Electronically RECEIVED on April 19, 2024
Appellate Court Clerk

Electronically FILED on April 25, 2024
Appellate Court Clerk

**IN THE SUPREME COURT OF TENNESSEE**
**AT JACKSON**

| | |
|---|---|
| STATE OF TENNESSEE,<br>*Appellant,*<br><br>v.<br><br>PERVIS TYRONE PAYNE,<br>*Appellee.* | SHELBY COUNTY<br><br>No. W2022-00210-SC-R11-CD<br><br>On Appeal By Permission from the Judgment of the Court of Criminal Appeals |

# AMICUS BRIEF OF GERALD PAUL ZVOLANEK IN SUPPORT OF APPELLANT THE STATE OF TENNESSEE

Cameron T. Norris* (TN Bar #033467)
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
cam@consovoymccarthy.com
*Resident of Knoxville, TN

Gregory F. Miller (*pro hac pending*)
(WA Bar #56466)
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
(206) 359-8000
GMiller@perkinscoie.com

*Counsel for Amicus Curiae Gerald Paul Zvolanek*

## TABLE OF CONTENTS

**Page**

## TABLE OF CONTENTS (continued)

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

## TABLE OF AUTHORITIES (continued)

**Page(s)**

## TABLE OF AUTHORITIES (continued)

**Page(s)**



**STATUTES**

## TABLE OF AUTHORITIES (continued)

**Page(s)**



**RULES**

## INTEREST OF AMICUS CURIAE

Mr. Gerald Paul Zvolanek is the brother of Charisse Christopher, as well as the uncle of Lacie and Nicholas Christopher. He is both a "Family member" and a "Victim" of the crimes at issue for purposes of Tennessee's constitutional and statutory provisions on victims' rights. Tenn. Code Ann. § 40-38-302(3), (4)(A)(iii)(*a*). He thus has a significant interest in this case.

## INTRODUCTION

This case involves one of the most horrific crimes ever committed in Tennessee. In 1987, Pervis Tyrone Payne repeatedly stabbed 28-year-old Charisse Christopher, her three-year-old son Nicholas, and her two-year-old daughter Lacie. The evidence presented against him at trial was "overwhelming." *Payne* v. *Tennessee*, 501 U.S. 808, 813 (1991). Payne's convictions and sentences have been repeatedly upheld—at every level of the Tennessee and federal judiciary—in the four decades since. Those proceedings have taken an enormous toll on the victims' family, as they have had to repeatedly relive the "inhuman brutality" that was "heaped upon" their "three innocent" family members. *State* v. *Payne*, 791 S.W.2d 10, 19 (Tenn. 1990).

Those proceedings included a prior claim of intellectual disability by Payne, which this Court held could not "challenge[] the judgment itself." *Payne* v. *State*, 493 S.W.3d 478, 487 (Tenn. 2016) (cleaned up). It reasoned that a "claim of ineligibility is completely independent of the validity of his original sentencing proceeding because it arises from a change in the law that occurred many years after he was sentenced." *Id.* The 2021 amendment to the intellectual-disability statute at issue here does not change that dynamic. It permits capital defendants to "petition the trial court for a determination of whether the defendant is intellectually disabled." Tenn. Code. Ann. § 39-13-203(g)(1).[1] It does not grant trial courts authority to grant *any* relief based on that determination, much less change "the judgment itself" and invalidate the "original sentencing." *Payne*, 493 S.W.3d at 487 (cleaned up). Yet the trial court did just that in resentencing Payne.

The Court of Criminal Appeals' affirming opinion was contrary to the statutory text, well-established principles of statutory construction, and this Court's precedents construing § 39-13-203. It fixated on the fact

[1] This brief quotes and cites the 2021 amendment to § 39-12-203. *See* App. Br. 18 & n.1 (explaining amendment history).

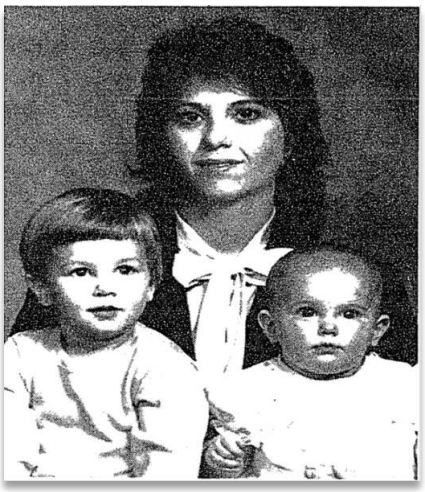
that subsection 203(g) was "silent" regarding a trial court's "sentencing authority." *State* v. *Payne*, 2023 WL 5599723, at *6 (Tenn. Crim. App. Aug. 30, 2023). But this Court has "decline[d] to 'read in' language into the statute that the General Assembly did not place there." *Coleman* v. *State*, 341 S.W.3d 221, 240 (Tenn. 2011). And here, the General Assembly "did not place" any language in subsection 203(g) granting trial courts remedial authority. *Id.* It did not need to because the existing procedural and statutory rules give this Court the exclusive authority to grant relief by either: denying a motion to set an execution date because "no execution should occur" in light of Payne's ineligibility, Tenn. Sup. Ct. R. 12.4(A); Tenn. Code Ann. § 40-23-119; or "[m]odify[ing] the punishment to … imprisonment for life," Tenn. Code Ann. § 39-13-206(d)(2).

The effect of the trial court's order—unless this Court reverses—is that Payne will never serve a single separate day in jail for murdering two-year-old Lacie. Nicholas and his family now face the prospect that Payne might soon go free after "the inexplicable brutality" he inflicted on Charisse, Lacie, and Nicholas. *Payne*, 791 S.W.2d at 16. That result is not authorized by Tennessee's intellectual-disability statute. This Court should reverse.

