under § 3-106 . . ." Md. Code (2001, 2018 Repl. Vol., 2021 Suppl.), § 3-108(a)(1) of the Criminal Procedure Article (emphasis added). The circuit court had no reason to know of the underlying reasons for Mr. Bush's housing at Perkins because the circuit court did not order Mr. Bush's commitment, and therefore, would not have received reports from the Department of Health and Mental Hygiene regarding his mental health.

Furthermore, although the evidence of Mr. Bush's housing at Perkins could, "in some circumstances, be sufficient" to support an inference of incompetence, it is not so in this case. *Drope, supra*, 420 U.S. at 180. This factor is not sufficient because it is outweighed by Judge Robinson's unique perspective of Mr. Bush -- *as he appeared to the court at that current time*. In light of all of the evidence before the trial court, we hold that Mr. Bush's housing at Perkins, and the limited evidence of a prior finding of incompetency in the District Court case, did not create a bona fide doubt to trigger the trial court's obligation to *sua sponte* determine Mr. Bush's competency to stand trial.

Mr. Bush stated that he was competent to stand trial, and his answers to the court's inquiries did not indicate that he misunderstood where he was or why he was in court. Mr. Bush recited the charges against him and exhibited to the trial court that he understood the nature of the proceedings when he consistently argued faulty legal and factual premises as to why he could not be prosecuted. Even though Mr. Bush's arguments may have been incorrect and based on improper theories, this does not mean that he misunderstood the nature of the proceedings or was incapable of defending himself. Indeed, Mr. Bush exhibited to the court that he knew that his "life [was] on the line" and made every effort to defend himself from the State's inevitable prosecution.

We hold that the circuit court properly evaluated and considered all the factors concerning Mr. Bush's competency, and that it did not err when it declined to *sua sponte* conduct a full-blown competency evaluation or hearing. We further hold that the circuit court did not abuse its discretion in denying Mr. Bush's motion for a new trial. The circuit

court was in the best possible position to evaluate Mr. Bush's competency to stand trial as he appeared to the court at that time. Under these circumstances, and considering all of the evidence of Mr. Bush's competency to stand trial, the trial court did not err in declining to *sua sponte* determine Mr. Bush's competency. We, therefore, affirm.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

Circuit Court for Baltimore County
Case No. C-03-CR-19-004111

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1270 & 167

September Terms, 2020 & 2021

NICHOLAS BUSH

v.

STATE OF MARYLAND

Graeff,
Berger,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Dissenting Opinion by Raker, J.

Filed: April 1, 2022

Raker J., dissenting:

The majority and I are at polar opposites in this case. The majority thinks that appellant was not denied due process, he was competent to waive counsel and a jury trial, he was competent to proceed to trial, and there were no red flags to alert the trial judge to raise a *bona fide* doubt as to appellant's competency. The majority applies the common law presumption of competency and affirms the judgment of conviction. In my view, appellant was not competent to waive any fundamental rights or to stand trial. His conviction should be reversed, and, therefore, his sentence to serve twenty-five years in prison, with no parole, should be vacated.

I dissent. I would hold that appellant was denied his substantive competency due process rights because it is unconstitutional to try a person who is incompetent. After appellant had been determined by a court in this State to be incompetent, the State had the obligation to establish his competency. Neither motions courts, where appellant waived his right to a jury trial and discharged his counsel, nor the trial court, ordered a competency evaluation of appellant. Having been found incompetent to stand trial previously in a Maryland court, and no court having found to the contrary, appellant was not competent to waive his right to a jury trial, to discharge his counsel or to proceed to trial. Any common law presumption of competency no longer existed after the District Court of Maryland found appellant to be incompetent. Accordingly, I would reverse.

The majority recites the facts, but omits some salient facts. Hence, I include facts here as well.

While this case was on-going, appellant had a parallel criminal proceeding in the District Court in Anne Arundel County. On February 20, 2019, appellant appeared for trial in the District Court of Maryland in Anne Arundel County on two theft charges, unrelated to the charges in the instant case. His initial appearance for that theft charge was December 31, 2019. On August 25, 2020, appellant again appeared in District Court in Anne Arundel County, on those unrelated theft charges, before Judge Danielle Mosley. At that hearing, Judge Mosley ordered a competency evaluation of appellant. On September 3, 2020, pursuant to an order of the court, Dr. Elizabeth Holt, a psychologist, evaluated appellant. On September 22, 2020, Judge Mosley found appellant incompetent, and committed him to Clifton T. Perkins Mental Hospital.

Appellant appeared in the Circuit Court for Baltimore County on December 4, 2019. This initial appearance hearing was very short because appellant talked over the judge to the extent that the judge said that she could not "get a word in edgewise." Appellant talked a lot about having been served with "the same warrant twice under two different . . . Central Control Numbers." The judge ordered that he remained detained.

On July 20, 2020, appellant appeared before a different circuit court judge, by video. Although this hearing was listed on the docket as a "bail review hearing," the main issue was appellant's request to discharge his assigned defense counsel. At this hearing, appellant discussed the themes of two warrants and his allegedly illegal detention. He told the court the following:

> "All right. First of all, I want it to be known I want to press—I want to file criminal charges for false imprisonment.