## BACKGROUND

### I. Payne murders Charisse and Lacie and nearly kills Nicholas.

Charisse Christopher was a 28-year-old single mother living in an apartment in Millington, Tennessee, with her children: 2-year-old Lacie and 3-year-old Nicholas. 501 U.S. at 817. The Christophers lived across the hall from Bobbie Thomas, Payne's girlfriend. *Id.* at 811. Charisse knew Ms. Thomas and Payne because Ms. Thomas's children often played with Nicholas and Lacie. 791 S.W.2d at 14.



On Saturday, June 27, 1987, Charisse fixed lunch for Lacie and Nicholas and then put them down for their afternoon naps.[2] After the children fell asleep, Payne knocked on the Christophers' door, asking for a drink of water.[3] He had spent the day drinking beer, injecting cocaine, and periodically dropping by Ms. Thomas's apartment to see if she had

[2] Because Nicholas was just four years old at the time of trial, he did not testify as a witness. But he later recounted his experience—including the attack—as part of a television documentary. *See Impact of Murder: My Lacie* (Investigation Discovery broadcast July 21, 2019).

[3] *Id.*

returned home from out of town. 501 U.S. at 811-12. On one of those visits, Payne left an overnight bag and three cans of malt liquor in the hallway by Ms. Thomas's door. *Id.* at 812

After Charisse let Payne into the apartment, he "began making sexual advances." *Id.* "Charisse resisted and Payne became violent." *Id.* Payne grabbed a butcher knife from the kitchen and stabbed Charisse 41 times, inflicting "42 direct knife wounds and 42 defensive wounds on her arms and hands." *Id.* at 813. Charisse's screams woke Nicholas and Lacie from their naps.[4] When they came to the kitchen to see why their mother was screaming, Payne turned the knife on them.[5] He stabbed Lacie nine times—inflicting wounds to her chest, abdomen, back, and head. 791 S.W.2d at 12. One of the thrusts severed Lacie's aorta, causing "rapidly fatal" blood loss. *Id.* Payne also stabbed Nicholas multiple times, inflicting wounds that had "completely gone through his body from front to back." *Id.*

[4] *Id.*

[5] *Id.*

Two neighbors heard Charisse's cries. Nancy Wilson, the apartment manager who lived beneath the Christophers, heard "Charisse screaming 'get out, get out.'" *Id.* at 11. Mrs. Wilson "started to go to the Christopher apartment to investigate, but decided against that, and returned to her apartment and immediately called the police." *Id.* Laura Picard, who was "sunbathing in the backyard" of the apartment complex, "heard a noise like a person moaning coming from the Christopher apartment followed by the back door slamming three or four times." 791 S.W.2d at 13. When Ms. Picard looked toward the direction of the noise, she saw a "hand with a gold watch" that "kept trying to shut that back door." *Id.*

A police officer arrived minutes after Mrs. Wilson called. *Id.* at 12. He entered the complex and encountered Payne on the stairway. *Id.* He described Payne as "so covered with blood that he appeared to be 'sweating blood.'" 501 U.S. at 812 (cleaned up). "When the officer asked, 'What's going on up there?' Payne struck the officer with the overnight bag, dropped his tennis shoes, and fled." *Id.* (cleaned up). The officer tried to pursue Payne, but he was too fast and "disappeared into another apartment complex." 791 S.W.2d at 12.

The apartment was "a horrifying scene." 501 U.S. at 812. Charisse lay "on the kitchen floor on her back, her legs fully extended." *Id.* at 813. Lacie lay "on the kitchen floor near her mother," with the murder weapon "at her feet" and "Payne's baseball cap … snapped on her arm near her elbow." *Id.* Both "Charisse and Lacie were dead." *Id.* at 812. But Nicholas was—somehow—"still conscious" and "still breathing." *Id.* at 812, 815. "He responded to the paramedics" and "was able to follow their directions." *Id.* at 815. Nicholas had "to hold his intestines in as he was carried to the ambulance." *Id.* at 815. At the hospital, he underwent "seven hours of surgery and a transfusion of 1,700 cc's of blood—400 to 500 cc's more than his estimated normal blood volume." *Id.* at 812. The

internal trauma that Nicholas suffered has rendered him a lifelong Type-1 diabetic. And he still has scars, running from his sternum to his navel, that are "a constant reminder" of that horrific afternoon.[6]

The police apprehended Payne a few hours later after finding him "hiding in the attic of the home of his former girlfriend." 501 U.S. at 813. The arresting officer described him as "very nervous" and "breathing real rapid." *Id.* (cleaned up). "He had blood on his body and clothes and several scratches across his chest." *Id.* "He was wearing a gold Helbrose wristwatch that had bloodstains on it." 791 S.W.2d at 13. "A search of his pockets revealed a packet containing cocaine residue, a hypodermic syringe wrapper, and a cap from a hypodermic syringe." 501 U.S. at 813. Officers found Payne's "overnight bag, containing a bloody white shirt, … in a nearby dumpster." *Id.*

## II. Payne is convicted and his sentences are ordered to run consecutively.

Payne was charged with two counts of first-degree murder and one count of assault with intent to commit murder in the first degree. 791 S.W.2d at 11. When pictures of Payne appeared on the television during

[6] *Id.*

local news coverage of the case, Nicholas told his family: "That's the man. He's the man who killed my mama."[7] The prosecution did not call Nicholas as a witness because he was just four at the time of the trial.[8] Even without Nicholas's testimony, the evidence presented against Payne at trial was "overwhelming." 501 U.S. at 813.

The witnesses' testimony created a "time frame" that "virtually preclude[d] any person other than [Payne] from committing the[] crimes." *Payne* v. *State*, 1998 WL 12670, at *21 (Tenn. Crim. App. Jan. 15, 1998). Nancy Wilson and Laura Picard "testified that, after they heard screaming from the upstairs apartment, they saw no one go up or down the stairs." *Id.* Ms. Picard described a "hand with a gold watch … trying to shut that back door," which matched the bloodstained "gold Helbrose wristwatch" that Payne "was wearing" when arrested. *Id.* at *3. And Mrs. Wilson "testified that, after the screaming stopped, she heard a person walk into the bathroom," wash up, "walk across the floor, slam the door shut and then run down the steps." *Id.* By "that point in time,"

[7] *Id.*

[8] *Id.*

the first officer was "on the scene" and encountered Payne on "the stairs covered in blood." *Id.* at *21.

All the physical evidence pointed to Payne. The blood that "was found on" his "bag, shirts, and shoes" matched Charisse and Lacie's blood type. 791 S.W.2d at 13. The blood "found on the black pants" that Payne "was wearing" at the apartment complex "and when arrested" matched Nicholas's blood type. *Id.* "His fingerprints were throughout the apartment." 1998 WL 12670, at *21. His fingerprints "were found" on "[t]hree Colt 45 beer cans … on a small table in the living room, two unopened, one opened but not empty." 791 S.W.2d at 13. Additional evidence showed that he had "purchased Colt 45 beer earlier in the day." *Id.* His "fingerprints were also found on the telephone and counter in the kitchen." *Id.* at 13.

Some of the most "damning" evidence against Payne was his "own testimony." 1998 WL 12670, at *21. He took the stand and gave testimony that "the jury was justified in rejecting as unbelievable and contrary to human conduct and experience." 791 S.W.2d at 16. "Incredibly," he claimed "that he went into the apartment and found the Christophers" lying on the kitchen floor. 1998 WL 12670, at *21. Payne explained that,

in the apartment complex, he had passed "a black man" coming down the stairs. 791 S.W.2d at 13. (He did not explain why nobody else in the apartment complex saw or heard the unidentified man.) When Payne reached the second floor, "he heard a baby crying and a faint call for help and saw the door was ajar." *Id.* He entered the Christophers' apartment and found Charisse and her children lying in their own blood. *Id.* at 14. (He did not explain why he set his three beer cans on the living room table before coming to their aid.) Payne said that he "got the phone on the wall," but he "didn't know no number to call." *Id.* (He did not explain why he did not know that "911" is the number for emergencies.) Payne tried to explain "the blood on his shirt, pants, tennis shoes, body, etc." by claiming that it must have happened when "he pulled the knife out of [Charisse's] neck" and from "walking and kneeling on the bloody floor and touching the two babies." *Id.* After pulling the knife from Charisse's neck, Payne was "suddenly motivated to leave and seek help" by "banging on some doors" to "tell someone" to "call the ambulance." *Id.* (Again, he did not explain why he did not know to call 911 for an ambulance.) Instead of actually knocking on any neighbors' doors, he "saw a police car

… and just panicked." *Id.* He said that he struck the officer on the stairway and ran "because the officer did not seem to believe him." *Id.*

On cross-examination, Payne could not account for the physical evidence from the crime scene. For instance, "he did not seem to realize" that "[t]he shoulder strap on the left shoulder of the blue shirt he was wearing while in the victim's apartment was torn." *Id.* at 14. And he "could not remember when it happened." *Id.* Similarly, "he did not recall his hat falling off" and could not explain how it became "intertwined in Lacie's arm." 1998 WL 12670, at *21. When asked about the "three or four scratches across his chest," he claimed that they "were stretch marks from lifting weights." 791 S.W.2d at 13-14.

The most dramatic admission came when the prosecutor confronted Payne about the bloodstains found on him. One of the State's experts had testified that it was physically impossible for Payne to have gotten blood on the tops of his shoes and legs from kneeling down as he claimed.[9] So the prosecutor asked Payne why there were "bloodstains on [his] left leg." 791 S.W.2d at 15. The question prompted Payne to offer an explanation

[9] *Id.*

that differed from prior accounts he had given investigators.[10] He said the blood must have "come from when she—when she hit the wall. When she reached up and grabbed me." 791 S.W.2d at 15. The prosecutor asked Payne to confirm "what [he] said, … that she got blood on you when she hit the wall?" *Id.* Payne realized he had incriminated himself and backtracked, saying: "That ain't—that's not what I said." *Id.*

The jury returned a guilty verdict on all three counts. *Id.* at 11. At the penalty phase, the prosecution called Mary Zvolanek, Charisse's mother, to describe the impact that the murders had on Nicholas. 501 U.S. at 814. Mary said:

> He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, "I'm worried about my Lacie."

*Id.* at 814-15. Nicholas was "worried about Lacie because Lacie always carried a blanket with her. That was a little thing she did. And he was afraid that she was cold."[11]

---

[10] *Id.*

[11] *Id.*

In his closing penalty-phase argument, the prosecutor asked the jury to consider "the continuing effects of Nicholas' experience." 501 U.S. at 815. He said:

> But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and baby sister....
>
> Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer.

*Id.* The jury deliberated for 12 minutes before returning with death sentences for both murders.[12]

When it came time to impose the judgment, the State asked the court to order that the sentences for Lacie's and Charisse's murders be served consecutively. *See* 2023 WL 5599723, at *1. The prosecutor specifically cited the possibility that the death penalty might be "declar[ed] unconstitutional" or be "somehow commute[d] to life in the Penitentiary" as making it "important" to establish that the "three

[12] *Id.*

sentences" were "to be served consecutively." *Id.* The trial court agreed and ordered that "all three" were "to run consecutive." *Id.*

## III. Payne's conviction and sentences are repeatedly upheld.

Payne's convictions and sentences have been upheld at every level of the Tennessee and federal judiciary over a four-decade-long series of appeals and post-conviction proceedings.[13] During that time, Payne "never raised the consecutive alignment of his sentences as an issue." 2023 WL 5599723, at *2. Instead, his exclusive focus—on direct appeal, in his state post-conviction proceeding, and in his federal habeas proceeding—was challenging his convictions and the validity of the death sentences. Those challenges all failed.