> Now everything I'm about to say I got court documents showing corruption from—from the top of the courts all—all the way down to the police, to the—to the detention centers, all the way down to it's crooked.
>
> So the reason why I want to fire my panel attorney is she knows—and the last panel attorney knows what's going on, and they're not speaking up for me. They're not filing no criminal charges against the courts.
>
> They know exactly what's going on. They got documents. They're work—they're work—they're working against me. They're working against me."

When the judge asked defense counsel what was going on, she said "one minute Mr. Bush is okay with me representing him, but as soon as I tell him I'm not filing criminal charges against anybody in the judicial system, then he believes I'm not on his side." Appellant responded as follows:

> "THE DEFENDANT: Now—now, that's the problem. Everybody been telling me that my lawyer got to do everything. I been trying to file false—I just came in this—in this courthouse telling—telling the Sheriff's Department that I want to press charges. I have a right to file false imprisonment charges.
>
> Everybody keeps telling me your lawyer need to do it. I got so many pieces of paper that say your lawyer got to do this shit. I'm tired of this, and she just sat here and told you she not going to do it, so how do I press charges against a government that is corrupt . . . .
>
> ***
>
> I don't get that. She just admitted that she's not going to do it. I got letters in here from everybody in the government saying your lawyer has got to file charges.
>
> They won't allow me to touch a phone in the detention center to press charges. I just came in this jail—in the courthouse to press charges.

> This Sheriff Department just told me, your public—your lawyer got to do that, so which one is it, is the lawyer or is it me? Because she just said she's not going to do it, so if she not going to do it, I have the right to. That's not fair.
>
> THE COURT: The—I believe you have to give [your lawyer] an opportunity.
>
> THE DEFENDANT: She just told you she not going to do it.
>
> THE COURT: Stop interrupting me, okay.
>
> THE DEFENDANT: Don't talk to me like—you—you're wrong.
>
> THE COURT: All right. I'm wrong, everybody is wrong.
>
> THE DEFENDANT: Don't talk to me like I'm wrong.
>
> THE COURT: Everybody is against you, I get that. But here's the thing, you have to give her an opportunity to work for you, if you don't do that then you're just hurting yourself."

The hearing continued, and it ended with the court denying appellant's request to discharge defense counsel.

Appellant appeared in the circuit court on August 18, 2020, by video for a bail review hearing, but appellant attempted to argue a motion to dismiss. The hearing ended quickly because appellant would not stop talking when ordered to do so.

On September 16, 2020, appellant appeared in the Circuit Court for Baltimore County by video for another hearing on appellant's motion to discharge his counsel. He told the court about "two warrants" and that he was "illegally detained." His counsel reported that appellant was "hyper focused on the fact that he believes he's being illegally held" and that appellant believed that she was "working with the State." Counsel

represented that appellant had threatened to kill her and her family. In open court, appellant called either the judge or defense counsel a "bitch" and threatened to kill either him or her; it was not clear to whom those remarks were directed. Defense counsel asked to be relieved of her duty to represent appellant. The judge said that "if I get that representation [that appellant had threatened to kill his counsel and her family] in writing, I'm going to grant the request."

On September 21, 2020, appellant appeared in the circuit court, and represented that he did not want to fire defense counsel. Instead, he wanted "her to do the right thing." When the court explained that defense counsel had to be allowed to withdraw because appellant had threatened to kill her, appellant responded as follows:

> "[W]hat she's really scared of, she ain't scared of me, she's scared to expose what ya'll doing. She knows that I have been served with the same warrant twice, with the same Central Complaint Number.
>
> She knows that I haven't had a bail or my initial appearance for a second—for a second one."

Appellant continued to raise his "same warrant twice" issue, and the court said "[r]ight, you keep saying that, I know." The judge permitted defense counsel to withdraw.

On October 5, 2020, appellant appeared before the circuit court by video. He purportedly waived his constitutional rights to counsel and to a jury trial. However, the court failed to announce on the record any determination as to the knowing or voluntary nature of those waivers. At this hearing, appellant said that "[t]he actual document that you need is War Room Commitment Pending Hearing document." Later, he said "I want

the—I want my real—I want the real discovery, not the fake one that they made up." The hearing concluded with appellant saying to the court "[f] . . . g clown. You're a f . . . g clown. You know you're going to prison, you f . . . g clown. You're a f . . . g clown."

Appellant's trial date was moved up significantly. Appellant proceeded to trial before a different circuit court judge on November 19, 2020, in a bench trial. Trial was held in-person, and appellant was brought to court that day from Clifton T. Perkins mental hospital. When appellant was brought into the courtroom, the judge, new to appellant, and appellant had the following exchange:

> "THE COURT: Mr. Bush, in preparing for the—you can feel free to be seated if you'd like—In preparing for the trial in this case I noticed a recent letter from you in which you informed the Court that you are currently residing at Clifton T. Perkins Hospital Center; is that correct?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay. Although there are multiple reasons why someone could be there, um, one of the possible reasons is a prior finding of a competency [sic] to stand trial. So I'm—I'm not going to simply overlook the possible reasons why you could be at Clifton T. Perkins.
>
> ***
>
> So, what is your understanding of why you are currently at Clifton T. Perkins?
>
> THE DEFENDANT: Um, it's—it's basically a poli—I'm being held as a political prisoner.
>
> When I went to the court the, um, the first time I went to court, the Public Defender and the State's Attorneys already had a plan, they wanted me to cop out to time served. Because, uh, they can't—they can't find me guilty.

If they found me guilty they would have to commit me to the Anne Arundel County Detention Center or DOC, and they can't do that because my records—my Rap Sheet says that I—or—or the records show that I have been committed to three other institutions at the same time, so that would—that would make it three—that would make it four institutions that I'm committed to, and that's against the law.

You can only be committed to one jail, and if you go somewhere else you got to go out on a writ. That's not what's going on in my case.

Um, my indictment for Baltimore County says that I have been incarcerate *[sic]* at Baltimore County Detention Center since October 5th of 2019 until now. But the War Room Commitment Pending Hearing document you need to commit me to the Baltimore County Detention Center says to Baltimore City Detention Center.

So from February—from October 5th of 2019—from October 5th of 2019 until February 19th of 2020 I was committed to Baltimore City for my Baltimore County case, then I was released.

I was sent to Montgomery County to do four months, which is against the law. And the same thing would have happened if I got—if I didn't cop—if I didn't take—if I took the—if I didn't take their deal and they found me guilty, they would have to either commit me to the Anne Arundel County Detention Center or DOC.

So I told the Public—I wrote—I raised my hand and told the judge I wanted a jury trial, I'm not accepting their plea. As soon as I said that the Public Defender told the—the judge they don't think I'm competent enough to stand trial.

THE COURT: So a court's duty to conduct a competency evaluation can be triggered in one of three ways. Um—

THE DEFENDANT: It wasn't—only until—

THE COURT: Let me—

THE DEFENDANT: —it wasn't that way. It that's not what happened.

THE COURT: Okay. Well, I'm talking about for this case. Um, so a court's duty to conduct a competency evaluation may be triggered in one of three ways. One of those is a motion of the defendant. Another is a motion of defense counsel, or another one is upon a sue *[sic]* sponte determination by the Court, sua sponte meaning 'on my own', um, that the defendant may not be competent to stand trial. So I'm going to ask you at this point, are you alleging that you are incompetent to stand trial in this case?

THE DEFENDANT: No, I'm competent.

THE COURT: Okay, Now, you and I have never met before, so I have no firsthand knowledge or experience regarding whether there are any potential issues regarding your competency to stand trial. I know that you have appeared in this court previously, and that there has been a finding that you knowingly, voluntarily and intelligently—intelligently waived your right to counsel, and were deemed capable of representing yourself in this case. I also, um, understand that there has been a finding that you have knowingly, intelligently, and voluntarily waived your right to a jury trial. These findings are not the same as a determination of competency, but the related proceedings provided another judge of this court opportunities to assess the extent to which you understood your rights and were capable of making your own decisions regarding those rights. According to Section 3-101(f) of the Criminal Procedure Article, incompetent to stand trial means not being able to understand the nature or object of the proceeding or to assist in one's defense. I'm going to ask you some preliminary questions. This is not intended to be a full-blown competency hearing, uh, because you're not alleging that you're incompetent to stand trial, and also at this point, there's no basis, uh, for it to appear to me that you may be incompetent to stand trial. And, again, I want to make sure that we adequately protect your rights in connection with this case. So, I'm going to—some of these questions I know it may seem basic but, um, bear with me."

At this point, the court asked appellant a series of questions to determine whether he understood where he was and what was going on. Appellant responded to those questions, but he continued to press on the "same warrant twice" issue. The court told appellant that he could raise a double jeopardy issue at the proper time. Trial before the court proceeded.

Immediately thereafter, appellant moved to dismiss the charges based on his two warrants issue, which the court denied. Appellant said to the judge "you're racist as shit."

At trial, the State called three witnesses: Birhanu Jifara (the cashier at the Exxon when it was robbed), Officer Torres, and Det. Heins. Appellant's cross-examination of the first witness focused on the issue of identification. Appellant's cross-examination of the State's second and third witnesses turned into appellant ranting about the supposed "same warrant twice" issue. After the State rested, appellant presented no evidence. Appellant's closing argument focused on the identification issue. He argued for an acquittal because he had been identified positively by a police detective who had reviewed video footage of the Exxon robbery, and the law says (in appellant's view) that one can only be found guilty of robbery if the robbery victim makes a positive, in-court identification of the defendant. The judge found him guilty.

Between verdict and sentencing, appellant was represented by counsel. Counsel filed a motion for a new trial. First, he argued that District Court Judge Mosley's finding and order of incompetency required a finding that appellant was incompetent to stand trial

in Baltimore County, and, second, that the trial judge should have *sua sponte* ordered a competency hearing.

In a very detailed opinion, released on March 24, 2021, the trial judge denied appellant's new trial motion. After providing an extensive summary of the procedural history of this case up until that point, the trial judge explained as follows:

> "On November 19, 2020, the Court asked [appellant] why he was transferred to Clifton T. Perkins Hospital Center. Mr. Bush's response was confusing and essentially non-responsive, but he demonstrated signs of being belligerent and disruptive, not incompetent to stand trial. The Court asked Mr. Bush questions to confirm that he was aware of where he was, that he knew that trial was occurring, and that he understood that the charges against him related to an August 5, 2019 incident at an Exxon gas station. Mr. Bush's responses to those questions did not indicate that there was a potential competency issue . . . . Although Mr. Bush frequently rambled and repeated the same arguments, he exhibited tell-tale signs of being combative and disruptive, not of being incompetent to stand trial . . . . Once the trial began, Mr. Bush's behavior and demeanor changed drastically. He was polite, respectful and cooperative. He asked appropriate questions of witnesses and demonstrated that he had formulated potential defense theories and was implementing a trial strategy. He was not belligerent or disruptive during the trial. There were no signs during the trial that he was not competent to stand trial . . . . Although Mr. Bush became belligerent again and repeatedly interrupted the Court at the conclusion of the trial, he unequivocally expressed his desire to immediately proceed to sentencing."