In rejecting Payne's challenges to his convictions, the Tennessee and federal appellate courts consistently concluded that the evidence of Payne's guilt is unassailable. On direct appeal, this Court concluded that "the evidence" was "sufficient to convince any rational trier of fact that [Payne] was guilty of murder in the first degree beyond any reasonable doubt." 791 S.W.2d at 16. The U.S. Supreme Court agreed that the

[13] *See Payne*, 2023 WL 5599723, at *2 (collecting thirteen prior orders in various state and federal proceedings).

evidence of guilt was "overwhelming." 581 U.S. at 813. And when Payne filed a petition for post-conviction relief, the Court of Criminal Appeals concluded: "There is no question as to the confidence in the jury's verdict." *Payne*, 1998 WL 12670, at *21.

After his federal habeas petition was denied, Payne began claiming that his intellectual disability barred his execution. In 2012, he "filed a motion to reopen his petition for post-conviction relief" on the ground that he was "intellectually disabled."[14] *Payne*, 493 S.W.3d at 481. His amended motion sought relief under the "error coram nobis statute" and "by directly invoking the intellectual disability statute." *Id.* at 483 (cleaned up). This Court affirmed the denial of his motion. It held that Payne was "not entitled to relief" by "proceeding in error coram nobis," and that the General Assembly "did not intend the intellectual disability statute to provide a private right of action to a capital defendant who was convicted and sentenced to death prior to the statute's enactment. *Id.* at 487, 489.

[14] Payne's motion came over a decade after this Court recognized a retroactively applicable right for intellectually disabled prisoners to challenge their death sentences. *See Payne*, 493 S.W.3d at 483.

When his intellectual-disability challenge failed, Payne turned to the Post-Conviction DNA Analysis Act of 2001. *See* Tenn. Code Ann. § 40-30-301, *et seq.* He filed a petition in 2020 seeking "testing of several evidentiary items" from the crime scene. Order Dismissing "Petition for Post-Conviction DNA Analysis" at 1, *Payne* v. *State*, No. P09594 (30th Jud. Dist., at Memphis Div. 1, Jan. 1, 2021). The petition was granted and the testing revealed, among other things, that Payne's DNA was on the knife he used to murder Charisse and Lacie, as well as on a washcloth in the apartment. *Id.* at 5-6, 9. Payne's counsel "acknowledged that the results of the testing were not exculpatory for" him. *Id.* at 7.

## IV. The trial court resentences Payne.

When Payne's DNA-based challenge failed, he turned back to his intellectual-disability claim. The day after subsection 203(g) was adopted, Payne filed a petition claiming he was ineligible for execution based on his intellectual disability. *See* 2023 WL 5599723, at *2. His petition claimed lower IQ scores than in his original criminal proceeding. When Payne was tested by a clinical psychologist in 1987—at a time when intellectual disability was not a bar to execution—he scored a "Verbal IQ 78" and a "Performance IQ 82." 791 S.W.2d at 17. But in 2021,

with an amended statute giving him a chance to avoid the death penalty, he presented declarations from experts attesting that his scores—when properly adjusted—"met the clinical and statutory definitions for intellectual disability." 2023 WL 5599723, at *2. The Shelby County district attorney's office chose not to dispute whether Payne was actually intellectually disabled. *Id.*

The trial court decided it should grant a resentencing hearing, not based on the text and structure of the statute, but based on its own view of what constitutes "fundamental fairness." *Id.* at *3 (cleaned up). The court held a two-day hearing and then ordered that the sentences for Charisse's and Lacie's murders "be served concurrently." *Id.* at *4.

## ARGUMENT

### I. Subsection 203(g) does not authorize trial courts to resentence prisoners.

#### A. Subsection 203(g)'s text does not authorize resentencing by the trial court.

This Court must begin with "the plain and ordinary meaning of the statute's language." *Coleman*, 341 S.W.3d at 240. In doing so, this Court presumes that the General Assembly "means what it says—and does not mean what it does not say." *Effler* v. *Purdue Pharma L.P.*, 614 S.W.3d 681, 688 (Tenn. 2020). Here, what the statute "does not say" should be

dispositive. *Id.* Subsection 203(g) does not authorize the trial court to do anything beyond making a "determination" as to whether the defendant is "intellectually disabled."

First, the statute does not permit prisoners to challenge the judgment or otherwise attack the validity of their original sentences. Subsection 203(g) gives capital defendants a right to "petition the trial court for a *determination* of whether the defendant is intellectually disabled." (emphasis added). In contrast, the Post-Conviction Procedure Act gives defendants a right to "petition … for relief from the judgment or judgments." Tenn. Code Ann. § 40-30-104(c). Similarly, the coram nobis statute authorizes prisoners to seek "relief" that can result in "the judgment … be[ing] set aside." Tenn. Code Ann. § 40-26-105(b)-(c). Those two statutes show that "[t]he Legislature knows how to specifically" create a statutory right to relief from a criminal judgment "through express language." *Effler*, 614 S.W.3d at 689. "Thus, the missing statutory provision" giving Payne a right to seek relief from the judgment "is missing for a reason—the Legislature never meant to include it." *Id.*

The lack of such claim-for-relief-from-the-judgment language is glaring given Tennessee's requirement that legislation "must contain

express language" in order to "create or confer a private right of action." Tenn. Code Ann. § 1-3-119. This Court previously held that § 39-13-203 does not "provide a private right of action to a capital defendant." *Payne*, 493 S.W.3d at 489. The General Assembly then added a private right of action via subsection 203(g) that mentions only a "determination [that] the defendant is intellectually disabled." The lack of any "express language" conferring a right to relief from judgment means that the "private right of action" in subsection 203(g) does not confer any such remedy. Tenn. Code Ann. § 1-3-119.

Second, the statute does not give the trial courts any remedial authority. Subsection 203(g) does not specify *any* action that the trial court is empowered to take in the event that it makes a "determination [that] the defendant is intellectually disabled." In contrast, other post-conviction statutes confer express authority on the trial court in the event of a successful petition. The Post-Conviction Procedure Act authorizes trial courts, if they "find[] a denial or infringement of the rights of the prisoner," to not "only vacate and set aside the judgment," but also "enter an appropriate order." Tenn. Code Ann. § 40-30-111(c). The Post-Conviction DNA Analysis Act of 2001 grants trial courts authority to

"make orders" in light of "favorable" petitions, as well as general "discretion" to "make such other orders as may be appropriate." *Id.* §§ 40-30-311, -312. Similarly, the Post-Conviction Fingerprint Analysis Act of 2021—which was passed in the same legislative session as subsection 203(g)—authorizes "orders" regarding "favorable" petitions and grants "discretion" to "make such other orders as may be appropriate." *Id.* §§ 40-30-411–12. So "the missing" grant of remedial authority in subsection 203(g) is "missing for a reason." *Effler*, 614 S.W.3d at 689.

The Court of Criminal Appeals compared subsection 203(g) to other statutes, but it did so with a blinkered focus on whether the phrases "multiples sentences and manner of service" were "mentioned anywhere in the first degree murder section of the Code." *Payne*, 2023 WL 5599723, at *8. "[T]he omission" of *any* remedial "provision" in subsection 203(g) should have prompted an inquiry into whether any "similar statutes" do "contain[]" a remedial "provision." *Coffman* v. *Armstrong Int'l, Inc.*, 615 S.W.3d 888, 894 (Tenn. 2021) (cleaned up). Subsection 203(g)'s lack of defined relief and specified remedial authority, compared to the post-conviction-relief statutes, "is significant to show that a different intention existed" for subsection 203(g). *Id.*

### B. The statutory context and broader statutory framework confirm that subsection 203(g) does not authorize resentencing by the trial court.

The "statutory context and the broader statutory framework" confirm the limited scope of subsection 203(g). *State* v. *Deberry*, 651 S.W.3d 918, 927 (Tenn. 2022). Both reinforce the conclusion that subsection 203(g) does not authorize trial courts to resentence defendants.

For starters, the "surrounding parts" of § 39-13-203 indicate that subsection 203(g) does not authorize resentencing prisoners. *Coffman*, 615 S.W.3d at 897. Subsection 203(d) authorizes a "sentencing proceeding" after the trial court "determines" the defendant has an "intellectual disability." Subsection 203(g) does not. Similarly, subsection 203(f) specifies that appeals from "determination[s] that the defendant does not have intellectual disability" must "follow[] the sentencing stage." Subsection 203(g) authorizes parties to "appeal the trial court's decision" without any sentencing stage. "Had the legislature desired a different result, it could have specified that" a successful subsection 203(g) claim results in a new sentencing proceeding in the trial court. *Deberry*, 651 S.W.3d at 931.

The "broader statutory framework" similarly confirms that the General Assembly intentionally omitted a resentencing provision from subsection 203(g). *See id.* at 927. A neighboring section expressly authorizes "a sentencing hearing conducted in accordance with § 39-13-207" in the event that the provisions in Title 39 governing homicide, "or the application of the sections, … is held to be invalid or unconstitutional so as to permanently preclude a sentence of death as to [an] individual." Tenn. Code Ann. § 39-13-206(e). The Court of Criminal Appeals drew the opposite (and incorrect) conclusion from the contrast in the statutes' terms. It "presume[d] that the legislature intended subsections 203(d) and 206(e) to fill the procedural gap" in "subsection 203(g)." *Payne*, 2023 WL 5599723, at *7. That was contrary to this Court's general teaching that courts should "decline to 'read in' language into the statute that the General Assembly did not place there." *Coleman*, 341 S.W.3d at 240.

The Court of Criminal Appeals also overlooked the existing procedural and statutory mechanisms for relief when it concluded that there was "no procedure" available to successful subsection 203(g) petitioners. *Payne*, 2023 WL 5599723, at *4. The most obvious procedural avenue for addressing Payne's ineligibility for the death penalty is the

one that this Court established in *Van Tran* v. *State*, 6 S.W.3d 257 (Tenn. 1999).[15] Because eligibility to be executed "is a question independent of the validity of trial and sentencing proceedings," the proper remedy is an "order" from this Court "staying the execution." *Id.* at 264, 272. When and if the Attorney General files a motion to set a new execution date for Payne, this Court would issue a permanent stay because "no execution should occur" in light of Payne's intellectual disability.[16] Tenn. Sup. Ct. R. 12.4(A). That is consistent with this Court's statutory authority to refuse to schedule an execution when "legal reason exists against the execution of the sentence." Tenn. Code Ann. § 40-23-119.

Alternatively, if this Court were to somehow conclude that subsection 203(g) permits alteration of Payne's original sentences, then the route to do so would be modifying—not vacating—the sentences

---

[15] This Court has determined that the incompetent-to-be-executed claim in *Van Tran* is "analogous" to Payne's ineligible-to-be-executed claim. *Payne*, 493 S.W.3d at 487.

[16] After *Van Tran*, this Court amended Tennessee Supreme Court Rule 12, allowing it to deny motions for execution dates because "the execution should be delayed," because "no execution date should be set," or because "no execution should occur." *In Re: Amendment to Supreme Court Rule 12*, (Tenn. Oct. 27, 2000), *available at* https://www.tncourts.gov/sites/default/files/rule12propamd.pdf (accessed Apr. 17, 2024).

pursuant to Tenn. Code Ann. § 39-13-206(d). Subsection 203(g) authorizes "[e]ither party" to "appeal the trial court's decision in accordance with Rule 3 of the Tennessee Rules of Appellate Procedure." This Court could, as part of that appeal, exercise its "authority … in reviewing the death sentence for first degree murder" and "[m]odify the punishment to … imprisonment for life." Tenn. Code Ann. § 39-13-206(d)(2).