The trial judge then summarized the law as to when a mandatory competency hearing is triggered, and explained that, in his opinion, it was never triggered in this case because: the defense never moved for one and no reasonable doubt as to appellant's competence arose. The court explained as follows:

> "Although the Court had an opportunity to observe Mr. Bush and his conduct during trial and is well aware of the obligations with respect to evaluating and determining the competency of a defendant in a criminal proceeding, it did not appear to the Court that Mr. Bush was exhibiting signs of being incompetent. Frankly, it is not uncommon for defendants to be uncooperative or even belligerent when facing the stressors associated with a criminal proceeding. Mr. Bush's behavior before the trial began was indicative of someone who was purposefully being uncooperative in an attempt to derail the trial, not someone who was unable to understand the nature and object of the proceedings or to provide his own defense.
>
> At the outset of the trial, in response to questions from the Court, Mr. Bush made it clear that he knew where he was, what the nature of the proceeding was and the nature of the State's allegations against him. After asking some baseline questions to assess potential competency issues, the Court did not have concerns about Mr. Bush's competency to stand trial. The Court provided Mr. Bush an opportunity to present argument in support of two motions he had previously filed. Although there were times when Mr. Bush's arguments did not make sense, that happens with attorneys sometimes too. Before the trial began, the Court had an opportunity to (and did) assess whether it had any potential concerns regarding Mr. Bush's competency to stand trial. At no time did the Court believe that a competency evaluation was required."

The trial judge then turned to whether the incompetency finding in District Court required a competency hearing in his court. In his analysis, the trial judge compared this case to *Gregg v. State*, 377 Md. 515 (2003) (where the Court of Appeals held a competency hearing was not required) and *Sibug v. State*, 445 Md. 265 (2015) (where the Court of Appeals held a competency hearing was required). The judge concluded *Gregg* was more similar than *Sibug*, and denied the motion for a new trial. The trial judge explained as follows:

> "The procedural differences between this case and Gregg actually support the conclusion that the Court was not required to raise the issue of Mr. Bush's competency sua sponte. As the decision in Gregg made clear, the Anne Arundel County District Court was divested of jurisdiction when Gregg prayed a jury trial in the Circuit Court. Unlike Gregg, this case does not involve the same case being transferred from a District Court to a Circuit Court in the same jurisdiction. It involves a competency determination by a District Court in another county in a case pending in another jurisdiction. From a procedural perspective, the reasons to begin anew in this Court are even more compelling. There is no basis for the Anne Arundel County District Court's competency determination to trigger this Court's obligation to evaluate his competency."

Appellant presented five issues to this Court for review. I will address his first, second, third, and fifth arguments. As to appellant's competency to stand trial, he argues that *bona fide* doubts were raised because: he arrived at court from Clifton T. Perkins, a Maryland State mental hospital, on the day of trial, he had been found incompetent by another trial judge, he behaved ridiculously in court during all of his pre-trial hearings, his trial, and his sentencing hearing, and a March, 2021, competency review by the Maryland Department of Health found appellant continued to be incompetent to stand trial. As I explain *infra*, and totally ignored by the majority, this claim is both a procedural due process competency claim and a substantive due process claim.

Second, appellant argues that his incompetency to stand trial rendered him incompetent to knowingly, intelligently, and voluntarily waive his rights to counsel and to a jury trial. He maintains that a defendant who is not competent to stand trial is *per se* incompetent to waive the right to a jury trial as a matter of federal constitutional law. This claim is a substantive due process competency claim.

Third, he argues that he was denied his constitutional right to a jury trial because his waiver was inadequate because he was not competent to that right, and an inadequate waiver of a jury trial is a *per se* denial of one's Sixth Amendment right to a jury trial.

Finally, appellant argues that the trial court abused its discretion in denying his motion for a new trial. He argues the court abused its discretion as follows:

> "[I]n concluding that Appellant's behavior 'was indicative of someone who was purposefully being uncooperative in an attempt to derail the trial, not someone who was unable to understand the nature and object of the proceedings or to provide his own defense.'"

Second, he argues the trial court abused its discretion in concluding that Maryland caselaw did not require him to conduct a competency hearing because appellant was, at the time, incompetent in District Court.

The majority adopts the State's argument totally. As to issue one, competency, the State argued, and the majority finds, that every criminal defendant enters a courtroom presumed competent. Thus, appellant walked into the courtrooms competent, and neither his in-court behavior, his arriving at court, for his trial, from a mental hospital, nor Judge Mosley's finding of incompetence raised a *bona fide* doubt as to his incompetency before any of the three circuit court judges. Thus, the common-law presumption of competency applies. The majority proceeds to find that competency is a fact-specific determination that is best left to the trial judge, and as such is due a deferential standard of review.