### C. The presumption against retroactivity precludes the trial court's application of subsection 203(g).

The decisions below also failed to follow the principle that courts "should deem statutory language ambiguous only after … applying well-established canons of statutory construction." *Deberry*, 651 S.W.3d at 930. The Court of Criminal Appeals addressed only the negative-implication canon. *See Payne*, 2023 WL 5599723, at *7-8. It overlooked the presumption against retroactivity—despite this Court having repeatedly applied the canon to § 39-13-203. The canon precludes construing subsection 203(g) to apply retroactively to the judgment, especially to the non-death-penalty portions of the judgment.

The presumption against "retroactive application" is one of the "well-established canons" that courts deploy to discern the "[o]riginal

public meaning ... of the statutory text." *Deberry*, 651 S.W.3d at 924-25. This Court has long followed this "universal rule of construction." *Taylor* v. *Rountree*, 83 Tenn. 725, 731 (1885). The presumption is, in effect, a "clear statement" rule. *See, e.g.*, *Lindh* v. *Murphy*, 521 U.S. 320, 325 (1997). Accordingly, this Court construes statutes to have "prospective and not retroactive force unless the latter purpose is plainly expressed or necessarily implied." *Dowlen* v. *Fitch*, 264 S.W.2d 824, 825 (Tenn. 1954). And it has frequently applied the canon to hold that § 39-13-203 "was not intended by the General Assembly to be given retroactive application." *Howell* v. *State*, 151 S.W.3d 450, 455 (Tenn. 2004) (citing *Van Tran* v. *State*, 66 S.W.3d 790, 798-99 (Tenn. 2001)); *see also Payne*, 493 S.W.3d at 488.

The Court of Criminal Appeals should have applied the presumption here. That would mean asking whether "the General Assembly include[d] specific, clear language expressing its intent" that subsection 203(g) should have "retroactive application" to the judgment and original sentence. *Van Tran*, 66 S.W.3d at 798. And the answer, of course, is that the General Assembly did not. *Id.* Rather, it authorized a

"determination" that makes a defendant *prospectively* "ineligible for the death penalty." Tenn. Code Ann. § 39-13-203(g)(1).

To be sure, the General Assembly did intend subsection 203(g) to be retroactive in one respect. It made the new "claim" retroactively available to defendants "sentenced to the death penalty prior to May 11, 2021." Tenn. Code Ann. § 39-13-203(g). But that does not mean that it clearly intended for subsection 203(g) to have "retroactive force" on the validity of the final judgment or original sentence. *Dowlen*, 264 S.W.2d at 825.

The precedential backdrop on which the General Assembly legislated makes that clear. Before 2021, this Court had identified two reasons for not applying § 39-13-203 retroactively. First, it contained "no language" that "applied to *death sentences* imposed before" its effective date. *Van Tran*, 66 S.W.3d at 798 (emphasis added). Second, it did not have "a procedure by which … *persons* sentenced to death" before its effective date could raise their intellectual disability "as a bar to execution." *Id.* (emphasis added). When the General Assembly adopted subsection 203(g) in 2021, it addressed only the "persons" issue. *Id.* It did not include any language calling for subsection 203(g) "to be applied"

directly "to death sentences." *Id.* Instead, subsection 203(g) simply creates a procedure for "defendant[s] … sentenced to the death penalty prior to the effective date of this act" to "claim" they are "ineligible for the death penalty." As explained above, *see supra* at 23-24, such a claim does not need to "act retroactively" on the original judgment and sentence. *State* v. *James*, 145 S.W.2d 783, 786 (Tenn. 1940) (cleaned up). Its "whole purpose is prospective" because "the prevention" of the execution of intellectually disabled prisoners is its "sole object and aim." *Id.*

Construing subsection 203(g) in such a manner is consistent with general retroactivity precedents. Those precedents make clear that the length and manner of a defendant's sentence are not subject to collateral attack after the judgment is final. Prior precedent holds that the consecutive alignment of sentences is not subject to retroactive challenge. *See Huddleston* v. *State*, 576 S.W.2d 8, 10 (Tenn. Crim. App. 1978) (holding that the *Gray* standard for "the imposition of consecutive sentences" was not "retroactive"); *Meeks* v. *Bell*, 2007 WL 4116486, at *8 (Tenn. Crim. App. Nov. 13, 2007) (holding that "*Apprendi* and its progeny do not apply to consecutive sentencing" retroactively).

Similarly, construing subsection 203(g) to permit collateral attack on the non-death-penalty portions of a judgment would be inconsistent with this Court's death-penalty jurisprudence. In the wake of the U.S. Supreme Court's general constitutional prohibition on imposing the death penalty, this Court concluded that those holdings "should not be applied retroactively *except to the extent necessary to prevent the execution of death sentences*," which meant that only "the death penalty portion of the trial court's judgment and subsequent sentence [should be] a nullity." *Bowen* v. *State*, 488 S.W.2d 373, 378 (Tenn. 1972) (emphasis added). As *Bowen* makes clear, subsection 203(g) should not have retroactive effect—especially beyond "the death penalty portion of the trial court's judgment"—because it is not "necessary to prevent the execution of death sentences." *Id.*

### D. The decisions below failed to "reference" this Court's precedents construing § 39-13-203.

Subsection 203(g) must also "be construed" with "reference to judicial decisions." Tenn. Code Ann. § 39-11-104. The Court of Criminal Appeals acknowledged this principle, but failed to follow it. *See Payne*, 2023 WL 5599723, at *5. That was error, as courts must "presume that the Legislature knows the law," including this Court's precedents, "and

makes new laws accordingly." *Ellithorpe* v. *Weismark*, 479 S.W.3d 818, 827 (Tenn. 2015). And here, the General Assembly amended § 39-13-203 after "this Court's decision" rejecting Payne's prior attempt to raise an intellectual-disability claim under the statute. *Id.*