The majority concludes that, despite appellant's bizarre, disruptive conduct, along with his residency at Clifton T. Perkins Mental Hospital, there was not a *bona fide* doubt

as to appellant's competence and that there was not enough evidence to find the presumption of competency rebutted. Maj. op. at 8. The majority finds the same for appellant's waiver of a jury trial and counsel.

It is well-settled that "the criminal trial of an incompetent defendant violates due process." *Medina v. California*, 505 U.S. 437, 453 (1992). This "prohibition is fundamental to an adversary system of justice." *Drope v. Missouri*, 420 U.S. 162, 172 (1975).

Md. Code (2001, 2018 Repl. Vol.), § 3-101 *et seq.* of the Criminal Procedure Article ("Crim. Proc."), addresses competency to stand trial in criminal cases. Crim. Proc. § 3-101(f) defines incompetent to stand trial as "not able: (1) to understand the nature or object of the proceeding; or (2) to assist in one's defense." Crim. Proc. § 3-104(a) requires the court to determine competency in certain situations, providing as follows:

> "(a) If, before or during a trial, the defendant in a criminal case or a violation of probation proceeding appears to the court to be incompetent to stand trial or the defendant alleges incompetence to stand trial, the court shall determine, on evidence presented on the record, whether the defendant is incompetent to stand trial.
>
> (b) If, after receiving evidence, the court finds that the defendant is competent to stand trial, the trial shall begin as soon as practicable or, if already begun, shall continue.
>
> (c) At any time before final judgment, the court may reconsider the question of whether the defendant is incompetent to stand trial."

Crim. Proc. § 3-106(c)(1)(i) provides as follows:

> "[i]f, after a hearing, the court finds that the defendant is incompetent to stand trial and, because of mental retardation or a mental disorder, is a danger to self or the person or property of another, the court shall order the defendant committed to the facility that the Health Department designates until the court finds that:
>
> 1. the defendant no longer is incompetent to stand trial;
>
> 2. the defendant no longer is, because of mental retardation or a mental disorder, a danger to self or the person or property of others; or
>
> 3. there is not a substantial likelihood that the defendant will become competent to stand trial in the foreseeable future."

The Department of Health and Mental Hygiene is required to report every six months regarding those who have been adjudged incompetent. Crim. Proc. § 3-108(a)(1)(i) ("In addition to any other report required under this title, the Health Department shall report to the court that has ordered commitment of a person under § 3-106 of this title . . . every 6 months from the date of commitment of the defendant.").

The United States Supreme Court has defined competency to stand trial as "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960). In other words, the test for competency is whether the mental illness renders a criminal defendant unable to understand the proceedings against him or her or unable to assist in his or her own defense. *Aleman v. State*, 469 Md. 397, 415 (2020).

Appellant "had the absolute constitutional right not to be tried if he [or she] was incompetent to stand trial." *Hogan v. State*, 240 Md. App. 470, 482 (2019) (citing *Medina*, 505 U.S. at 449; *Drope*, 420 U.S. at 171). There are two kinds of incompetency claims: a procedural due process competency claim and a substantive due process competency claim. *James v. Singletary*, 957 F.2d 1562, 1569 (11th Cir. 1992). First, appellants may allege that the trial court denied them due process by failing *sua sponte* to hold a competency hearing. *Id.* This is known as a *Pate* [*v. Robinson*, 383 U.S. 375 (1966),] or procedural, incompetency due process claim. *Id.* Second, appellants may allege that they were denied due process by experiencing trial and conviction while incompetent. *Id.* This is known as a substantive claim of incompetency claim. *Id.*; *see also James*, 957 F.2d at 1569.

The United States Supreme Court held, in *Pate*, 383 U.S. at 378, that "the conviction of an accused person while he [or she] is legally incompetent violates due process." *Pate* requires a court to *sua sponte* conduct an inquiry into a defendant's mental capacity whenever the court learns of facts or events that raise a "*bona fide* doubt" as to a defendant's competence to stand trial. *See Wood v. State*, 436 Md. 276, 290-91 (2013). The procedural issue here is whether, in light of what was known to the trial court, "the failure to make further inquiry into petitioner's competence to stand trial, denied him a fair trial." *Drope*, 420 U.S. at 174-75; *see also Walton v. Angelone*, 321 F.3d 442, 459 (4th Cir. 2003).

In *James v. Singletary*, the United States Court of Appeals for the Eleventh Circuit explained the difference between a procedural claim of incompetency (a so-called *Pate* claim), and a substantive claim of incompetency:

> "A *Pate* claim of incompetency, therefore, differs from a substantive incompetency claim in the following respects. A petitioner presenting a claim under Pate must first establish that the trial court should sua sponte have held a competency hearing. Once the petitioner has established this, he or she has made out a federal constitutional violation. At this point, the state has the opportunity to establish before the federal district court the petitioner's competency at the time of trial. In effect, the state thereby may demonstrate that the state trial court's failure to hold a competency hearing constituted harmless error. In this harmless error inquiry, the federal district court need not decide whether or not the error influenced the determination of guilt or punishment, because a finding of incompetency by the state trial court would have precluded a determination of guilt or innocence: the defendant could not have been tried. In other words, the trial of an incompetent defendant is per se prejudicial.
>
> By contrast, a petitioner raising a substantive claim of incompetency is entitled to no presumption of incompetency and must demonstrate his or her incompetency by a preponderance of the evidence.
>
> In sum, there are two kinds of incompetency claims. First, a petitioner may allege that the trial court denied him or her due process by failing sua sponte to hold a competency hearing. This is a *Pate* claim. Second, a petitioner may allege that he or she was denied due process by being tried and convicted while incompetent. This is a substantive claim of incompetency. To put it bluntly, a *Pate* claim is a substantive incompetency claim with a presumption of incompetency and a resulting reversal of proof burdens on the competency issue."

James, 957 F.2d at 1571-72 (footnotes omitted).

In *Grant v. Royal*, 886 F.3d 874, 892-94 (10th Cir. 2018), the United States Court of Appeals for the Tenth Circuit explained again the difference between procedural due process and substantive due process competency claims most cogently. The quote is long, but valuable reading. The court stated as follows:

> "'[C]ompetency claims can raise issues of both substantive and procedural due process.' *Walker v. Attorney Gen.*, 167 F.3d 1339, 1343 (10th Cir. 1999). Although 'sometimes there is overlap,' procedural competency and substantive competency are distinct claims. *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999). 'A procedural [due process] competency claim is based upon a trial court's alleged failure to hold a competency hearing, or an adequate competency hearing, while a substantive competency claim is founded on the allegation that an individual was tried and convicted while, in fact, incompetent.' *Allen v. Mullin*, 368 F.3d 1220, 1239 (10th Cir. 2004) (quoting *McGregor v. Gibson*, 248 F.3d 946, 952 (10th Cir. 2001) (en banc)).
>
> 'The distinction between substantive and procedural claims is significant because courts have evaluated these claims under differing evidentiary standards.' *Walker*, 167 F.3d at 1344. To make out a procedural competency claim, a defendant must demonstrate that 'a reasonable judge should have had a bona fide doubt as to [the defendant's] competence at the time of trial,' *McGregor*, 248 F.3d at 954, but the claim does 'not require proof of actual incompetency,' *Allen*, 368 F.3d at 1239. Further, procedural competency imposes on the trial court a continuing duty to monitor the defendant's behavior. *See Drope v. Missouri*, 420 U.S. 162, 181, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) ('Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.').
>
> 'A substantive competency claim, on the other hand, requires the higher standard of proof of incompetency by a preponderance of the evidence.' *Allen*, 368 F.3d at 1239

> (emphasis added) (citing *Cooper v. Oklahoma*, 517 U.S. 348, 368–69, 116 S. Ct. 1373, 134 L.Ed.2d 498 (1996)). A petitioner alleging a substantive claim must demonstrate that he actually lacked a 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding [and] a rational as well as a factual understanding of the proceedings against him.' *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). Thus, a petitioner alleging a substantive competency claim must show that he was convicted during a period of incompetency, *McGregor*, 248 F.3d at 953, whereas a procedural competency petitioner 'states a procedural competency claim by alleging the trial court failed to hold a competency hearing after the defendant's mental competency was put in issue.' *Valdez v. Ward*, 219 F.3d 1222, 1239 (10th Cir. 2000).
>
> Moreover, the two claims rest on different evidentiary bases. In evaluating a procedural competency claim, '[o]ur review is limited to the evidence that was made available to the state trial court.' *Lay v. Royal*, 860 F.3d 1307, 1314 (10th Cir. 2017) (citing *Allen*, 368 F.3d at 1239). However, post-conviction evidence can often be relevant to establishing substantive incompetency. *See, e.g.*, *Nguyen v. Reynolds*, 131 F.3d 1340, 1345–47 (10th Cir. 1997) (considering post-conviction behavior in prison in the context of a substantive competency claim). In further juxtaposition, competency claims based on substantive due process are subject neither to waiver, nor to procedural bar, whereas their procedural counterparts are susceptible to both. *See id.* at 1346; *Barnett*, 174 F.3d at 1133."

Grant, 886 F.3d at 892-93 (emphasis added).

Appellant's Substantive Competency Due Process Claim

I turn first to appellant's substantive due process arguments as to whether he was incompetent to stand trial and to waive his constitutional rights at the pre-trial proceedings. The instant case presents a conundrum. At oral argument, it seems as though counsel for appellant stated that appellant was not arguing what we here characterize as a substantive