In 2012, Payne alleged that his intellectual disability precluded executing him, claiming relief under coram nobis and a prior version of § 39-13-203. *Payne*, 493 S.W.3d at 481-82. This Court rejected both claims in 2016. *Id.* at 484-89. It noted that a prisoner's "claim that he is ineligible to be executed because of his disability is analogous to a claim that he is not competent to be executed," which does not "challenge[] the judgment itself." *Id.* at 487 (cleaned up). "Similarly," it reasoned, Payne's "claim of intellectual disability does not attack the validity of his sentencing proceeding as of the time it took place." *Id.* So Payne's claim could not "challenge[] the judgment itself." *Id.* (cleaned up). "Rather, and crucially, his claim of ineligibility is completely independent of the validity of his original sentencing proceeding because it arises from a change in the law that occurred many years after he was sentenced." *Id.*

This Court further noted that the prior version of "the intellectual disability statute does not contain a procedure by which intellectually

disabled persons sentenced to death before July 1, 1990, can raise their intellectual disability as a *bar to execution*." *Id.* at 488 (emphasis added; cleaned up). This Court concluded its opinion by "encourag[ing] the General Assembly to consider whether another appropriate procedure should be enacted to enable defendants condemned to death prior to the enactment of the intellectual disability statute to seek a determination of their eligibility to be executed." *Id.* at 492.

Subsection 203(g) echoes the language of this Court's opinion in *Payne*. *See* App. Br. 17. It follows that the General Assembly must have understood subsection 203(g) as creating "a bar to execution," but not a means to "challenge[] the judgment itself." *Payne*, 493 S.W.3d at 487-88. If it had intended otherwise, it would have included language specifying that subsection 203(g) permits a prisoner to "attack the validity of his sentencing proceeding." *Id.* at 487.

### E. The legislative history lacks evidence of clear intent to authorize retroactive relief from the judgment.

The Court of Criminal Appeals also erred when considering the legislative history. As the State points out, it failed to exhaust the available canons of construction before looking to the legislative history, *see* App. Br. 44, and it overlooked the Fiscal Note reflecting the

assumption that the amendment would not result in the early release of prisoners, *see id.* 38-39, *see also, e.g.*, *Nelson* v. *Colorado*, 581 U.S. 128, 143-44 (2017) (Alito, J., concurring) (citing a fiscal note's "financial projections" as reflecting the legislature's "assumption").

Additionally, the Court of Criminal Appeals erred by treating silence in the legislative history as confirmation of ambiguity. *See Payne*, 2023 WL 5599723, at *7. That is contrary to how this Court examined § 39-13-203's legislative history in *Van Tran*, 66 S.W.3d at 798. This Court determined that silence regarding retroactive effect—whether "a product of oversight … or assumption" by the legislature—is not a basis for construing the statute retroactively. *Id.* There must be "evidence of a clear legislative intent to apply the statute retroactively." *Id.* Here, the legislative history is "ambiguous" on the retroactive-realignment issue, so the correct conclusion is that the General Assembly amended the statute "on the assumption that no prisoner then on death row" would be able to seek retroactive sentence realignment. *Id.*

### F. This Court's precedents confirm that subsection 203(g) does not authorize relief from the judgment.

The Court of Criminal Appeals also failed to follow this Court's prior precedents construing § 39-13-203. This Court has identified "six

principles" from those precedents "that have guided" its "approach to the application of Tenn. Code Ann. § 39-13-203." *Coleman*, 341 S.W.3d at 240. The third and fourth principles—"giv[ing] effect to the plain and ordinary meaning" and "declin[ing] to 'read in language"— are addressed above. *See supra* at 18-25. Two other principles apply here and support reversal.[17]

### 1. The decisions below extend subsection 203(g) beyond its express purpose of preventing the execution of the intellectually disabled.

This Court has recognized that § 39-13-203 effectuates a "public policy" that "opposes the execution of persons with intellectual disabilities." *Coleman*, 341 S.W.3d at 240. The trial court—and the Court of Criminal Appeals—failed to account for that limited purpose when construing subsection 203(g). Instead, they granted broader relief that "conflicts with the limited language of the statute and its narrow purpose." *Poper ex rel. Poper* v. *Rollins*, 90 S.W.3d 682, 687 (Tenn. 2002).

[17] The second and fifth principles are specific to the standard for "intellectual disability" under the statute. *See Coleman*, 341 S.W.3d at 240. Since Payne's intellectual disability was not disputed, they are inapplicable.

The plain "statutory language" of subsection 203(g) is the primary source of "legislative intent and purpose." *Id.* at 684. Subsection 203(g)'s text makes clear that it has a single aim: providing intellectually disabled plaintiffs an opportunity to establish that they are "ineligible for the death penalty due to intellectual disability." The Court of Criminal Appeals made no attempt to assess its interpretation in light of that "narrow purpose." *Poper*, 90 S.W.3d at 687.

If this Court were to conclude that subsection 203(g) confers remedial authority on trial courts, it should limit that authority to making the prisoner "ineligible for the death penalty." Tailoring the relief available under subsection 203(g) to its purpose is consistent with this Court's general approach to construing remedies. For example, *Baugh* v. *Novak* refused to adopt "a broader remedy than necessary to vindicate the purpose of Tenn. Code Ann. § 48-16-208." 340 S.W.3d 372, 388 (Tenn. 2011); *cf. Hardy* v. *Tournament Players Club at Southwind, Inc.*, 513 S.W.3d 427, 440 (Tenn. 2017) (asking "whether implying a private remedy is consistent with the underlying purposes of the legislation"). Similarly, this Court has held that, where a procedural rule or statute "provides no guidance as to the remedy to be applied," then "the

appropriate procedural remedy must be tailored to the express language and purpose of the rule." *State* v. *Grave*s, 126 S.W.3d 873, 877-78 (Tenn. 2003) (fashioning a remedy for violation of Criminal Rule 5.1(a)); *cf. State* v. *Davidson*, 509 S.W.3d 156, 233 (Tenn. 2016) (noting "the general rule that remedies should be tailored to the injury suffered" (cleaned up)).