due process claim. Nonetheless, I believe the issue is before the Court properly because a substantive due process competency claim is not waivable. *Grant*, 886 F.3d at 893; *Walker v. Attorney General for State of Oklahoma*, 167 F.3d 1339, 1344 (10th Cir. 2000); *Kibert v. Peyton*, 383 F.2d 566, 569 (4th Cir. 1967) (holding "[t]he Supreme Court has held categorically that the defense of incompetency to stand trial cannot be waived by the incompetent, *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), and it ineluctably follows that his counsel cannot waive it for him by failing to move for examination of his competency."); *Ellingburg v. Lockhart*, 397 F. Supp. 771, 777 (E.D. Ark., Pine Bluff Div. 1975); *Coolbroth v. District Court of Seventeenth Judicial Dist. In and For County of Adams*, 766 P.2d 670, 673 (Colo, En Banc. 1988) (noting "The mental competency of a defendant placed on trial is so basic to our concept of fundamental fairness that a claim of incompetency to stand trial cannot be waived."); *Smith v. State*, 443 N.E.2d 1187, 1188 (Ind. 1983); *Jones v. District Court In and For Twenty-first Judicial Dist.*, 617 P.2d 803, 806 (Colo. En Banc. 1980); *Com. v. Marshall*, 318 A.2d 724, 727 (Pa. 1974); *cf. Godinez v. Moran*, 509 U.S. 389 (1993) (citing *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938)) (holding "[a] criminal defendant may not be tried unless he is competent, *Pate v. Robinson*, 383 U.S. 375, 378, 15 L. Ed. 2d 815, 86 S. Ct. 836 (1966), and he may not waive his right to counsel or plead guilty unless he does so 'competently and intelligently.'"). Moreover, appellant's counsel raised this issue in his motion for a new trial below, and the trial judge addressed the issue, although not referring explicitly to the claim as a substantive competency claim.

In his motion for a new trial, appellant raised primarily a procedural due process competency argument. In paragraph fourteen of his motion, however, appellant argued as follows:

> "14. Counsel further argues that there was no credible, reliable evidence presented in this case as to defendant's competency that reasonably challenges the prior district court's finding of the defendant's incompetence beyond a reasonable doubt."

I would liberally construe his pleadings and interpret that argument as a substantive due process argument.[9]

In the instant case, although not designated by counsel as such, appellant has a hybrid claim: a substantive claim of incompetency, as well as a procedural claim of incompetency. His substantive claim is that, because he was found by a District Court judge to be incompetent, the State was required to establish that he was competent before he could proceed to trial or to waive any of his constitutional rights, *i.e.*, his right to a jury trial and his right to counsel. His procedural claim of incompetency is based upon his alleged bizarre and irrational behavior, along with his Clifton T. Perkins address, provided a *bona fide* doubt as to his competency, thereby requiring the courts to have ordered, *sua sponte*, a competency evaluation.

[9] The majority chooses to ignore totally the jurisprudence on substantive due process competency, perhaps on the basis that the argument is not raised by appellant. Substantive due process was raised by defense counsel in his motion for a new trial, decided by the trial judge and in any case, it cannot be waived.

Turning to appellant's substantive due process competency claim: I would hold that once a criminal defendant has been found incompetent by a Maryland trial judge, that defendant may not be tried nor waive constitutional rights unless and until a court of competent jurisdiction finds the defendant to be competent to stand trial.[10] *Sibug*, 445 Md. at 318. The *Sibug* court held that the presumption of incompetency prevails in that court until a judge of that same court finds otherwise.

The Meaning of Sibug v. State, 445 Md. 265 (2015)

In *Sibug*, the Court of Appeals addressed "the quagmire that results from a defendant in a criminal case having been adjudicated incompetent, then eight years later being tried and convicted in the same case without having been adjudged competent to stand trial." *Id.* at 267. The Court held that "the court erred by failing to make a judicial determination of Sibug's competency pursuant to Section 3-104 of the Criminal Procedure Article and also clearly erred, during sentencing, in finding Sibug competent to stand trial." *Id.* at 267-68. Sibug argued that a presumption of incompetency arose as a result of the prior determination of incompetency. *Id.* at 305. The Court ruled as follows:

> "We agree with Sibug, but we need not go so far as to embrace that a presumption of incompetency existed as a result of the first adjudication. Rather, it is sufficient on the facts before us that the tenets of Section 3-104 were engaged during the retrial in 2008, requiring a determination of competency, because Sibug had been adjudicated incompetent in the same case in the same court. Cases from our sister states and federal courts assist us in our analysis."

[10] The issue is not whether any particular trial judge knows of the prior determination of competency. Rather, the issue is the mental capacity of the defendant.

Id. at 306-7 (footnote omitted).

The *Sibug* holding raises the next question not addressed specifically by that court: does the *Sibug* holding apply in a different court in Maryland, and in a different case? Significantly, the *Sibug* court limited its holding to the same court and the same case and was based upon an interpretation of the Maryland competency statute, and not any presumption of incompetency arising from the first determination. *Id.* at 306. The issue before this Court was not before the *Sibug* court because the defendant in that case appeared in the same court in the same case. *Id.* at 268, 278-79. Significantly, the court stated, "we need not go so far as to embrace that a presumption of incompetency existed as a result of the first adjudication." *Id.* at 306.

Not constrained by *Sibug*, I would hold that once a defendant is found by a court in this State to be incompetent, the defendant remains incompetent in any court in this State, unless and until a court of competent jurisdiction finds the defendant to be competent. "The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings." *Godinez*, 509 U.S. at 401 n.12. The concept of competency is neither geographic nor case specific, nor is mental capacity or ability to understand so limited. Whether one calls it a rebuttable presumption of incompetency or a burden of proof, the result is the same. Once a defendant is found to be incompetent, the State must establish competency before proceeding to trial or finding a waiver of constitutional rights. Because the issue is a mental state of mind, it makes no sense to limit that "capacity" to a particular court or case. Yes, competency is a fluid

concept, but, once a finding of incompetency has been found by a court in this State, that finding is controlling until the State presents sufficient evidence to establish competency. *See, e.g.*, *Smallwood v. Gibson*, 191 F.3d 1257, 1278-79 (10th Cir. 1999); *Hurt v. United States*, 327 F.2d 978, 981 (8th Cir. 1964); *Mills v. State*, 256 A.2d 752, 755 (Del. 1969); *People v. Gipson*, 34 N.E.3d 560, 569 (Ill. App. Ct., 1st Dist., 3rd Div. 2015); *State v. Lewis*, 340 P.3d 415, 419-20 (Ariz. Ct. App., Div. 2 2014); *Molina v. State*, 946 So. 2d 1103, 1105-6 (Fla. Dist. Ct. App., 5th Dist. 2006).

After Judge Mosley's September 22, 2020, order, appellant was incompetent to stand trial or to waive any constitutional rights. The record reflects no court order to the contrary. The common law presumption of competency is no longer applicable, and irrespective of whether a presumption of incompetency arises or not, the burden is on the State to establish that appellant is competent. *United States v. Giron-Reyes*, 234 F.3d 78, 81 (1st Cir. 2000).

Gregg v. State, *377 Md. 515 (2003)*

The majority highlights and relies heavily on the following principle that it deduces from *Gregg*:

> "[A] prior competency determination -- in separate criminal jurisdiction -- does not automatically transfer to a subsequent criminal jurisdiction, such that additional competency determinations would automatically be required. Thus, in such cases, competency must be raised anew before the subsequent court either by motion of the defendant or defense counsel, or, if the defendant appears to that court to be incompetent."

Maj. Op. at 34.

I believe the majority reads *Gregg* too broadly, and well-beyond the question that was before that court. The question before the Court in *Gregg*, was "whether the circuit court erred in failing to inquire into his competency to waive counsel" in *that* case. *See id.* at 524. "[T]he District Court judge [whose competency determination preceded Gregg's appearance before the circuit court] concluded that Gregg was *competent* to stand trial." *Id.* at 522, 523 (emphasis added). The Court in *Gregg* was *not* considering "whether the circuit court erred in failing to inquire into [the defendant's] competency to waive counsel" in a case where a prior District Court judge had concluded that the defendant was incompetent, the matter before us in this case. *See id.* at 522, 524. The distinction is important. Yes, a presumption of competency could attach in *Gregg*, where the prior ruling was a determination the defendant was in fact competent. That is very different from a prior finding of incompetency.

Procedural Due Process Competency Claim—A Pate Claim

I would prefer not to address appellant's procedural due process claim, because, in light of my view that appellant was denied a substantive due process competency claim, it is unnecessary. Yes, as the majority finds, the trial judge wrote a thorough opinion, based upon his observations of appellant during trial and a consideration and interpretation of the law. He focused on what he knew at the time. He applied *Sibug* narrowly, without guidance from any appellate court on the application of *Sibug* to the facts of the instant case.

I disagree, however, with the majority's analysis of the procedural due process issue and particularly the majority's strong blessings that none of the three circuit court judges should have had a *bona fide* doubt as to appellant's competency. When the trial court asked appellant why he was living at Clifton T. Perkins, appellant stated: "Um, it's—it's basically a poli—I'm being held as a political prisoner." Really? Is that a sufficient answer as to why appellant is at the state mental hospital? A Clifton T. Perkins residency raises a big red flag. Perhaps that alone is insufficient to raise a constitutional *bona fide* doubt. But, put together all the other behavior related herein about appellant's behavior and surely, can we really say all this behavior was simply a disruptive defendant?

Waivers of Jury Trial and Counsel

Finally, was appellant competent to waive of his rights to counsel and to a jury trial. For the reasons set out above, I would hold that he was not.

The Sixth Amendment to the United States Constitution permits a defendant to waive the right to counsel and to self-represent at trial. *Faretta v. California*, 422 U.S. 806, 814, 819 (1975). A waiver is valid only if the defendant is competent, and if the defendant offers the waiver knowingly and voluntarily. Rule 4-215(b); *Godinez*, 509 U.S. at 400. The same is true for waiver of a jury trial. *Abeokuto v. State*, 391 Md. 289, 316 (2006); *United States v. Hardridge*, 285 F. App'x 511, 514 (10th Cir. 2008) (Stating identical standard for competence to waive jury trial as standard for competence to stand trial: "[a] defendant is competent to waive his right to a jury trial if he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and

has a rational as well as factual understanding of the proceedings against him." (internal citations and quotation marks omitted)); *see also United States v. David*, 511 F.2d 355, 361-62 (D.C. Cir. 1975).

As to appellant's ability to waive his right to a jury trial, or to be represented by counsel, it would be incongruous to hold that a defendant may be incompetent and yet knowingly or intelligently 'waive' his right to a jury trial or right to counsel. *Sibug*, 445 Md. at 296, (quoting *Pate*, 383 U.S. at 385-86). "Defendants who are not competent cannot waive their constitutional rights." *Hernandez-Gallardo v. United States*, 2015 U.S. App. LEXIS 23497 2015 (11th Cir.).

I would hold that appellant's purported waiver of those rights was not valid as he was not competent to do so, having been found incompetent in the District Court of Maryland, and the State had not met its burden to establish otherwise.

The jurisprudence on competency does not support the majority's opinion. For those reasons, I dissent, and I would reverse the judgments of convictions.

The correction notice(s) for this opinion(s) can be found here:

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