"The evil that" subsection 203(g) "is aimed at remedying" is the execution of the intellectually disabled. *Payne*, 493 S.W.3d at 486 (construing the coram nobis statute); *see supra* at 33-34. The statute was "not intended to provide" capital defendants a chance to reduce their prison time through retroactive realignment of their sentences. *Id.* So Payne is "not entitled to [the] relief" he received from the trial court. *Id.*

**2. The decisions below failed to construe subsection 203(g) in light of similar statutes in other jurisdictions.**

When "the proper application of the statute is not clear, the Court may confirm its interpretation of the statute by considering … similar statutes in other jurisdictions." *Coleman*, 341 S.W.3d at 240. Other legislatures, who wanted to make intellectual disability a statutory basis for categorically reducing prison time, "have been able to craft statutes clearly reflecting their intent." 341 S.W.3d at 243. At least two states—

Kansas and Indiana—have passed statutes that not only bar the execution of individuals with intellectual disabilities, but also prohibit sentencing such individuals to life without the possibility of parole for first-degree murder. *See* Kan. Stat. Ann. § 21-6622(f); Ind. Code Ann. § 35-50-2-9(a). In contrast, Tennessee's intellectual-disability statute "specifically allows" intellectually disabled "individuals to receive sentences of life and life without the possibility of parole." *Wren* v. *State*, 2017 WL 4331054, at *3 n.1 (Tenn. Ct. Crim. App. 2017). The fact that Tennessee has not adopted any prohibition on imprisoning the intellectually disabled indicates that the General Assembly "purposefully chose" to limit the scope of section 39-13-203 to prohibiting the death penalty. *Coleman*, 341 S.W.2d at 240, 243. Construing subsection 203(g) to permit a collateral attack on the consecutive alignment of Payne's sentences and an effective reduction in his prison sentence would stretch the statute beyond its intended scope.

## II. The policy considerations that justify refraining from executing the intellectually disabled do not apply here.

This Court's inquiry should "begin[] and end[] with the plain language of the statute." *Tuggle* v. *Allright Parking Sys., Inc.*, 922 S.W.2d 105, 107 (Tenn. 1996). Still, it bears noting that the lower courts'

departure from subsection 203(g)'s plain language is especially improper because the constitutional concerns with death sentences against the intellectually disabled are inapplicable here.

This Court has held that the constitutional prohibition on executing the intellectually disabled flows from the notion that "the penalty of death is qualitatively different from any other sentence." *Van Tran*, 66 S.W.3d at 807 (cleaned up). For that reason, there is "no authority" in Tennessee "for the proposition that an intellectually disabled person is prohibited from receiving a life sentence" or "life without the possibility of parole." *Wren*, 2017 WL 4331054, at *3 & n.1. Courts in other states have consistently reached the same conclusion, *see, e.g.*, *Levin* v. *State*, 992 N.W.2d 878 (Iowa Ct. App. 2023); *Avalos* v. *State*, 635 S.W.3d 660, 671-72 (Tex. Crim. App. 2021). Those courts have determined that "the[] concerns" justifying the categorical prohibition on executing the intellectually disabled "are less extreme … when an individual is facing a prison sentence, even when it is life without parole, than when an individual faces the death penalty." *Commonwealth* v. *Jones*, 90 N.E.3d 1238, 1252 (Mass. 2018). The decisions below would make Tennessee an outlier. No other state, based on amicus counsel's research, has made

intellectual disability a basis for retroactively challenging the non-death-penalty aspects of a prisoner's sentence. This Court should not make Tennessee the first.

What's more, affirming the lower courts' misapplication of subsection 203(g) would "inflict a profound injury" on the victims' family. *Shinn* v. *Ramirez*, 596 U.S. 366, 376-77 (2022) (cleaned up). The four decades of proceedings attacking the original judgment against Payne have deprived the victims and their family of "finality" and the ability to "move forward knowing the moral judgment will be carried out." *Id.* at 376 (cleaned up). Now, they face the prospect of a probation hearing where Payne might "go free" without serving a single separate day in jail for murdering Lacie. *Id.* (cleaned up). This Court should not deny "the State and the victims" their "legitimate interest" in maintaining the original judgment's consecutive alignment of Payne's sentences. *Id.* at 377 (cleaned up).

## CONCLUSION

This Court should reverse the judgments of the trial court and the Court of Criminal Appeals.

Respectfully submitted,

Dated: April 19, 2024

*/s/ Cameron T. Norris*

Cameron T. Norris* (TN Bar #033467)
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
cam@consovoymccarthy.com
*Resident of Knoxville, TN

Gregory F. Miller (*pro hac pending*)
(WA Bar #56466)
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
(206) 359-8000
GMiller@perkinscoie.com

*Counsel for Amicus Curiae Gerald Paul Zvolanek*

## CERTIFICATE OF COMPLIANCE

This brief complies with the requirements in Section 3.02(a)1 of Tennessee Supreme Court Rule 46. This brief contains 7,497 words.

Dated: April 19, 2024

*/s/ Cameron T. Norris*
Counsel for Amicus Curiae
Gerald Paul Zvolanek

## CERTIFICATE OF SERVICE

I filed this brief via the Court's electronic-filing system, which will electronically serve the parties' counsel.

Dated: April 19, 2024

*/s/ Cameron T. Norris*
Counsel for Amicus Curiae
Gerald Paul Zvolanek